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PATNA SECTION

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PATNA HIGH COURT

1940

Chief Justice :

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Puisne Judges :

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" " Shankar Balaji Dhavle, I.C.S.
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	6	B R	410		186	I C	560		6	B R	416		5	Cut L T	22
	21	P L T	849		19	Pat	321	147	185	I C	59	193	6	B R	872
52	186	I C	855						6	B R	94				

AIR	Other Journals		
193	189	I C	878
	5	Cut L T	92
194	20	P L T	871
	5	Cut L T	75
	188	I C	849
	6	B R	751
197	189	I C	646
	6	B R	841
198	21	P L T	448
	19	Pat	337
	188	I C	260
	41	Cr L J	559
	6	B R	621
201	20	P L T	957
	185	I C	816
	6	B R	262
204	19	Pat	1
	188	I C	337
	6	B R	653
239	185	I C	83
	1939	I T R	522
	6	B R	101
242	189	I C	105
	6	B R	760
	5	Cut L T	24
	41	Cr L J	718
	21	P L T	824
243	6	B R	920
	190	I C	248
	5	Cut L T	15
	21	P L T	1030
245	7	B R	20
	190	I C	377
	5	Cut L T	45
247	6	B R	836
	189	I C	543
	5	Cut L T	35
249	6	B R	804
	189	I C	419
	5	Cut L T	60
251	188	I C	672
	6	B R	711
	5	Cut L T	39
252	189	I C	457
	21	P L T	652
	6	B R	837
	41	Cr L J	746
253	21	P L T	217
	189	I C	319
	6	B R	776
254	185	I C	626
	6	B R	224
256	6	Cut L T	19
	7	B R	128
	191	I C	62
257	21	P L T	37
	186	I C	172
	6	B R	299
259	21	P L T	125
	7	B R	56
	190	I C	431
261	185	I C	606
	21	P L T	173
	6	B R	222
263	186	I C	170
	6	B R	300
264	21	P L T	294
FB	188	I C	241
	6	B R	610
	19	Pat	531
270	185	I C	788
	21	P L T	363
	6	B R	256
272	186	I C	312
	41	Cr L J	283
	6	B R	337
275	188	I C	154
FB	6	B R	602
	21	P L T	552
	19	Pat	553
283	186	I C	221
	21	P L T	262
	6	B R	304
286	185	I C	404
	21	P L T	541
	6	B R	177
289	19	Pat	369
	7	B R	59
	190	I C	457
	41	Cr L J	910
	22	P L T	98
295	186	I C	227
	41	Cr L J	267
	6	B R	307
	21	P L T	731
299	186	I C	182
	41	Cr L J	257
	6	B R	301
	21	P L T	627
300	185	I C	638
	21	P L T	165
	6	B R	229
303	21	P L T	223
	19	Pat	393
	188	I C	725
	6	B R	729
304	19	Pat	600
FB	21	P L T	568
	189	I C	329
	6	B R	785
	6	Cut L T	49
310	19	Pat	382
	21	P L T	660
	6	B R	884
	189	I C	883
313	185	I C	630
	41	Cr L J	217
	6	B R	226
316	185	I C	738
	41	Cr L J	221
	6	B R	241
	21	P L T	1085
322	19	Pat	104
	7	B R	52
	190	I C	418
324	6	B R	743
FB	188	I C	772
	21	P L T	587
	19	Pat	739
328	21	P L T	377
FB	188	I C	729
	6	B R	713
	19	Pat	618
341	185	I C	685
	19	Pat	172
	6	B R	236
	21	P L T	577
346	188	I C	745
FB	6	B R	737
	21	P L T	597
	19	Pat	870
352	6	B R	775
	189	I C	244
	21	P L T	678
353	185	I C	796
	6	B R	259
353	21	P L T	830
355	21	P L T	13
	19	Pat	413
	7	B R	67
	41	Cr L J	931
	190	I C	517
361	21	P L T	144
	6	B R	835
	189	I C	539
	41	Cr L J	742
362	21	P L T	9
	189	I C	650
	6	B R	843
364	186	I C	806
	41	Cr L J	384
	6	B R	396
365	185	I C	162
	41	Cr L J	114
	6	B R	110
371	185	I C	278
	19	Pat	269
	6	B R	145
373	21	P L T	273
	187	I C	533
	41	Cr L J	467
	6	B R	493
375	185	I C	598
	21	P L T	194
	41	Cr L J	214
	6	B R	221
376	186	I C	401
	6	B R	367
377	186	I C	809
	19	Pat	404
	6	B R	398
	21	P L T	845
379	6	B R	801
	189	I C	423
382	7	B R	54
	190	I C	425
	41	Cr L J	907
384	186	I C	397
	6	B R	365
	21	P L T	1055
385	21	P L T	453
FB	6	B R	813
	189	I C	513
	19	Pat	752
406	21	P L T	246
	6	B R	849
	189	I C	739
409	186	I C	423
	41	Cr L J	311
	6	B R	366
	21	P L T	697
410	21	P L T	171
	6	B R	842
	189	I C	641
	41	Cr L J	777
411	21	P L T	150
	186	I C	368
	6	B R	346
414	21	P L T	121
	6	B R	874
	41	Cr L J	810
	189	I C	867
417	21	P L T	349
	6	B R	805
	189	I C	426
	41	Cr L J	738
420	21	P L T	227
	19	Pat	524
	7	B R	65
420	190	I C	449
422	21	P L T	108
	6	B R	791
	189	I C	355
423	186	I C	438
	6	B R	369
425	21	P L T	155
	186	I C	359
	6	B R	351
430	21	P L T	104
	189	I C	416
	6	B R	792
432	186	I C	385
	6	B R	359
437	21	P L T	197
	6	B R	840
	189	I C	463
438	21	P L T	277
	7	B R	90
	190	I C	581
444	21	P L T	259
	190	I C	152
	6	B R	916
446	21	P L T	231
	187	I C	135
	41	Cr L J	414
	6	B R	425
449	19	Pat	208
	6	B R	894
	190	I C	46
	22	P L T	46
467	6	B R	809
FB	21	P L T	667
	189	I C	500
	19	Pat	893
471	21	P L T	326
	187	I C	349
	41	Cr L J	451
	6	B R	464
472	21	P L T	146
	186	I C	355
	6	B R	357
474	21	P L T	271
	187	I C	300
	6	B R	448
475	186	I C	798
	6	B R	397
476	21	P L T	374
	187	I C	539
	6	B R	495
478	186	I C	686
	21	P L T	257
	6	B R	390
479	186	I C	784
	41	Cr L J	381
	6	B R	391
480	186	I C	793
	6	B R	395
482	185	I C	671
	19	Pat	111
	6	B R	232
486	21	P L T	206
	187	I C	256
	41	Cr L J	427
	6	B R	440
492	187	I C	139
	41	Cr L J	417
	6	B R	428
494	21	P L T	219
	187	I C	266
	6	B R	446
	19	Pat	507
497	6	B R	459

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
497	187	I C	353	563	191	I C	288	609	21	P L T	442	661	7	B R	339
498	6	B R	502	565	6	B R	630		6	B R	689		192	I C	196
	187	I C	583		188	I C	269		188	I C	411	663	19	Pat	343
499	6	B R	461	567	19	Pat	289	610	6	B R	771		192	I C	170
	187	I C	361		7	B R	214		189	I C	262		7	B R	322
	41	Cr L J	452		191	I C	436		1940	8 I T R	369	667	6	Cut L T	39
502	6	B R	433	571	21	P L T	407	612	6	B R	692		7	B R	360
	187	I C	207		7	B R	206		188	I C	467		192	I C	223
504	6	B R	485		191	I C	492	613	21	P L T	675	668	6	B R	569
	187	I C	522	573	19	Pat	424		7	B R	145		188	I C	45
	19	Pat	578		6	B R	757		191	I C	106	670	6	B R	769
512	6	B R	477		188	I C	859		42	Cr L J	78		189	I C	240
	187	I C	484	577	21	P L T	514	614	19	Pat	410	671	7	B R	235
	21	P L T	770		6	Cut L T	43		7	B R	147		191	I C	597
513	6	B R	465		7	B R	139		22	P L T	109	673	19	Pat	824
	187	I C	387		191	I C	82		191	I C	128		7	B R	344
	41	Cr L J	457		42	Cr L J	72	615	6	B R	393		192	I C	213
	21	P L T	943	579	6	B R	765		186	I C	786	675	6	B R	773
515	6	B R	496		189	I C	109	616	6	Cut L T	37		189	I C	269
	187	I C	580	581	6	B R	483		7	B R	231	677	19	Pat	354
516	19	Pat	433		187	I C	518		191	I C	599		7	B R	245
	7	B R	283	583	21	P L T	593	617	21	P L T	320		191	I C	695
	192	I C	17		6	Cut L T	9		7	B R	472	683	19	Pat	715
541	6	B R	503		7	B R	143	620	6	B R	688		192	I C	187
	187	I C	586		190	I C	792		188	I C	417		7	B R	330
	41	Cr L J	472	585	7	B R	138	622	19	Pat	398	692	21	P L T	503
546	6	B R	430		190	I C	796		7	B R	170		6	B R	761
	187	I C	132	587	6	Cut L T	41		191	I C	296		189	I C	114
548	7	B R	23		7	B R	141	623	6	B R	567	696	7	B R	236
	190	I C	382		191	I C	89		187	I C	794		191	I C	590
	41	Cr L J	902	588	6	B R	550	625	6	B R	424		22	P L T	80
549	21	P L T	289		187	I C	825		187	I C	128	699	21	P L T	710
	6	B R	532		41	Cr L J	509		41	Cr L J	409		7	B R	358
	187	I C	701		6	Cut L T	73	627	6	B R	571		192	I C	248
	19	Pat	485	594	6	Cut L T	5		188	I C	39	701	6	B R	854
552	21	P L T	343		7	B R	109	629	6	B R	767		189	I C	737
	7	B R	79		190	I C	760		189	I C	232		41	Cr L J	795
	190	I C	534	595	6	B R	557	631	6	B R	754	702	7	B R	244
555	21	P L T	336		187	I C	846		188	I C	854		191	I C	693
	190	I C	733		41	Cr L J	520		41	Cr L J	702	703	21	P L T	622
	7	B R	46	596	21	P L T	431	633	21	P L T	897		19	Pat	917
557	21	P L T	427		188	I C	611	SB	1940	8 I T R	563		7	B R	341
	6	B R	698		6	B R	708		7	B R	172	706	21	P L T	713
	188	I C	488		19	Pat	909		191	I C	340		7	B R	209
	19	Pat	832	599	6	B R	632		20	Pat	13		191	I C	495
559	21	P L T	413		188	I C	277	653	19	Pat	494	707	19	Pat	688
	6	B R	648		19	Pat	514		7	B R	226		7	B R	250
	188	I C	330		22	P L T	92		191	I C	542		191	I C	773
	41	CrL J	578	603	6	B R	564								
561	6	B R	701		187	I C	862	658	19	Pat	662	717	21	P L T	793
	188	I C	495		41	Cr L J	523		7	B R	315		7	B R	239
	19	Pat	844	605	6	B R	693		192	I C	56		191	I C	595
563	21	P L T	340		188	I C	429	661	21	P L T	510	718	7	B R	232
	7	B R	168		41	Cr L J	587		6	Cut L T	1		191	I C	580

Other Journals = All India Reporter

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ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1940	P	204	289	1940	P	567	410	1940	P	614	600	1940	P	304	844	1940	P	561
90	"	"	92	301	"	"	163	413	"	"	355	618	"	"	328	852	1941	"	181
104	"	"	322	321	"	"	102	424	"	"	573	662	"	"	658	862	"	"	1
111	"	"	482	337	"	"	198	433	"	"	516	669	1941	"	83	870	1940	"	346
123	1939	"	667	343	"	"	663	485	"	"	549	688	1940	"	707	893	"	"	467
159	"	"	678	354	"	"	677	494	"	"	653	715	"	"	683	909	"	"	596
172	1940	"	341	369	"	"	289	507	"	"	494	739	"	"	324	917	"	"	703
186	1939	"	662	382	"	"	310	514	"	"	599	752	"	"	385	927	1941	"	155
208	1940	"	449	393	"	"	303	524	"	"	420	824	"	"	673	935	"	"	43
263	1941	"	172	398	"	"	622	531	"	"	264	832	"	"	557	938	"	"	147
269	1940	"	371	404	"	"	377	553	"	"	275	838	1941	"	139	949	1940	PC	137
275	1941	"	19					578	"	"	504					974	1941	P	99

6 Bihar Reports = All India Reporter

BR	AIR			BR	AIR			BR	AIR			BR	AIR			BR	AIR		
1	1939	PC	249	176	1940	PC	1	346	1940	P	411	493	1940	P	373	746	1940	P	180
6	"	P	460	177	"	P	286	348	"	PC	33	495	"	"	476	751	"	"	194
8	"	"	683	179	"	PC	7	351	"	P	425	496	"	"	515	754	"	"	631
14	"	"	462	184	1939	P	678	357	"	"	472	498	"	FC	25	757	"	"	573
19	1940	"	45	187	"	"	623	359	"	"	432	499	"	"	7	760	"	"	242
22	"	"	17	189	1940	PC	3	365	"	"	384	502	"	P	498	761	"	"	692
23	"	"	47	194	"	FC	3	366	"	"	409	503	"	"	541	765	"	"	579
24	1939	"	525	195	"	P	170	367	"	"	376	508	"	FC	10	767	"	"	629
25	1940	"	18	200	1939	"	522	368	"	"	111	517	"	"	19	769	"	"	670
26	1939	PC	238	203	"	"	611	369	"	"	423	524	"	P	24	770	"	"	192
30	"	P	512	215	"	"	659	371	"	"	109	532	"	"	549	771	"	"	610
33	1940	"	16	218	"	"	497	373	"	"	102	535	"	PC	63	773	"	"	675
34	1939	"	520	221	1940	"	375	377	"	"	97	542	"	P	179	775	"	"	352
36	"	PC	244	222	"	"	261	383	"	"	107	543	"	FC	26	776	"	"	253
41	"	P	536	224	"	"	254	385	"	"	81	549	"	P	161	777	"	PC	116
45	"	"	448	226	"	"	313	390	"	"	478	550	"	"	588	785	"	P	304
48	1940	"	106	229	"	"	300	391	"	"	479	557	"	"	595	790	"	"	191
49	"	"	114	232	"	"	482	393	"	"	615	559	"	PC	70	791	"	"	422
51	1939	"	488	236	"	"	341	395	"	"	480	564	"	P	603	792	"	"	430
53	"	"	321	241	"	"	316	396	"	"	364	567	"	"	623	794	"	PC	124
56	"	"	451	247	"	"	184	397	"	"	475	569	"	"	668	798	"	P	19
62	1940	"	140	248	"	"	7	398	"	"	377	571	"	"	627	799	"	PC	114
64	"	"	149	250	"	"	32	400	"	"	74	574	"	PC	60	801	"	P	379
66	"	"	121	251	"	PC	11	401	"	"	52	577	"	P	163	804	"	"	249
74	"	"	76	256	"	P	270	403	"	"	88	585	"	PC	55	805	"	"	417
79	"	"	57	259	"	"	353	405	"	"	90	589	"	FC	20	809	"	"	467
81	"	"	113	262	"	"	201	407	"	"	137	594	"	PC	82	813	"	"	385
82	"	"	71	265	"	PC	16	410	"	"	50	598	"	"	86	835	"	"	361
84	"	"	131	267	"	P	75	412	"	"	158	602	"	P	275	836	"	"	247
87	"	"	64	268	"	PC	17	414	"	"	117	610	"	"	264	837	"	"	252
88	1939	"	526	270	"	P	58	416	"	"	145	617	"	"	160	840	"	"	437
92	1940	"	155	271	"	PC	30	418	"	"	142	618	"	PC	90	841	"	"	197
94	"	"	147	274	"	P	40	421	"	"	5	621	"	P	198	842	"	"	410
96	"	"	151	278	"	PC	19	422	"	"	49	623	"	PC	75	843	"	"	362
98	"	"	153	282	"	P	9	424	"	"	625	630	"	P	565	845	"	PC	128
101	"	"	239	290	"	"	87	425	"	"	446	632	"	"	599	849	"	P	406
104	"	"	133	291	"	PC	24	428	"	"	492	636	"	PC	93	852	"	PC	132
106	1939	"	570	299	"	P	257	430	"	"	546	648	"	P	559	854	"	P	701
108	"	"	386	300	"	"	263	433	"	"	502	650	"	PC	98	855	"	"	177
109	"	"	592	301	"	"	299	435	"	"	92	653	"	P	204	858	"	"	1
110	1940	"	365	302	"	"	56	440	"	"	486	688	"	"	620	860	"	"	37
117	1939	"	636	304	"	"	283	446	"	"	494	689	"	"	609	864	1941	"	147
141	"	"	504	307	"	"	295	448	"	"	474	692	"	"	612	868	1940	"	3
142	"	"	591	312	"	"	6	452	"	PC	54	693	"	"	605	870	"	PC	145
144	"	"	597	313	1939	"	594	453	"	P	65	698	"	"	557	872	"	P	193
145	1940	"	371	316	"	"	625	459	"	"	497	701	"	"	561	874	"	"	414
148	1939	"	428	321	"	"	630	461	"	"	499	703	"	PC	101	876	"	PC	137
150	1940	"	119	324	1940	"	54	464	"	"	471	708	"	P	596	884	"	P	310
152	1939	"	688	326	1939	"	601	465	"	"	513	711	"	"	251	888	1941	"	9
153	1940	"	129	328	"	"	662	466	"	PC	45	713	"	"	328	892	"	"	18
155	"	"	135	333	1940	FC	5	477	"	P	512	726	"	PC	111	894	1940	"	449
157	1939	"	682	334	"	PC	36	478	"	"	62	729	"	P	303	912	1941	"	11
159	"	"	667	336	"	FC	4	480	"	"	185	731	"	PC	105	914	"	"	161
170	1940	FC	1	337	"	P	272	483	"	"	581	737	"	P	346	916	1940	"	444
172b	1939	P	607	339	"	PC	38	485	"	"	504	743	"	"	324	918	1941	"	4
																920	1940	"	243

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PLT	AIR			PLT	AIR			PLT	AIR			PLT	AIR			PLT	AIR		
1	1940	PC	3	108	1940	P	422	155	1940	P	425	219	1940	P	494	277	1940	P	438
9	"	P	362	109	"	"	106	165	"	"	300	223	"	"	303	289	"	"	549
13	"	"	355	111	1939	PC	163	171	"	"	410	227	"	"	420	294	"	"	264
24	"	FC	1	117	1940	P	140	173	"	"	261	231	"	"	446	306	"	"	113
29	"	P	102	121	"	"	414	177	"	PC	36	237	"	PC	11	309	"	FC	26
37	"	"	257	125	"	"	259	181	"	P	131	246	"	P	406	320	"	P	617
41	"	"	71	129	"	"	114	185	1941	"	19	252	"	"	109	326	"	"	471
45	1939	"	611	133	"	PC	30	194	1940	"	375	257	"	"	478	327	"	PC	54
69	1940	PC	38	138	1939	P	411	197	"	"	437	259	"	"	444	331	"	"	33
81	"	P	177	142	1940	FC	3	199	"	PC	16	262	"	"	283	336	"	P	555
86	1939	"	575	144	"	P	361	201	1941	P	24	271	"	"	474	340	"	"	563
91	1940	PC	24	146	"	"	472	206	1940	"	486	273	"	"	373	343	"	"	552
104	"	P	430	150	"	"	411	217	"	"	253								

PLT	AIR			PLT	AIR			PLT	AIR			PLT	AIR			PLT	AIR			PLT	AIR		
349	1940	P	417	541	1940	P	286	678	1940	P	352	815	1940	FC	19	947	1941	P	70
355	"	PC	55	545	"	PC	101	679	"	PC	45	818	1939	P	592	970	"	"	129
363	"	P	270	552	"	P	275	697	"	P	409	821	1941	"	106	973	"	"	130
369	"	"	142	568	"	"	304	702	1941	"	147	824	1940	"	242	976	"	"	177
374	"	"	476	577	"	"	341	710	1940	"	699	826	1941	"	145	980	"	"	185
377	"	"	328	587	"	"	324	713	"	"	706	830	1940	"	353	1005	1940	PC	137
405	"	FC	25	593	"	"	583	716	1941	"	161	835	1941	"	35	1019	1941	P	174
407	"	P	571	597	"	"	346	721	"	"	45	838	"	"	116	1021	"	"	175
413	"	"	559	608	"	"	179	728	"	"	43	843	"	"	38	1026	"	"	144
416	"	"	119	611	"	PC	86	731	1940	"	295	845	1940	"	377	1030	1940	"	243
420	"	"	137	618	"	P	149	739	1941	"	99	849	"	"	50	1033	"	"	92
427	"	"	557	622	"	"	703	753	1940	FC	10	854	1941	"	90	1042	1941	"	53
431	"	"	596	627	"	"	299	770	"	P	512	864	1940	"	62	1055	1940	"	384
437	"	"	49	631	"	FC	7	773	"	PC	114	869	"	PC	158	1057	1941	"	1
442	"	"	609	637	"	P	180	776	1941	P	157	873	1941	P	118	1063	"	"	167
448	"	"	198	645	"	"	153	783	"	"	95	897	1940	"	633	1067	"	"	65
453	"	"	385	652	"	"	252	790	"	"	37	935	"	PC	222	1082	"	"	141
497	"	PC	98	655	"	PC	134	793	1940	"	717	940	1941	P	26	1085	1940	"	316
503	"	P	692	660	"	P	310	795	1941	"	48	943	1940	"	513	1096	1941	"	59
510	"	"	661	667	"	"	467	797	1940	PC	167	946	1941	"	44	1109	1940	FC	20
514	"	"	577	675	"	"	613	808	1941	P	6					1118	1941	P	146
519	"	PC	93																

CASES OVERRULED & REVERSED

IN

A. I. R. 1940 PATNA

Debnath Mahata v. Jagadish Chandra Deo Dhabal Deb, (1936) 15 Pat 644= 1936 P W N 885 = 18 P L T 46 = A I R 1936 Pat 563=165 I C 378	Reversed in A I R 1940 P C 137.
Jagdeo Sahu v. Mahabir Prasad, (1934) 13 Pat 111=15 P L T 73=A I R 1934 Pat 127=153 I C 602	Overruled in A I R 1940 Pat 385 (F B).
Prahlad Chandra Singh v. Bhim Mahto, (1940) 19 Pat 172=1940 P W N 317 =6 B R 236=A I R 1940 Pat 341= 185 I C 685.	Overruled in A I R 1940 Pat 346 (F B).
Saraswati Pathack v. Land Acquisition Deputy Collector, Champaran, (1917) 2 Pat L J 204 = 3 Pat L W 419 = A I R 1917 Pat 176=39 I C 650	Overruled in A I R 1940 Pat 102 (S B).

THE
ALL INDIA REPORTER
1940
Patna High Court

* A. I. R. 1940 Patna 1

HARRIES C. J. AND FAZL ALI J.

Bhikhari Mahto—*Plaintiff*—Appellant.

v.

Bansropan Ram and another —
Defendants — Respondents.

Letters Patent Appeal No. 10 of 1939, Decided on 4th August 1939, from decision of Agarwala J., D/- 12th January 1939.

*** Debtor and Creditor—Money obtained as result of decree between parties — Decree not compromise decree—Subsequent suit to recover that money cannot succeed.**

If money has been obtained as the result of a decree between the parties if such be not a compromise decree, then a subsequent suit to recover back that money cannot succeed. Different considerations would arise if the parties had compromised and the compromise had been induced by the fraud of the person who obtained the benefit under the compromise. In such a case the compromise could be set aside as also the decree based upon it. [P 3 C 1]

Where therefore *C* is paid his dues on hand-note by *B* on behalf of *A* and in spite of that payment *C* brings a suit against *A* for recovery of the same money and obtains a decree against *A* and *A* pays, *A* cannot subsequently bring a suit against *C* for recovery of the money paid by him : *(1797) 7 T R 269, Foll.* [P 3 C 2]

D. N. Varma — *for Appellant.*

Hareshwar Prasad Sinha and A. B. N. Sinha and Harians Kumar — *for Respondents (Defendants 1 and 2 respectively).*

Harries C. J.—This is a Letters Patent appeal against a decision of Agarwala J., in second appeal reversing the decrees of the Courts below and dismissing the plaintiff's claim. The facts of the case can be shortly stated as follows : The plaintiff mortgaged certain lands in favour of defendant 1 by a mortgage dated 11th September 1929. The consideration for the mortgage was Rs. 500 and a sum of Rs. 272 out of the sum of Rs. 500 was left with defendant 1 to pay off certain moneys due from the plaintiff to defendant 2 on hand-notes. The Courts below have found that defendant 1 paid the money as directed ; but unfortunately for the plaintiff, defendant 2 brought a suit against him in the Small Cause Court, for what he alleged was due on the hand-notes, and recovered by means of a decree of that Court a sum of Rs. 316-7-0. It may be observed that in the present case defendant 2 tried to argue that his suit in the Small Cause Court referred to sums other than dues on these particular hand-notes ; but the Courts below have found that this suit related to the very hand-notes which had been discharged by the payment made by defendant 1 at the plaintiff's direction to defendant 2. The suit, as originally framed was brought against defendant 1 and in the plaint it was alleged that he had not paid defendant 2 as agreed in the mortgage deed. Defendant 1 pleaded that he had paid defendant 2, whereupon the plaintiff obtained leave to amend his plaint and add defendant 2. As I have stated, both the Courts below have come to the conclusion that defendant 1 paid defendant 2 before the latter brought the suit on the hand-notes, and before Agarwala J., it was admitted that this payment had been made and that no point could be made against defendant 1.

The learned Munsif and the learned Subordinate Judge came to the conclusion that the plaintiff was entitled to recover as against defendant 2 the sum which he had been compelled to pay twice over in discharge of the hand-notes. Both the Courts however were of opinion that the plaintiff had no claim whatsoever against defendant 1 who had paid the sum of Rs. 272 to defendant 2 as directed. In second appeal Agarwala J., held that the plaintiff could not recover in this suit as against defendant 2. He held that though the plaintiff

had unfortunately been compelled by a decree of the Court to pay the sum due a second time, yet such could not be recovered by a subsequent suit.

It has been argued before us that the plaintiff must be entitled to recover what he has paid twice over from defendant 1 or from defendant 2. With regard to defendant 1, it is to be observed that the plaintiff has not appealed against the decree which was in favour of defendant 1. Both the Courts below, as I have said, dismissed the claim as against defendant 1. In any event, it is perfectly clear that the plaintiff can have no claim whatsoever against defendant 1, because he discharged his obligation and paid to defendant 2 the sum of Rs. 272 as he was directed to do by the terms of the mortgage deed. In my view the plaintiff cannot recover this sum from defendant 2. What has happened in this case is that plaintiff discharged his debt under the handnotes by the payment of Rs. 272 by defendant 1 to defendant 2. Unfortunately for the plaintiff however defendant 2 brought a subsequent suit upon these very hand-notes and that suit was decreed against the plaintiff and the decree realized by execution. What the plaintiff is now seeking to do is to recover money back which he was compelled to pay as a result of the decree which defendant 2 obtained against him.

It seems clear that defendant 2 had no justification for the suit which he brought. The findings of the lower Courts are clear and are to the effect that defendant 2 had been paid all that was due to him by the plaintiff upon the hand-notes when he brought the suit. However that suit succeeded, and defendant 2 obtained a decree against the plaintiff, which the latter was compelled to satisfy by payment. In those circumstances, can the plaintiff now sue to recover what he was compelled to pay by suit on the ground that the money had been previously paid to defendant 2 and that the latter had no right whatsoever to recover the money again by the Small Cause Court suit which he brought? In my view this case is completely covered by the old English case in (1797) 7 T R 269[1] (Smith's Leading Cases, Edn. 13, Vol. 2, page 386). In that case the defendant had previously brought a suit against the plaintiff for goods sold, for which the plaintiff had actually paid and obtained the defendant's receipt. Unfortunately for the plaintiff he mislaid the receipt, when the defendant sued him for the price of the goods. The plaintiff failed to satisfy the Court that he had paid, and the defendant obtained a judgment for the sum due which was eventually realized. Later the plaintiff found the receipt and brought a suit to recover the money which he had been compelled to pay to the defendant as a result of the earlier suit. It was held that the plaintiff could not recover this money as money had and received, because it was money which had been obtained as the result of a litigation culminating in a judgment. The case in (1797) 7 T R 269[1] has been considered on a number of occasions by their Lordships of the Judicial Committee, and the principle laid down has been followed in this country. In my view the facts of the present case cannot be distinguished from those in (1797) 7 T R 269.[1] In the present case defendant 2 was paid his dues on the hand-note by defendant 1 on behalf of the plaintiff. That was in substance and in fact a payment by the plaintiff of what he owed under the hand-notes. In spite of that payment, defendant 2 brought a suit against the plaintiff, and in that suit he obtained a decree under which he recovered for the second time the amount due under the hand-notes. Defendant 2 in this case did precisely what the defendant did in (1797) 7 T R 269;[1] and it appears to me that the plaintiff in this case cannot recover for the same reason as the plaintiff failed to recover in (1797) 7 T R 269.[1] This is money which had been paid to the defendant under the compulsion of legal process, and as such cannot be recovered in a subsequent suit.

It has been argued before us that the principle laid down in (1797) 7 T R 269[1] is only applicable where the defendant was not guilty of fraud, dishonesty or sharp practice. It is said that if there is bona fides on the part of the defendant, then the money is irrecoverable; but, on the other hand, if there is mala fides, then the money is recoverable. Our attention has been drawn to the case in (1900) 1 Q B 675[2] where Kennedy J., held that in certain circumstances money obtained under legal compulsion was recoverable. In that case no judgment of the Court was pronounced, and the money was not obtained as a result of the decree. The plaintiff had sued the defendant and had by mistake given the

1. Marriot v. Hampton, (1797) 7 T R 269=2 Esp 546=4 R R 439.

2. Ward & Co. v. Wallis, (1900) 1 Q B 675 = 69 L J Q B 423=82 L T 261=16 T L R 193.

defendant credit for a sum of £75. The defendant realizing that this credit had been given to him by mistake paid the balance and obtained from the plaintiff a receipt for the full amount including the sum of £75, for which credit had been wrongly given. Subsequently the plaintiff realized that this sum of £75 had not been paid and brought a suit to recover that amount. Kennedy J., held that he was entitled to recover on the ground that though the defendant had obtained a benefit as a result of legal process, yet as he had acted dishonestly he could not retain such a benefit. It is to be observed that in that case there was no decree, but rather it was a case which was settled between the parties without a fight on the merits of a decree.

Counsel for the appellant has also cited the case in (1836) 4 A & E 858.[3] In that case a Spanish Duke was arrested by one Collins, an insolvent, for a fictitious debt of £10,000 upon a writ which was afterwards set aside. The Duke, who was ignorant of the English language, in order to obtain his release, agreed to pay £500 and gave bail for the remainder of the sum; and the £500 was accordingly paid. An action having been brought by the Duke to recover this sum, it was held that he was entitled to succeed, and the Court later discharged the rule for a new trial. In delivering judgment, Lord Denman said:

It is asserted that the principle of decision in (1797) 7 T R 269[1] has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under the compulsion of legal process can never be recovered back; but only that, after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in another action. This is the ground upon which the decision is put by Lord Kenyon.

The English law is clear that if money has been obtained as the result of a decree between the parties if such be not a compromise decree, then a subsequent suit to recover back that money cannot succeed. Different considerations would arise if the parties had compromised and the compromise had been induced by the fraud of the person who obtained the benefit under the compromise. In such a case the compromise could be set aside as also the decree based upon it. Such was the decision in 17 M L J 82.[4] In that case it was found that the defendant inveigled the plaintiff into a compromise fraudulently, and accordingly (1797) 7 T R 269[1] had no application to such a case. In the present case there was no compromise, but a decree was passed against the plaintiff who apparently put up no defence. The money now sought to be recovered is money which the plaintiff was compelled to pay as the result of such decree. Such, in my view, cannot be recovered in a subsequent suit. Agarwala J. allowed the appeal upon these grounds, and in my view his decision was right and must be affirmed. I would therefore dismiss this appeal with costs. There will be one set of costs in this Letters Patent appeal.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal dismissed.*

3. Cadaval v. Collins, (1836) 4 A & E 858=6 N & M 324=2 H & W 54 = 5 L J (N S) K B 171=43 R R 499.
4. Raghavachariar v. Thiruvenkatasami Iyengar, (1907) 17 M L J 82.

A. I. R. 1940 Patna 3

ROWLAND AND CHATTERJI JJ.

Haldher Prasad Singh and another — Appellants.

v.

Natha Singh and others —Respondents.

Appeal No. 173 of 1938, Decided on 9th August 1939, from original order of Sub-Judge, Muzaffarpur, D/- 18th June 1938.

Deed — Construction — Sale of zamindari share masewa decree for costs and mesne profits — Decree for costs and mesne profits held not transferred along with share in zamindari.

During the pendency of a suit by a lady for possession of zamindary property the lady entered into a champertous agreement with a third person whereby it was agreed that the latter should bear all the costs of the litigation and should receive in return half of the zamindari property. The suit was decreed for the zamindari property with mesne profits and costs. In accordance with the agreement a sale deed was executed which provided "the half share in the zamindari together with all zamindari rights appertaining thereto masewa the decree for costs and mesne profits have been transferred":

Held that the expression 'masewa' implied everything but the decree for costs and mesne profits. Hence the decree for costs and mesne profits was not transferred in addition to zamindari share.

[P 5 C 1]

B. P. Sinha and Krishna Kumar Singh — *for Appellants.*

Mahabir Prasad and B. K. Saran — *for Respondents.*

Rowland J. — This appeal by the decree-holders arises out of an objection in execution which was decided against the appellants under S. 47, Civil P. C. The mother of the appellants sued to recover possession of certain properties after setting aside alienations made by her own mother.

For the purpose of prosecution of this suit she entered into a champertous agreement with Narsingh Singh. The suit was decreed for part of the zamindari property claimed with mesne profits and costs and the decree was affirmed in appeal. During the pendency of the appeal, Mt. Ramzhari Kuer died in 1932 and the present appellants were substituted. They entered into an agreement with Narsingh Singh similar to that between the lady and him. In pursuance of the agreement they executed on 10th October 1934 a sale deed in his favour. They are now seeking to execute the decree for costs and there is pending an application by them for ascertainment of the mesne profits. This objection was taken against the execution of the decree for costs by judgment-debtors 21-23. They are brothers of Narsingh Singh who is now dead and they have alleged in their petition of objection that the decree for costs and mesne profits was transferred to Narsingh Singh by the sale deed of 1934 so that the appellants can no longer execute this part of the decree. The Subordinate Judge accepted the case of the objectors ; hence this appeal.

The question turns on the reading and construction of the sale deed. The Subordinate Judge has treated it as governed by a passage which he cites and understands to mean that besides the zamindari property the decree for costs and mesne profits was also transferred. In appeal we are invited to examine the document as a whole and to hold that the passage referred to by the Subordinate Judge does not bear the meaning he has attributed to it both on a proper construction of the words used and also because that meaning is contrary to the tenor of the whole of the document. First the document recites the agreement between Mt. Ramjhari Kuer and Narsingh Singh. She is said to have agreed that

> she would execute a sale deed in respect of one-half of the proprietary interest that would be acquired by means of the suit in his (Narsingh's) favour in lieu of the costs of the suit and his labour.

This part of the document does not allude to any promise by the lady to transfer the costs or mesne profits that might be awarded. The objection of the respondents gave quite a different version of the agreement between the lady and Narsingh Singh. According to this version, the lady was to execute a deed of absolute sale in respect of one-half of the milkiat interest, costs and mesne profits for which the decree would be passed. Further that the decree would be jointly executed by the lady and Narsingh Singh in respect of their one-half share each of the milkiat interest, costs and profits. So far as this agreement was concerned, the objection of the respondents was totally at variance with the agreement as recited in the sale deed which they rely on to support their case. The next agreement was that entered between the appellants and Narsingh Singh after the death of Mt. Ramjhari Kuer. What the sale deed recites is that

> out of the proprietary interest we would get from the appeals we would execute a deed of sale in his (Narsingh's) favour in respect of one-half share of the interest claimed in the suits as agreed to by our mother, and we would keep the other half.

In the petition of objection of the respondents this agreement is not referred to. The objection as presented alleged that the sale deed of 10th October 1934 transferred to Narsingh Singh half the decree for costs and mesne profits in addition to half the zamindari property. At a later stage the objectors were permitted to substitute the word 'half' and to claim that the entire decree for costs and mesne profits had been transferred to them. Such a transfer, it will be seen from what has already been said, would go a good deal beyond what had been promised in the previous agreements. Those agreements appear to have contemplated that Narsingh Singh should bear all the costs of the litigation and that he should receive in return simply half of the properties and not that he should receive back as well as the property the costs incurred by him. In fact Rs. 700 had been spent during the appeal in the High Court by the present appellants and at the time of the execution of the sale deed provision was made for the repayment of this amount of Rs. 700 in cash by Narsingh Singh to the appellants. Coming to the transfer itself the document further recites :

> Now Babu Narsingh Singh requested us, the executants, that we should take our dues of Rs. 700 and execute a deed of sale in respect of half share of the proprietary interest that was acquired by means of the suit.

There is no reference of any request by Narsingh Singh that the executants should execute a deed of sale in respect of any part of the decree for costs or mesne profits. The document then says that the executants have sold the stated shares of proprietary interest

> together with (mai) appurtenances and rights of water, forest, etc. . . . . In short all the zamindari rights appertaining thereto masewa the decree for

costs and mesne profits and also (wobhi) 3 kathas 4 dhoors of kaimi jote lands.

The particulars of the property transferred are given at the beginning and also at the end of the deed. At the beginning mention is made of the consideration of Rs. 4000 and of the property transferred as 1 anna 14 gandas and 4 kowris of proprietary interest and 3 kathas and 4 dhoors of kaimi jote lands. At the end again details of the proprietary interest sold and specification of properties of the vended property are set out and again there is no reference to any decree for costs or mesne profits. The expression "maseva" was interpreted by the Subordinate Judge as meaning "besides or in addition" and Mr. Mahabir Prasad has referred to the Student's Practical Dictionary in support of this interpretation; but I find in the dictionary cited, the translation given is not 'besides' but 'beside' a meaning much more analogous to 'outside than to' along with or including. In Shakespear's Hindustani and English Dictionary the expression 'sewa' is rendered as 'more, additional, besides, except, save, but, other than, over and above.' No doubt if the word 'sewa' stood alone there would be no difficulty in holding that the expression was meant to exclude the decree. 'Ma' means 'what is'. The combined expression 'maseva' is rendered in Shakespear's Dictionary 'what is besides; besides, moreover, over and above, save'. According to its literal meaning then the expression 'maseva' may be rendered as that which is besides the decree and may imply everything but the decree. Having regard to the tenor of the document as a whole I am of opinion that this is the meaning which the expression must bear in its present context. On that view I would hold that the money decree was not transferred to Narsingh Singh by the sale deed. On that view the objection ought to have been dismissed.

I would allow the appeal, dismiss the objection and direct that the Subordinate Judge proceed with execution according to law. The appellants are entitled to their costs of this appeal and of the objection in the Court below.

Chatterji J. — I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 5

DHAVLE AND MEREDITH JJ.

Mahesh Singh and others — Appellants.

v.

Gajadhar Singh and others — Respondents.

Appeal No. 36 of 1938, Decided on 3rd August 1939, from original order of Sub-Judge, Gaya, D/- 23rd December 1937.

Civil P. C. (1908), O. 21, R. 22 — Decree amended—Period of one year should be counted from date of amended decree.

The decree contemplated in O. 21, R. 22 must be the decree to be executed, not only when it is an appellate decree dealt with in cl. (2) but also when it is a decree which has been reviewed or amended as dealt with in cl. (3) and cl. (4) of Art. 182, Limitation Act. Hence where a decree is amended the period of one year is to be counted from the date of the amended decree and not the date of the original decree. [P 6 C 1]

S. M. Mullick and Harinandan Singh — *for Appellants.*

Sir M. N. Mukharji, G. C. Das and M. N. Pal—*for Respondents.*

Dhavle J.—This appeal arises out of an order dismissing an application under O. 21, R. 90 for setting aside an execution sale. The only point urged before us is that the execution itself, which was based on an application of 18th September 1935, was incompetent because the decree under execution was passed on 26th January 1934, and no notice under O. 21, R. 22 was either served or even taken out. It is however not disputed that the decree of 26th January 1934 — it was a final decree in a partition suit—was amended after notice to the parties concerned on 2nd September 1935. If limitation is counted from this date, no notice under O. 21, R. 22 was at all necessary. The learned advocate for the appellants has contended that the date of the decree contemplated in O. 21, R. 22 must be the date of the decree as originally passed and cannot be the date of amendment of the decree; and in support of this contention he has referred to cl. (4) which was added in 1908 to Art. 182 (replacing old Art. 179), Limitation Act, and gives the starting point of limitation for the execution of a decree which has been amended as the date of the amendment. But that addition was only made in order to settle a conflict of views on the question whether the amendment of a decree did or did not come within the expression "a review of judgment" which occurred in cl. (3) and gave a fresh starting point. Unlike Art. 182 and unlike the Civil Procedure Code of 1882, O. 21, R. 22 does

not specifically deal with decrees which have been modified in appeal, and yet it is obvious that in such cases the period of one year will have to be counted from the date of the appellate decree which is the decree to be executed. The decree contemplated in O. 21, R. 22 must, it seems to me, be the decree to be executed, not only when it is an appellate decree dealt with in cl. (2) but also when it is a decree which has been reviewed or amended as dealt with in cls. (3) and (4) of Art. 182, Limitation Act. From the time the original decree was amended—I observe in passing that it was amended on notice and before it had become time-barred—the parties in the present case were all (as the case may be) bound by or entitled to execute the amended decree instead of the original decree; and the starting point for limitation for execution was the date of the amendment. Why then must O. 21, R. 22 be so construed as to count the period of one year from the date of the original unamended decree? And the respondents took their stand so much on the amendment that they not only specified it in their particulars against the heading "the date of the decree" prescribed by R. 11 (2) (c) of O. 21 but further sought execution (in part) by proceeding against property which only came to the appellants as a result of the amendment. In my opinion the lower Court was right in counting the period of one year from the date of the amended decree and therefore holding that no notice under O. 21, R. 22 was necessary. The appeal fails and I would dismiss it with costs.

Meredith J.—I agree.

D.S./R.K. *Appeal dismissed.*

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* A. I. R. 1940 Patna 6

HARRIES C. J. AND FAZL ALI J.

Ramjan Ali — Appellant.

v.

Khawja Meer Ahmed Sethi —

Respondent.

Letters Patent Appeal No. 4 of 1939, Decided on 4th August 1939, from decision of Manohar Lall J. D/- 6th December 1938.

*** (a) Limitation Act (1908), S. 19 — What constitutes signature under S. 19 explained.**

If upon a document which purports to be an acknowledgment of liability there appears the name of the debtor, and this name is introduced under his authority with a view to authenticate the document, such a document would be a valid acknowledgment of his liability. Thus, it is not necessary that the name should be written by the debtor himself. It is sufficient if it is written by a person acting with authority to write his name and to acknowledge the debt in question. Moreover the Section, as it stands, does not draw any distinction between a person who is literate and one who is not literate. In either case, an acknowledgment signed by an agent with his authority would be enough. The Section also does not say as to what should be the form of the signature, and if the name of the debtor is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own, such a name whether written or printed would constitute his signature within the meaning of the expression as used in S. 19: *1 All 683, Rel. on.* [P 7 C 1]

(b) Limitation Act (1908), S. 19—Letter of acknowledgment written by person at instance of debtor—Debtor posting that letter to creditor's address—Person can be inferred to have been duly authorized to make acknowledgment.

Where a letter of acknowledgment has been written by a person at the instance and upon the instructions of the debtor and the debtor has caused the letter to be posted to the address of the creditor, these circumstances indicate that the person had been duly authorized to make the acknowledgment. [P 7 C 2]

K. K. Banarji — *for Appellant.*

Gholam Muhammad — *for Respondent.*

Fazl Ali J.—This is an appeal under the Letters Patent from a decision of Manohar Lall J. in a second appeal affirming the decision of the Courts below in a suit based on a bond executed by defendant 1 in favour of defendant 2 on 19th June 1931. The bond having been duly assigned by defendant 2 in favour of the plaintiff, the latter brought this suit on 23rd March 1934, to recover the sum due under it. The only question which arises in this second appeal is whether two letters, Exs. 1 and 1 (a) dated 23rd September 1933 and 28th January 1934, respectively, constitute a valid acknowledgment of the liability of defendant 1 so as to extend the period of limitation for the suit which would otherwise have been barred. Admittedly these letters were written not by defendant 1 but by one Rahmat Ali; but both the trial Court and the lower Appellate Court found that Rahmat Ali wrote these letters at the instance of and on the instructions given by defendant 1, and defendant 1 had these letters duly posted to the address of defendant 2. Both the Courts held upon these facts that these letters constituted a valid acknowledgment of liability so as to bring the case under S. 19, Limitation Act, and this view has been upheld by the learned Judge of this Court on second appeal.

The learned advocate for the appellant contends that these letters do not constitute

a valid acknowledgment, first, because they were not signed by defendant 1 himself although there is evidence to prove that he could make his own signature; and secondly, because Rahmat Ali was not duly authorized to acknowledge the debt due under the bond. It is true that the letters have not been signed by defendant 1; but the question as to what constitutes a signature under S. 19, Limitation Act, has been considered in a series of cases by the Indian High Courts, and there is a consensus of opinion that if upon a document which purports to be an acknowledgment of liability there appears the name of the debtor, and this name is introduced under his authority with a view to authenticate the document, such a document would be a valid acknowledgment of his liability. This view is very lucidly set out in the judgment delivered by the learned Chief Justice of the Allahabad High Court in 1 All 683,[1] and it has been reiterated in a number of subsequent decisions. The learned Chief Justice in the case referred to above observed as follows :

> The Act does not require that the signature should be at the foot or in any particular part of the document, and in our judgment, whenever the maker of an instrument or his agent acting with authority introduces the name of the maker with a view to authenticate the instrument as the instrument of the maker, such an introduction of the name is a sufficient signature.

Thus it is not necessary that the name should be written by the debtor himself. It is sufficient if it is written by a person acting with authority to write his name and to acknowledge the debt in question. Expln. 2 to S. 19, Limitation Act, clearly states that for the purposes of the Section 'signed' means signed either personally or by an agent duly authorized in this behalf. It is contended that defendant 1 being literate could have signed the letters himself; but the Section, as it stands, does not draw any distinction between a person who is literate and one who is not literate. In either case, an acknowledgment signed by an agent with his authority would be enough. The Section also does not say as to what should be the form of the signature, and it is now well settled that if the name of the debtor is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own, such a name whether written or printed would constitute his signature within the meaning of the expression as used in S. 19, Limitation Act. This view is also in consonance with the view taken in a number of English decisions. The effect of these decisions is stated thus in Addison on Contracts, Edn. 11, p. 41 :

> If the party has recognized and adopted his printed name or signature for instance, by sanctioning or permitting the distribution of printed handbills, or printed particulars of sale, in which his name appears there has been a signature by an agent duly authorized, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it.

The second objection which has been put forward on behalf of the appellant is equally untenable. As I have already stated, it has been found by the Courts below that the letter was written by Rahmat Ali at the instance of defendant 1 and upon his instructions. It has also been found that it was defendant 1 who caused the letter to be posted to the address of defendant 2. These circumstances clearly indicate that Rahmat Ali had been duly authorized to make the acknowledgments in question. In my opinion, the view taken by Manohar Lall J. is perfectly correct, and I would therefore dismiss this appeal with costs.

Harries C. J.—I agree.

D.S./R.K. *Appeal dismissed.*

1. Mathura Das v. Babu Lal, (1875-77) 1 All 683.

A. I. R. 1940 Patna 7

ROWLAND AND CHATTERJI JJ.

Harballav Prasad Chowdhury and others — *Plaintiffs* — Appellants.

v.

Jagballav Prasad Chowdhury, Defendant and another, Plaintiff — Respondents.

Misc. Appeal No. 142 of 1937, Decided on 24th August 1939, from original order of Sub-Judge at Darbhanga, D/- 5th March 1937.

(a) Civil P. C. (1908), O. 47, R. 1 — Error analogous to one apparent on face of record — Review is permissible.

Where there is an error apparent on the face of the record or something analogous to it, the review is permissible under the express provisions of O. 47, R. 1. [P 8 C 2]

(b) Civil P. C. (1908), O. 47, Rule 4 (1) — R. 4 (1) cannot be interpreted to mean that its provision is contravened if Court grants application though there is not sufficient ground for review.

Sub-r. (1) of R. 4 cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted the case falls under sub-r. 2. [P 8 C 2; P 9 C 1]

(c) Civil P. C. (1908), O. 43, R. 1 (w) and O. 47, R. 7—Appeal granted by O. 43, R. 1 (w) is restricted by O. 47, R. 7.

The right of appeal granted by O. 43, R. 1 (w) is restricted by the grounds set out in O. 47, R. 7 : *A I R 1926 Bom 121 and A I R 1929 Nag 73, Dissent.; A I R 1936 Pat 310 and A I R 1916 Pat 370, Foll.* [P 9 C 1]

(d) Civil P. C. (1908), S. 115— Order sought to be revised amounting to final decree and thus appealable — S. 115 does not apply.

Under S. 115 revision is permissible only where the order complained of is not appealable. Where an order sought to be revised amounts to a final decree and thus appealable, S. 115 cannot come in: *A I R 1927 Lah 435, Disting.* [P 9 C 2]

B. N. Mitter, R. Chowdhury and Ajit K. Mitter — *for Appellants.*

Bhabananda Mukharji — *for Respondents.*

Chatterji J. — This appeal arises out of proceedings in a partition suit instituted so far back as in the year 1917. Without going into the long history of the case, it will be enough to state that in pursuance of the preliminary decree which was passed in 1919, a commissioner was appointed who eventually submitted his report on 26th April 1935. According to his findings, the plaintiffs were entitled to get various sums from the defendant who was the karta of the joint family. The defendant filed objections to the report and those were disposed of by the Subordinate Judge by his order dated 17th January 1936. Accepting the commissioner's report in part, he passed a final decree. Before the final decree was actually prepared, the defendant made an application on 17th February 1936 for review of the judgment dated 17th January 1936. In the application certain items in the commissioner's report were specifically referred to and it was prayed that "those items should be reconsidered with a view to rectify the mistakes and inequities that have crept in owing to a misapprehension." This application was presented to and heard by the same Judge who passed the final decree on 17th January 1936. He granted the application by his order dated 5th March 1937 and by the same order he passed a fresh final decree. The present miscellaneous appeal is directed against that order in so far as it granted the application for review. The substantial point urged in this appeal is that there were no sufficient grounds upon which the learned Subordinate Judge could review the final decree which was passed on 17th January 1936. In support of his contention Mr. Mitter has relied upon the decision of the Privy Council in 3 Lah 127[1] where their Lordships laid down that "any other sufficient reason" in O. 47, R. 1, Civil P. C., means a reason sufficient on grounds at least analogous to those specified immediately previously. In the present case however the learned Subordinate Judge has held that there was an error apparent on the face of the record or something analogous to it. If that is so, certainly the review was permissible under the express provisions of O. 47, R. 1. But let us assume that the Subordinate Judge was wrong in his view of the facts with which he was dealing. The question is whether in this appeal we can examine the propriety of his decision. Indeed under O. 43, R. 1 (w) an order granting an application for review is appealable; but O. 47, R. 7 specifies certain limits within which such an appeal can be entertained. The relevant portion of O. 47 R. 7 runs as follows :

> An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was: (a) in contravention of the provisions of R. 2, (b) in contravention of the provisions of R. 4, or (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

Thus it is clear that an order granting an application for review can be objected to only upon the three grounds specified in the above rule and no other. Now in the present case the first and the third grounds unquestionably do not exist. An attempt was made by Mr. Mitter to support the appeal on the second ground, namely that the application was in contravention of the provisions of Rule 4. That rule runs as follows :

> (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.
>
> (2) Where the Court is of opinion that the application for review should be granted, it shall grant the same : Provided that (a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for : and (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

Sub-r. (1) does not obviously apply as it refers to a case where the Court rejects the

1. Chhajju Ram v. Neki, (1922) 9 A I R P C 112 =72 I C 566 = 3 Lah 127=49 I A 144 (P C).

application. It cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted the case falls under sub-r. 2. Mr. Mitter wanted to rely on proviso (b) of that sub-rule, but the application was not based on the ground of discovery of any new matter or evidence nor was it granted on any such ground. The position therefore is that none of the grounds on which the order granting the application for review could be attacked by way of appeal exists in the present case. Mr. Mitter has referred us to a decision of the Bombay High Court in A I R 1926 Bom 121[2] and to the decision of the Nagpur Court in 116 I C 645.[3] In both these cases it was no doubt held that the right of appeal granted by O. 43, R. 1 (w) is not restricted by the grounds set out in O. 47, R. 7. But there are decisions of this Court on this point in 17 P L T 766[4] and 1 Pat L J 193.[5] In the latter case, though it was a decision of a single Judge, it was held that an appeal under O. 43, R. 1 (w) is subject to the provisions of O. 47, R. 7. It was further held that an order granting a review merely for sufficient ground is not appealable. In 17 P L T 766[4] a Division Bench of this Court held that when a review is granted an appeal is permissible only on the grounds specified in O. 47, R. 7. The High Courts of Calcutta, Rangoon and Lahore have also taken the same view as this Court. This being the state of the authorities on the point, I am afraid we are unable to follow the decisions of the Bombay High Court and the Nagpur Court referred to. It is to be observed that the Bombay High Court subsequent to its aforesaid decision deleted O. 43, R. 1 (w) by virtue of its rule-making power.

Mr. Mitter further contends that the order now under appeal being the final judgment in the suit, it may be attacked on grounds other than those specified in O. 47, R. 7. The answer to this is that this is not a regular appeal against the final decree but a miscellaneous appeal from the order granting the application for review and it cannot be treated as a regular appeal in view of the fact that the question of court-fee would arise. Mr. Mitter has asked us to treat the appeal as a regular appeal on payment of the deficit court-fee; but it is now too late to accede to that prayer. The appeal was presented on 19th July 1937 and was not properly constituted as a regular appeal, being insufficiently stamped. There is no justification for converting it into a regular appeal so long after the expiration of the prescribed period of limitation. Mr. Mitter lastly asked us to treat the memorandum of appeal as an application in revision as was done in 8 Lah 617.[6] Under Sec. 115, Civil P. C., revision is permissible only where the order complained of is not appealable. In the present case the order sought to be revised amounts to a final decree and as such is appealable. Consequently, Sec. 115 cannot come in. In the Lahore case, where the facts were quite peculiar, there was no such appealable decree or order. I would dismiss the appeal but in the circumstances the parties should bear their own costs.

Rowland J. — I agree.

D.S./R.K. *Appeal dismissed.*

2. Daso Keshav Panchbhavi v. Karbasappa Kariyappa, (1926) 13 A I R Bom 121=94 I C 591 = 27 Bom L R 1446.
3. Mukundsa v. Motiram, (1929) 16 A I R Nag 73 = 116 I C 645 = 25 N L R 104.
4. Jadunandan Singh v. Shankar Sahu, (1936) 23 A I R Pat 310=162 I C 992=17 P L T 766.
5. Sundar Lal v. Upendra Nath, (1916) 3 A I R Pat 370 = 35 I C 15 = 1 Pat L J 193.
6. Sikandar Khan v. Baland Khan, (1927) 14 A I R Lah 435=107 I C 596=8 Lah 617=29 P L R 81.

A. I. R. 1940 Patna 9

MOHAMAD NOOR AND DHAVLE JJ.

Bibi Zohra — Petitioner.

v.

Bibi Habibunnissa — Opposite Party.

Civil Revn. No. 293 of 1938, Decided on 15th February 1939, against order of Dist. Judge, Darbhanga, D/- 24th August 1938.

(a) Mahomedan Law—Wakf—Kazi when can appoint mutwalli, stated.

Under the Mahomedan law the Kazi has power to appoint a mutwalli when a vacancy occurs and there is none to take office under the terms of a wakf or when the mutwalliship devolves under the deed of wakf upon a minor. [P 11 C 2]

(b) Mahomedan Law — Wakf — Powers of District Judge of appointing mutwallis in summary proceeding and their limitations stated.

The District Judge as a principal Civil Court of original jurisdiction and by virtue of his power as a Kazi may, when there is a vacancy in the office of a mutwalli, nominate a mutwalli but he has no power in a summary proceeding to appoint another mutwalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under S. 92,

Civil P. C. When however two persons each claim to be the mutwalli, the dispute between them is one of a civil nature and must be decided in an ordinary civil suit. The vindication of individual rights is not a matter for decision either under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act. The appointment of a mutwalli by a District Judge in a summary proceeding is not appealable, and such appointment should be made in cases of emergency, and by the very nature of it must be subject to the result of any suit which may be instituted by any of the parties who claim adversely to one another to be the mutwalli, or subject to the result of any suit which may be instituted either under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act : *Case law reviewed.* [P 11 C 2; P 13 C 1, 2]

(c) Mahomedan Law—Wakf—After death of mutwalli his mukhtar-am according to instructions of deceased handing over estate to another person—Such act is unauthorized and person to whom estate is handed over cannot be said to have assumed office of mutwallishiip.

Where after the death of a mutwalli his mukhtar-am has in accordance with the instructions of the deceased mutwalli handed over the estate to another person, this act of mukhtar-am is unauthorized as after the death of mutwalli his power of attorney in favour of the muktar-am comes to an end. The person to whom the estate is handed over cannot therefore be said to have assumed the office of mutwallishiip. [P 13 C 2; P 14 C 1]

(d) Mahomedan Law—Wakf—District Judge in summary proceeding cannot decide that under wakf deed certain person was to be mutwalli on death of last holder—Further, he cannot appoint deputy mutwalli during minority of rightful mutwalli.

The District Judge, has no jurisdiction in the summary proceeding before him to decide that under the wakf deed certain person was to be the mutwalli on the death of the last holder. Such a decision can only be given in a properly constituted suit. Further, his order that a deputy mutwalli should be appointed during the minority of a rightful mutwalli is wrong. A deputy mutwalli presupposes a mutwalli. The minority makes it impossible for him to depute anybody else to work as the mutwalli. [P 14 C 1]

(e) Mahomedan Law—Wakf — Right of person under wakf deed to be appointed mutwalli during minority of rightful mutwalli is forfeited if former had repudiated wakf.

Even if a wakf deed has provided that certain person should be appointed mutwalli during the minority of rightful mutwalli that person forfeits that right if he had repudiated the wakf. [P 14 C 1]

Hassan Jan and Azizullah — *for Petitioner.*

Sir Sultan Ahmad, Murari Prasad and Syed Ali Khan — *for Opposite Party.*

Order. — This is an application against an order of the District Judge of Darbhanga directing that a deputy mutwalli of a wakf be appointed in the manner indicated in the order. The facts are these. One Sheikh Shukrullah, along with one of his wives, Zaibunissa, made a wakf of certain properties for religious and charitable purposes. By the wakf deed he appointed himself to be the mutwalli for his life; on his death his wife, Zaibunissa, if she was alive, then, was to be the mutwalli, and after her, Wajihuddin, a son of his from another wife Habibunissa, was to be the mutwalli. In case Zaibunissa died during the lifetime of Shukrullah, Wajihuddin was to be the mutwalli if a major at the time of Shukrullah's death; but if he (Wajihuddin) be a minor at the time, then till he attained majority, Mt. Bibi Zohra, daughter of Sheikh Shukrullah from Zaibunissa was to be the mutwalli, but on his (Wajihuddin's) attaining majority he was to become the mutwalli and the mutwallishiip of Bibi Zohra was to terminate. Wajihuddin was given power to nominate the mutwalli after him from among the male members of the family of Shukrullah, and each successive mutwalli thereafter was given a similar power. This was to continue as long as capable and honest male members of the family of Shukrullah were available. In case of extinction of the male descendants of Shukrullah, female members of his family who would be found capable were to be nominated mutwalli in accordance with the aforesaid arrangement, and the power of nominating successors was given to them also. Wajihuddin died during the lifetime of Shukrullah, who continued to work as mutwalli till his death in December 1929. Thereupon Zaibunissa became the mutwalli. Her right to the mutwallishiip was disputed by her co-widow Habibunissa who applied to be the mutwalli, but the District Judge in a proceeding (Miscellaneous Case No. 30 of 1930) overruled the objection of Habibunissa. Zaibunissa continued as mutwalli till her death.

It appears that towards the end of the year 1935, one Razid Ali applied to the District Judge of Darbhanga for action under Act 14 of 1920 or Act 42 of 1923 calling upon the mutwalli, Mt. Zaibunissa, to submit accounts. Accounts were submitted on 10th February 1936, and they were being examined when Zaibunissa died on 23rd May 1938. Mt. Zohra, the daughter of Shukrullah and Zaibunissa, appeared in that proceeding and intimated to the Court that her mother was dead, and stated that according to the deed of wakf she had succeeded to the mutwallishiip of the wakf and had taken charge of it from the mukhtar-am, who had rendered all accounts to her. She asked that her name should be

substituted in the proceeding in place of the deceased Mt. Zaibunissa. To this Mt. Habibunissa, widow of Sheikh Shukrullah, objected. Her case was that according to the deed of wakf, Abdul Hai, son of Shukrullah from her, was entitled to be the mutwalli after the death of Zaibunissa, and she prayed that the application of Bibi Zohra be rejected and Abdul Hai who was then a minor be recognized as mutwalli. Having on the death of Shukrullah been appointed guardian of the properties of Abdul Hai, Habibunnissa applied to be appointed guardian of the wakf properties also. By an order dated 18th June 1938, the District Judge held that on a true construction of the wakf deed Abdul Hai was the rightful mutwalli, but that as he was a minor aged only about 12 years some deputy mutwalli should be appointed to act in his place during his minority. He called upon both the parties to convene a meeting of the local public interested in the wakf and to place before him by 30th June the opinion of the majority as to who was the most proper person to be appointed deputy mutwalli. On 30th June Mt. Habibunissa filed a petition stating that the meeting was held and by a resolution she was appointed the deputy mutwalli.

In the meantime Mt. Zohra filed the present application for revision in this Court. Further proceedings in the lower Court were stayed by an order of this Court dated 29th June 1938; and by another order dated 29th July 1938 the revision application was admitted for hearing and it was ordered that the District Judge when he appointed a deputy mutwalli should appoint that person to be the receiver of the wakf also so that the interest of the wakf property also might be fully safeguarded. This order was to remain in force pending the hearing of the civil revision application. By an order dated 24th August 1938, the District Judge accordingly appointed Maulvi Halim Raza to be the deputy mutwalli and receiver till the disposal of this revision application.

Mr. Hasan Jan who has appeared on behalf of the petitioner, Bibi Zohra, has contended that the District Judge had no jurisdiction in a summary proceeding to appoint a deputy mutwalli and the less so when there was de facto mutwalli in the person of Bibi Zohra to whom the estate was made over by Sheikh Abdul Haq, the mukhtar-am of the late mutwalli Bibi Zaibunissa, under instructions from the latter. As regards the powers of a District Judge in such matters it is beyond question that under the Mahomedan law the Kazi has power to appoint a mutwalli when a vacancy occurs and there is none to take office under the terms of a wakf or when the mutwallishiip devolves under the deed of wakf upon a minor. But at present there is no officer with the designation of Kazi and the question is how far a District Judge of a British Court has the powers of a Kazi. The District Judge as presiding in the principal Court of original civil jurisdiction, (or the officer presiding in any other Court empowered in that behalf by the Local Government) has been given power under Sec. 92, Civil P. C., in a suit instituted under the provisions of that Section, to remove a mutwalli and appoint a new one. There is similarly with reference to those wakfs that come under the Religious Endowments Act of 1863, the power of the Civil Court, in a suit instituted with the leave of the Court, to remove the trustee; the Act defines the Civil Court as meaning the principal Court of original civil jurisdiction and any other Court empowered in that behalf by the Provincial Government. It has been held in a number of cases that the provisions of this Act apply not only to those endowments which were in existence at the time the Act was passed and had been taken under control by the Board of Revenue under Regn. 19 of 1810, but also to later institutions which come within its purview: 4 Pat 741,[1] 11 Pat 594,[2] A I R 1930 All 577[3] and 38 C W N 1056.[4]

There is no other statutory provision vesting a District Judge or any other Court with the power of appointing or removing a mutwalli; but there is a number of decisions to the effect that the District Judge as a principal Civil Court of original jurisdiction has by virtue of his power as a Kazi, a general power of appointing mutwallis in a summary proceeding which we must now examine. His powers under Sec. 92, Civil P.C., and S. 14, Religious Endowments Act of 1863, (as we have already indicated) can only be exercised in a properly framed suit, and

1. Diljan Ali v. Akhtari Begum, (1925) 12 A I R Pat 544=88 I C 1035=4 Pat 741=7 P L T 4.
2. Ram Prasad v. Ramkishun Prasad, (1932) 19 A I R Pat 177=138 I C 331=11 Pat 594=13 P L T 256.
3. Syed Husain v. Syed Hamid, (1930) 17 A I R All 577=124 I C 710=1930 A L J 1208.
4. Badar Rahim v. Badsha Mia, (1934) 21 A I R Cal 741=153 I C 291=62 Cal 125=38 C W N 1056=60 C L J 298.

the question before us has arisen not in a suit but on an application to be dealt with summarily. In 37 Cal 870,[5] Pugh J. sitting in the Original Side of the Calcutta High Court, held that although a Judge of the High Court exercises the functions of a Kazi when administering Mahomedan law, the procedure to be adopted is to be regulated by the Code of Civil Procedure and the rules and orders of the High Court. This was the view taken by the learned Judge on an application by a mutwalli for the sanction of the Court to sell certain wakf properties. This, if we may say so, would prima facie appear to be the correct position so far as statutory provisions are concerned, but a number of decision point the other way.

In 43 Cal 467[6] the Calcutta High Court had to consider the general powers of a District Judge as a Kazi in respect of wakfs. The plaintiff had instituted the suit in the Court of a Subordinate Judge for a declaration that she was entitled to be the mutwalli of a certain wakf and for recovery of possession of the property. The Subordinate Judge decreed the suit. On appeal the District Judge dismissed it, and there was a second appeal to the High Court. Mookerjee J. after an examination of a number of decided cases and other texts held that under the Mahomedan law that Qadi alone was competent to exercise authority in respect of wakfs, who was so expressly authorized in his Letters Patent. The balance of opinion of Mahomedan jurists (he found) favoured the view that the Chief Qadi should have authority expressly conferred on him in order to enable him to deal with wakfs. It followed, in his opinion, that a Subordinate Judge who was not expressly authorized by the Government to exercise functions in connexion with the administration of wakfs was not competent to deal with wakf cases. He considered it doubtful whether a District Judge had implied authority to exercise the functions of a Kazi under the Mahomedan law. In respect of wakfs for public purposes of a religious nature within sub-s. (1) of S. 92, Civil P. C., the District Judge might, in his view, be assumed to have been authorized to discharge the functions of a Kazi, but (the learned Judge observed) "the real difficulty arises in cases of private wakfs."

5. In re Halima Khatun, (1910) 37 Cal 870=7 I C 33.
6. Atimanneessa Bibi v. Abdul Sobhan, (1916) 3 A I R Cal 894=32 I C 21=43 Cal 467=22 C L J 577=20 C W N 113.

In an earlier case, 37 Cal 179,[7] the same learned Judge (sitting with Vincent J.) had upheld the approval by a Subordinate Judge of a mortgage of wakf property lying within his jurisdiction as no less effectual than a sanction by a District Judge whose position (as he considered) offered only a more or less far fetched analogy to that of a Kazi.

In 3 C W N 158[8] it was held that a Court of superior jurisdiction in a district and the High Court in a Presidency town is, generally speaking, vested with the powers of a Kazi under the Mahomedan law. This was followed in 36 Cal 21.[9] In 55 Cal 1284[10] it was held (to quote from the placitum) that :

> A mutwalli of a wakf under the Mahomedan law can be appointed by application when it does not involve the removal of an existing mutwalli.

It was also held that a District Judge should exercise the powers of a Kazi in connexion with public religious trusts the administration of which is vested in the Kazi under the Mahomedan law, and that as such it is his duty to appoint a trustee when there is no one to administer the trust. It was further held that sub-cls. (a) and (b) of cl. (1) of S. 92, Civil P. C., are correlative and not disjunctive; that is to say, the power to appoint a new trustee given by the Section is dependent on the removal of the old. In other words, it was held that when there is a vacancy and no mutwalli is otherwise available, the District Judge may appoint one on application, but that he cannot do so in that way if the conditions of Sec. 92 (a Section which is available for the removal of a trustee de son tort also) are satisfied.

In a case recently decided in this Court 19 P L T 934,[11] James J. held that when an office of a mutwalli of a wakf falls vacant, the District Judge is entitled under proper circumstances to make an appointment to fill the vacancy, but he has no general power to remove a mutwalli in miscellaneous proceedings, his powers in this respect being limited. In 4 Pat 741,[1] a case already referred to, it was held that a suit

7. Nimai Chand Addya v. Golam Hossein, (1910) 37 Cal 179=3 I C 353=11 C L J 317=14 C W N 535.
8. Shama Churn Roy v. Abdul Kabeer, (1899) 3 C W N 158.
9. In re Woozatunnessa Bibi, (1909) 36 Cal 21=1 I C 512.
10. Abdul Alim v. Abir Jan, (1928) 15 A I R Cal 368=110 I C 416=55 Cal 1284=32 C W N 835.
11. Mohammad Yusuf v. Mohammad Ayub, (1938) 25 A I R Pat 537=178 I C 813=19 P L T 934.

for the removal of the trustee by the donor or his heirs cannot be instituted except under the special jurisdiction conferred by the Religious Endowments Act, 1863, or S. 92, Civil P. C. In 47 Cal 592[12] it was held that S. 92, Civil P. C., relates to suits claiming any of the reliefs specified in sub-s. (1) thereof and an application by a mutwalli for sanction to grant a lease is not a suit under sub-s. (1) of Sec. 92; and the following passage from Ameer Ali's Mahomedan Law was quoted and followed :

> The application for sanction should be made to the District Judge if the property is situated in the mofussil, or to the Judge on the Original Side of the High Court if it is within a Presidency town. It is not necessary to bring a suit for obtaining such sanction; it will be granted upon a proper application being made by the mutwalli.

The learned Judges further observed that any application made by the mutwalli will, of course, be enquired into by the District Judge before sanctioning a lease as Kazi.

This case is also an authority for the proposition that the District Judge by virtue of his office is vested with the general powers of a Kazi under the Mahomedan law, and that these powers can be exercised in cases for which no provision has been made in the statutes. We may now refer to the powers of the District Judge under two recent Acts, Act 14 of 1920 which is of general application, and the Mussalman Wakf Act of 1923 (Act 42 of 1923). Under the former Act, the District Judge may on an application made to him, direct a trustee to furnish the petitioner through the Court with particulars of a trust property and that the accounts of the trust be audited; on the failure of the trustee to furnish information so required, he is to be deemed guilty of breach of trust so as to attract the provisions of S. 92, Civil P. C. But if the party complained against undertakes to institute a suit, the proceeding has to be stayed. Under the second Act, which applied to Mussalman wakfs only, the mutwalli is placed under an obligation to furnish particulars relating to the wakf to the Court (inter alia) of the District Judge; these particulars are to be published, and further particulars may be called for, and periodical accounts are to be submitted to the Court. These two Acts thus place wakfs under the control and supervision of the District Judge within the limits indicated.

It may be said on these authorities that there is practically a consensus of opinion that when there is a vacancy in the office of a mutwalli the District Judge in his discretion may nominate a mutwalli, but that he has no power in a summary proceeding to appoint another mutwalli in place of one who is in office. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under S. 92, Civil P. C. When however two persons each claim to be the mutwalli, the dispute between them is one of a civil nature and must be decided in an ordinary civil suit (*see* Mulla's Civil Procedure Code, pp. 304-305, Edn. 10, and the cases cited there) : the vindication of individual rights is not a matter for decision either under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act. Now the appointment of a mutwalli by a District Judge in a summary proceeding is not appealable, and according to the trend of the authorities we have already referred to, such appointment should be made in cases of emergency, and by the very nature of it must be subject to the result of any suit which may be instituted by any of the parties who claim adversely to one another to be the mutwalli, or subject to the result of any suit which may be instituted either under S. 92, Civil P. C., or under the provisions of the Religious Endowments Act.

The next question is whether the appointment of a deputy mutwalli was within the competence of the learned District Judge in the circumstances of the present case. We have already referred to Mr. Hasan Jan's contention that Bibi Zohra was a de facto mutwalli though she may be no more than a trustee de son tort and that the learned Judge had no jurisdiction in this summary proceeding to interfere with her possession. But was Bibi Zohra in actual charge of the trust properties as mutwalli when the learned District Judge intervened in the matter? Mt. Zaibunissa, the last mutwalli, died on 23rd May 1938, as we have already said, and Zohra applied for substitution of her name in the proceeding started under Act 14 of 1920 and Act 42 of 1923 on 28th May. The interval was one of five days only, too short for a definite supposition that Zohra had taken possession of the wakf estate. There was no doubt an application by Abdul Haq, claiming to have been the mukhtar-am of Mt. Zaibunissa, that in accordance with the instructions of Mt. Zaibunissa deceased, he had made over the estate to Zohra. But Mt. Zaibunissa's power of attorney in favour of

12. Fakhrunnessa Begam v. District Judge of 24-Parganas, (1920) 7 A I R Cal 129 = 56 I C 475=47 Cal 592=24 C W N 339.

Abdul Haq ceased to have any effect on her death, and what he claims to have done under it by way of making the estate over to Zohra was plainly unauthorized. Zaibunissa also had no power to nominate a mutwalli under the wakf deed. In view of all these circumstances we are of opinion that Zohra had not really assumed the office of mutwalli and that there was certainly a vacancy in that office.

The learned District Judge, had however no jurisdiction in the proceeding before him to decide that under the wakf deed Abdul Hai was to be the mutwalli on the death of Zaibunissa. Such a decision can only be given in a properly constituted suit. His order further that a deputy mutwalli should be appointed during the minority of Abdul Hai was also wrong. A deputy mutwalli presupposes a mutwalli. Even if Abdul Hai be the rightful mutwalli, the Kazi had power to appoint a mutwalli during Abdul Hai's minority and incapacity to perform the duties of mutwalli. The minority makes it impossible for him to depute anybody else to work as the mutwalli. We hold therefore that the decision of the District Judge that Abdul Hai is the mutwalli and his order that a deputy mutwalli should be appointed are without jurisdiction and must be set aside.

The fact however remains that the estate is without a mutwalli. It is true that in the wakf deed it was provided that in case Wajihuddin be a minor at the death of Shukrullah, Zohra was to act as mutwalli during his minority. But Zohra, it appears, repudiated the wakf in Miscellaneous Case No. 23 of 1930 in which Habibunissa had applied to be appointed a mutwalli in preference to Zaibunissa. She has thus forfeited any claim (such as it may have been) to be appointed mutwalli even during the minority of Abdul Hai. We accordingly, while setting aside the order of the learned District Judge, direct that Habibunissa be appointed mutwalli. This appointment will hold good during the minority of Abdul Hai and will be subject to the result of any suit which may be instituted for the regular determination of the question who is entitled to be mutwalli. In case no such suit be instituted, Habibunissa will cease to be mutwalli when Abdul Hai attains majority and will then make over the trust property to him. We make no order about costs.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 14

ROWLAND J.

Mosaheb Dome — Appellant.

v.

Emperor.

Criminal Appeal No. 29 of 1939, Decided on 16th May 1939, from decision of Addl. Sess. Judge, Gaya, D/-21st January 1939.

(a) Criminal P. C. (1898), S. 310—Fact that accused is registered member of criminal tribe should not be disclosed to jury until after their verdict.

The fact that an accused is a registered member of a criminal tribe under the Criminal Tribes Act is like a previous conviction, a matter from which bad character can be inferred and which may affect the sentence. It should be treated in the same way as the fact of a previous conviction by not being disclosed to the jury until after the verdict lest their minds should be prejudiced. [P 15 C 1]

(b) Penal Code (1860), S. 457 — Prosecution must prove criminal intention — Entry of one person into house of another cannot be presumed to be criminal.

When criminal intention is an ingredient of an offence, it is on the prosecution to prove that intention just as much as any other ingredient. The entry of one person into the house of another will not be presumed criminal at all unless there are circumstances from which an inference of criminality can be drawn. [P 15 C 2]

(c) Criminal P. C. (1898), S. 287—Admission by accused in committing Magistrate's Court that he committed theft is evidence.

An admission by the accused in the committing Magistrate's Court, that he entered another's house on one night with intent to commit theft is evidence under S. 287. [P 15 C 2]

(d) Criminal Tribes Act (1924), S. 23 — Charge under S. 457 or S. 451, Penal Code — Previous conviction under S. 380 — S. 23 does not apply.

Where charge against the accused is under S. 457, Penal Code, which is an offence mentioned in the Schedule; but his previous conviction had been under S. 380, Penal Code, which is an offence not mentioned in the Schedule, the fact that the accused was a registered member of a criminal tribe is wholly irrelevant. Sec. 451, Penal Code, is also not mentioned in the Schedule. It is not necessary to impose a more severe sentence than would be appropriate in the case to any person convicted under Sec. 451 after a previous conviction under Section 380. [P 16 C 1]

S. C. Chakraverti — *for Appellant.*

Judgment. — The appellant Mosaheb Dome alias Sahebwa Dome has been convicted by the Additional Sessions Judge of Gaya on a verdict of guilty by a majority, of four to one on a charge of lurking house trespass with intent to commit theft in the house of Abdul Hai at Daudnagar. He was also charged under S. 75, Penal Code, with being liable to enhanced punishment by

reason of a previous conviction and to this charge he pleaded guilty. There is evidence that he is a registered member of a criminal tribe under the Criminal Tribes Act, 6 of 1924. He has been sentenced to rigorous imprisonment for six years and directed under S. 565, Criminal P. C., to notify his residence or change of residence for a period of three years after the termination of his sentence. His appeal which is sent from jail states that he is innocent and has been wrongly convicted at the instance of constable Ram Swarup Singh; but in a case tried by jury appeal lies only on points of law.

The procedure followed at the trial and in charging the jury is open to the following comments. Under S. 54, Evidence Act, the fact of bad character of the accused is irrelevant in criminal proceedings and facts indicating bad character are not to be disclosed to the jury while the substantive offence is still open for their decision. In S. 310, Criminal P. C., provision is made for cases in which an accused is charged with liability to enhanced punishment by reason of a previous conviction. The further charge is not to be read out in Court, nor is the accused to be asked to plead to it, nor is it to be referred to by the prosecution until after the verdict. The fact that an accused is a registered member of a criminal tribe under the Act is like a previous conviction, a matter from which bad character can be inferred and which may affect the sentence. It should be treated in the same way as the fact of a previous conviction by not being disclosed to the jury until after the verdict lest their minds should be prejudiced. The record does not show that the accused has had the full protection which the law is intended to provide. In the first information Ex. 1 the accused is referred to as "a member of the C. T. Act" and this portion of the information should have been excluded when reading it out to the jury. There is no indication that such a precaution was taken. As the trial proceeded the prosecution were allowed to examine Harihar Nath Singh, a clerk of the police office, to prove that Mosaheb Dome of Daudnagar was entered in the criminal tribes register. This evidence certainly ought not to have been admitted until after the verdict had been taken or the accused convicted. In the charge to the jury the learned Judge stated:

> For establishing the charge under S. 457, I. P. C., it is necessary for the prosecution to prove that the accused entered the house of Abdul Hai in the night and that his intention in doing so was to commit theft.

The charge was of lurking house trespass by night and the definition in Sec. 443, I. P. C., indicates that one ingredient in this offence is "having taken precautions to conceal such house trespass." The jury were never asked to find and have not found whether this ingredient was present. As regards his intention of committing theft, the learned Judge told the jury:

> In the absence of anything to show that the accused had the intention to commit some offence other than theft, the presumption will be that his intention was to commit theft.

This is not a correct statement of the law. When criminal intention is an ingredient of an offence, it is on the prosecution to prove that intention just as much as any other ingredient. The entry of one person into the house of another will not be presumed criminal at all unless there are circumstances from which an inference of criminality can be drawn. It might be necessary in this state of things to direct a re-trial but for the fact that in the Committing Magistrate's Court, the accused had admitted that he entered Abdul Hai's house on the night of 8th September 1938, with intent to commit theft. That admission is evidence under S. 287, Criminal P. C., and in face of that admission, I do not think that the result of the trial was affected by the misdirection to which I have referred; but there is no admission that the accused had taken any precautions to conceal his presence nor was this point put to him by the committing Magistrate. Nor do I find any evidence of any precautions taken by the accused to conceal his presence. That being so, the conviction under Sec. 457, I. P. C., cannot be supported and the verdict must be treated as one of guilty of house trespass—S. 451. As the intention was theft, the prisoner is liable under the latter part of the Section to imprisonment up to seven years. His conviction on the charge of liability to enhanced punishment by reason of his previous conviction and Section 75, I. P. C., does not call for any comment.

Section 23, Criminal Tribes Act, regulates the punishment to be imposed on a member of any criminal tribe who having been convicted of any offence mentioned in Sch. 1 to the Act is again convicted of an offence mentioned in that Schedule. In the circumstances stated, the accused is to be punished on a second conviction with imprisonment for a term of not less than seven

years. Therefore if S. 23 was applicable, the sentence of six years would have been in the absence of special reasons to the contrary inadequate. The Sub-divisional Magistrate thought this Section to be applicable and in that view felt bound to commit the accused to the Court of Session. The learned Judge has not considered the question whether Sec. 23 applies. The charge against the appellant was under Sec. 457, I. P. C., which is an offence mentioned in the Schedule; but his previous conviction had been under S. 380, I. P. C., which is an offence not mentioned in the Schedule. Therefore the fact that the accused was a registered member of a criminal tribe was wholly irrelevant, and need not have been brought on the record at all. I may point out that the offence of which the accused is now being convicted, namely Sec. 451, I. P. C., is also not mentioned in the Schedule. It is not necessary to impose a more severe sentence than would be appropriate in the case to any person convicted under Sec. 451 after a previous conviction under S. 380. In the result, the decision of the Court is modified and the accused convicted under S. 451, I. P. C., read with Sec. 75. There is no evidence of his committing any theft and the sentence of six years appears to me unduly severe. I sentence him to two years' rigorous imprisonment and order him under S. 565, Criminal P. C., to notify his residence or change of residence for a period of three years after the termination of his sentence.

D.S./R.K. *Decision modified.*

A. I. R. 1940 Patna 16

HARRIES C. J. AND FAZL ALI J.

Markhu Mahto and others —
Defendants — Appellants.

v.

Saharai Mahto and others, Plaintiffs and others Defendants—Respondents.

Appeal No. 744 of 1937, Decided on 1st September 1939, from appellate decree of Deputy Commissioner Sub-Judge, Manbhum, D/- 31st May 1937.

(a) Evidence Act (1872), S. 32 (3) — Statement "against pecuniary or proprietary interest" —Statement itself and not transaction in which it is made is to be looked at.

In order to determine whether a certain statement is against the pecuniary or proprietary interest of the person making it the statement itself and not the nature of the transaction in the course of which the statement is made, is to be looked at.

[P 17 C 1]

(b) Evidence Act (1872), S. 13 — Statement by *A* of assertion of her right, in 1892 — Entry in Record of Rights in 1922 showing the right belonging to *B* — Former statement cannot be used to rebut entry in Record of Rights.

Where in a deed of gift executed in 1892 there was a statement asserting *A's* right to a certain property and in the Record of Rights published in 1922 such property was entered in the name of *B* :

Held that though under S. 13 a mere assertion of right may be some evidence of its existence, the former statement could not be used to rebut the entry in the Record of Rights which must be presumed to be correct at the date it was made because it may well be that both the statement and the entry correctly represented the state of things which prevailed at the time they were made.

[P 17 C 1]

S. C. Mazumdar — *for Appellants.*

A. K. Roy and R. S. Chatterji — *for Respondents.*

Fazl Ali J. — The dispute between the parties has in this appeal been narrowed down to one point only, namely whether the lands set out in Sch. 1 of the plaint which consist of plots Nos. 750, 751 and 753 to 756 are lands which belonged to one Bhim through whom they are claimed by the plaintiffs or they are lands belonging to defendants 21, 17 and 18. It is common ground that the plaintiffs are the reversionary heirs of Bhim and if these lands belonged to Bhim, they are entitled to a decree in regard to these lands along with the other lands in suit. It is also common ground that these lands have been recorded as the raiyati lands of defendants 21, 17 and 18 in the Record of Rights which was finally published in the year 1922. Both the Courts below have held in spite of the entry in the Record of Rights that the lands in question belonged to Bhim and they have based their decision wholly upon a deed of gift executed on 29th October 1892, by Bhim's widow, Mt. Jamuna, in favour of her daughter Dulali. In this deed Mt. Jamuna gave a list of the properties which she was giving away to her daughter and the two Courts below have held that the fact that the lands in question were included in this list shows that they belonged to Bhim. The questions which we are asked to decide are—first, whether the deed in question is admissible in evidence ; and, secondly, whether it can be used to rebut the entry in the Record of Rights.

On the first point it was contended by the learned advocate for the respondents that the facts that the lands were given away by Mt. Jamuna by the deed of gift amounted to a statement by her that they were her property, and this statement is

admissible under S. 32, cl. (3), Evidence Act. This clause however makes only such statements admissible in evidence as are against the pecuniary or proprietary interest of the person making it. It is contended that inasmuch as Mt. Jamuna was giving away these lands to her daughter, the requirements of this Section are fulfilled, and it should be held that the statement in question is against Jamuna's pecuniary interest. The argument appears to be a novel one and cannot be accepted. In order to determine whether a certain statement is against the pecuniary or proprietary interest of the person making it, we must look to the statement itself and not to the nature of the transaction in the course of which the statement is made. On the respondent's own showing the statement made by Jamuna amounts to an assertion that it is her property. Such an assertion can by no stretch of reasoning be held to be a statement against the pecuniary or proprietary interest of Jamuna. It is therefore clear that this statement is not admissible under S. 32, cl. (3), Evidence Act.

It is next contended that the statement in question is admissible under S. 13 of the Act. This Section provides that where the question is as to the existence of any right, any transaction by which the right in question was created, claimed, modified, recognized, asserted or denied is a relevant fact; and it may be conceded that under the Section mere assertion of a right may be some evidence of its existence. The question however still remains whether the assertion made in 1892 can be used as evidence to rebut the entry in the Record of Rights which must be presumed to be correct at the date it was made. In my opinion the answer to this question must be in the negative. As the law stands, the entry in the Record of Rights gives rise to the presumption that in the year 1922 when it was finally published, defendants were the raiyats of the disputed plots. On the other hand, the utmost that the Courts below were entitled to infer from the assertion made in 1892 was that at that time the land was probably the land of Jamuna, widow of Bhim. It seems to me to be clear that the statement in the deed of gift cannot be used to rebut the entry in the Record of Rights, because it may well be that both the statement and the entry correctly represented the state of things which prevailed at the time they were respectively made. The learned Courts below have entirely overlooked this aspect of the case and so their decision does not bind us in this appeal. It was also contended on behalf of the respondents that inasmuch as the learned Munsif has believed the oral evidence adduced by the plaintiffs with regard to their possession of the disputed lands till 1339 F., the decree passed in their favour cannot be interfered with. It appears however that the learned Munsif did not base his decision on the finding on which the respondents rely and the lower Appellate Court did not even refer to the oral evidence relating to the plaintiffs' possession of the disputed land till 1339 F. In my opinion therefore this appeal should be allowed in part and the decrees of the Courts below should be set aside in so far as they relate to plots Nos. 750, 751 and 753 to 756 set out in sch. 1 of the plaint. The parties will be entitled to proportionate costs throughout.

Harries C. J.—I agree.

D.B./R.K. *Appeal partly allowed.*

A. I. R. 1940 Patna 17

HARRIES C. J. AND FAZL ALI J.

Mt. Razia Begum— Judgment-debtor— Appellant.

v.

Krishnadeonarayan Mahtha and others — Decree-holders — Respondents.

Appeal No. 314 of 1938, Decided on 10th August 1939, from original order of Sub-Judge, Muzaffarpur, D/- 15th August 1938.

Bihar Money-lenders Act (1938), Ss. 13 and 14 as amended by Act 7 of 1939—Mortgage decrees.

Sections 13 and 14 apply to mortgage decrees and sales thereunder. [P 18 C 1]

M. Yunus and T. N. Sahay — *for Appellant.*

S. N. Bose and A. K. Mitra — *for Respondents.*

Harries C. J.—This is a judgment-debtor's appeal from an order of the learned Subordinate Judge of Muzaffarpur allowing in part only an application of the judgment-debtor under S. 47, Civil P. C., and Ss. 15, 16 and 17, Bihar Money-lenders Act of 1938. In the year 1921, the judgment-debtor executed a mortgage bond in favour of the decree-holders for Rs. 62,000 and in 1928, a decree was passed in favour of the decree-holders upon this bond. There appears to be a sum of Rs. 17,000 or so still due from the judgment-debtor to the decree-holders. A large number of properties com-

prised in the bond have already been sold, and there is now left a house and compound which is said to be of a value far exceeding Rs. 17,000. The decree-holders wished to put the whole of this property, namely, the house and compound to sale, but the judgment-debtor objected.

In the application which gives rise to this litigation, the judgment-debtor claimed that a fresh sale proclamation should be issued by reason of the fact that the account given in the sale proclamation was incorrect. The parties appear to have agreed that the account given in the sale proclamation was incorrect, and the learned Subordinate Judge accordingly held that a fresh sale proclamation would be necessary. No point arises upon this aspect of the case. The applicant also prayed that only such portion of the compound attached to the house which had been previously valued at Rs. 29,701-14-0 by the Court should be ordered to be sold as it was sufficient to satisfy the decretal dues. This prayer was made in consequence of Secs. 16 and 17, Bihar Money-lenders Act, 1938.

The learned Subordinate Judge came to the conclusion that these Sections of the Bihar Money-lenders Act had no application to mortgage decrees. In his view to hold that these Sections applied to mortgage-decrees would be to interfere with the integrity of the mortgage. The Amending Act, namely Bihar Money-lenders Act, 1939 (Act 7 of 1939) has been passed, and Ss. 16 and 17 of the old Act are now incorporated in Ss. 13 and 14, Amending Act. There can be no doubt that by the terms of the Amending Act that Act applies to this case.

It has been argued by Mr. Yunus on behalf of the judgment-debtor-appellant that the plain words of Secs. 13 and 14 make it clear that they apply to mortgage decrees. Mr. Bose on behalf of the respondents does not contend otherwise, and in my view it is clear that these Sections do apply to mortgage decrees and sales thereunder. That being so, the learned Subordinate Judge was wrong in holding that the judgment-debtor had no right to ask the Court to sell only a portion of the property to satisfy the decretal dues. The result therefore is that this appeal must be allowed and the order of the learned Subordinate Judge in so far as it relates to the sale of the property must be set aside and the case remanded to the Court below to be disposed of according to law. The Court below will take into consideration Secs. 13 and 14, Bihar Money-lenders Act, 1939, and will act accordingly. The appellant must have his costs in this Court and in the Court below.

Fazl Ali J. — I agree.

D.S./R.K. *Case remanded.*

A. I. R. 1940 Patna 18

AGARWALA J.

Dhanukhdhari Singh and another — Petitioners.

v.

Jethan Singh and others — Opposite Party.

Civil Revn. No. 718 of 1938, Decided on 21st August 1938, against order of Munsif, First Court, Gaya, D/- 6th December 1938.

Transfer of Property Act (1882), S. 83 — S. 83 does not contemplate conditional deposit —If such deposit be considered valid it cannot be treated as if condition did not exist — Mortgagee must fulfil condition.

Section 83 does not contemplate a conditional deposit of the amount but if the deposit be considered as valid it cannot be treated as if the condition attached did not exist. Hence, a mortgagee is entitled to accept the money deposited by the mortgagor only subject to the condition imposed by the latter. [P 19 C 1]

L. N. Sinha — *for Petitioner.*

R. Prasad and B. K. Sinha — *for Opposite Party.*

Order. — The petitioner is a mortgagor and the opposite party is the mortgagee. The mortgage was a usufructuary one. The mortgaged property consisted of some bakasht lands and some raiyati lands. The mortgagor deposited the amount due on the mortgage under S. 83, T. P. Act. Notice was served on the mortgagees who were four in number. On the date fixed for their appearance, 13th June, only three of them appeared. As the Court could not make over the amount deposited unless all the mortgagees appeared, the Court rightly took steps to satisfy itself that the notices had been served on all the mortgagees. The 24th June was fixed for proof of service. On that day service of notices was proved. The Court then passed the following order: "The case is disposed of." It is quite clear from the circumstances that what the Court meant was that as the mortgagees had not accepted the deposit, the case was disposed of. Subsequently the mortgagees applied to withdraw the deposit. The mortgagor objected that they were not entitled to withdraw it unless they were prepared to give him khas possession of the bakasht lands which were

the subject-matter of the mortgage. To this the mortgagees replied that they never had khas possession of the bakasht lands. The Court called upon them to execute a reconveyance of the mortgaged property in favour of the mortgagor and this was done. The mortgagor objected to the deposit being made over to the mortgagees unless he should be given khas possession. His objection was overruled and against the order overruling the objection he has applied to this Court.

It is quite clear that up to 24th June there had been no acceptance of the money by the mortgagee and it remained the property of the mortgagor. The Court had disposed of the mortgagees' application to withdraw the money on account of the absence of one of them. The money that was then in Court being the property of the mortgagor should have been made over to him by the Court unless the mortgagor agreed that it should be considered as a fresh tender of the mortgage amount to the mortgagees. From the petitions filed by the parties it would appear that the mortgagor did consent to the amount that belonged to him and which was in Court being considered as a fresh tender of the mortgage dues. But it was subject to a condition, namely, that he should be given khas possession of the bakasht lands. S. 83 does not contemplate a conditional deposit of the amount but even if the deposit be considered as valid, it cannot be treated as if the condition attached to it did not exist. The mortgagee was entitled to accept the money only subject to the condition but was not entitled to ignore the condition. In my opinion, the Court below was wrong in deciding that the mortgagees are entitled to withdraw this money, for, it had already disposed of the matter on 24th June. The application is therefore allowed but there will be no order for costs.

D.B./R.K. *Application allowed.*

A. I. R. 1940 Patna 19

ROWLAND AND CHATTERJI JJ.

Surya Mohan Thakur—Defendant—Appellant.

v.

Mt. Bibi Tasiran Nisan, Plaintiff and others, Defendants—Respondents.

Appeal No. 701 of 1937, Decided on 1st September 1939, from appellate decree of Addl. Sub-Judge, Bhagalpur, D/- 17th July 1937.

(a) Bihar Tenancy Act (8 of 1934), S. 148-A —In suits framed under S. 148-A there can be only one rent decree — Where there are two, both are regarded as consolidated decree for entire rent.

There can be only one rent decree for the entire rent of the holding and the effect of two decrees obtained in two suits by different cosharer landlords, and framed according to the provisions of S. 148-A, Bihar Tenancy Act, is that one is supplementary to the other and both are regarded as a consolidated decree for the entire rent, payable to the different cosharer landlords in proportion to their shares. It cannot be said that the first is a rent decree and the second decree has the effect of only a money decree : *A I R 1934 Pat 350, Disting.* [P 20 C 1, 2]

(b) Bihar Tenancy Act (8 of 1934), S. 65 — Two rent decrees — Property purchased in execution of one decree is free from charge created by other decree.

Where there are two rent decrees, if one decree is executed first and the holding is sold in execution, it will not pass subject to the charge created by the other decree. On general principle where there are two decrees of equal priority and in execution of one of them the judgment-debtor's property is sold the same property cannot be sold again in execution of the other decree : *16 C W N 701, Foll.* [P 20 C 2 ; P 21 C 1]

J. M. Ghosh — *for Appellant.*

S. C. Majumdar and Ramanugrah Narain Sinha — *for Respondents.*

Chatterji J.—The subject of the dispute which has given rise to this appeal is an occupancy holding of 8·89 acres of which the landlords are, as to twelve annas share, defendants 1 and 2 and, as to the remaining four annas, defendant 4. On 19th September 1932 defendants 1 and 2 filed a rent suit (No. 1107 of 1932) making defendant 4 a party defendant. On the same date defendant 4 filed another suit (No. 1120 of 1932) making defendants 1 and 2 parties defendants. Both the suits purported to be under the provisions of Sec. 148-A, Bihar Tenancy Act. Both the suits were decreed ex parte, Suit No. 1107 on 10th January 1933 and Suit No. 1120 on the following day. On 9th February 1934 defendants 1 and 2 applied for execution of their decree. Defendant 4 also applied for execution of his decree on 26th February 1934. On 21st June 1934 the holding was sold in execution of the decree of defendant 4 and purchased by him. On 4th July 1934 defendants 1 and 2 also purchased the holding in execution of their decree. On 15th March 1935 defendant 4 settled the holding with the plaintiff. On 11th January 1936 defendants 1 and 2 settled the same holding with defendant 3. The plaintiff thereupon brought the present suit on 25th March 1936 pray-

ing for a declaration of his title to and recovery of possession of the disputed holding. The Munsif dismissed the suit on the finding that the decree of defendants 1 and 2 had the effect of a rent decree, while the decree of defendant 4 had the effect of a money decree and therefore what passed at the auction sale to defendant 4 was not the holding itself but the right, title and interest of the judgment-debtor. On appeal the learned Subordinate Judge has reversed the decision of the Munsif, holding that both the decrees had the effect of rent decree and the first sale which was held on 21st June 1934 would prevail. Defendant 2 has preferred this second appeal.

The first point argued by Mr. Ghose on behalf of the appellant is that the Subordinate Judge was wrong in holding that both the decrees had the effect of rent decree. His contention is that the first decree which was obtained by defendants 1 and 2 on 10th January 1933 was a rent decree, whereas the decree which was obtained on the following day by defendant 4 had the effect of a money decree. In determining the correct position we must proceed on the footing that both the decrees are valid and binding decrees so far as the parties thereto are concerned. Neither party can be heard to say that either of the decrees was wrong or improperly obtained. In the second suit, after the decree in the first suit had been obtained, it could have been objected that the suit was not maintainable because a rent decree under the provisions of S. 148-A, Bihar Tenancy Act for the entire rent of the holding had already been passed. If this objection had been taken, the position might have been that the second suit would have been held to be not maintainable at all. But it cannot be said that the decree had the effect of a mere money decree, because if the contention of Mr. Ghosh were to be accepted, the second decree was altogether wrong and was improperly obtained because the suit was not at all maintainable. However, it is not open to the appellant to take that position now. As both the suits were framed according to the provisions of S. 148-A, Bihar Tenancy Act both the decrees would be regarded as having the effect of rent decrees. No doubt an anomalous position arises because there can be only one rent decree for the entire rent of the holding. The real effect of the two decrees taken together was that one was supplementary to the other and that both must be regarded as a consolidated decree for the entire rent payable to the different cosharer landlords in proportion to their shares. If however it was permissible for defendants 1 and 2 to contend that the later decree of defendant 4 had the effect of a mere money decree, they could not consistently maintain that their own decree was a rent decree. The two suits were instituted and carried on simultaneously. In each suit it was open to the landlord defendant to contend that the suit as framed was not maintainable for the entire rent of the holding. If such objection had been raised, the Court in each suit might have passed a decree which would not be a decree under S. 148-A, Bihar Tenancy Act.

Mr. Ghosh relies on the decision of Khwaja Mohammad Noor J., in A I R 1934 Pat 350[1] in support of his contention that the first decree would be a rent decree, whereas the second would have the effect of a money decree. The decision however does not really support the contention. His Lordship laid down that a decree passed in a suit framed under S. 148-A, Bihar Tenancy Act must be deemed to be a decree for the entire rent of the holding, and once such a decree has been obtained a similar suit by another cosharer for the same period is not maintainable. At the same time he held that if in the latter suit a decree is allowed to be passed the decree would operate as res judicata. He stated:

> It must be taken that the objection as to the maintainability of the suits was taken by the appellants and decided against them. The decrees are good decrees.

The effect of his decision therefore is that both the decrees, as between the parties thereto, must be regarded in the eye of law as decrees under S. 148-A or, in other words, rent decrees. The next contention raised by Mr. Ghosh is that even assuming that both the decrees were rent decrees, still the auction-purchase of defendant 4 must be held to be subject to the charge created by the decree of defendants 1 and 2. He relies on S. 65, Bihar Tenancy Act which provides that the rent of the holding shall be a first charge. That does not mean that where there are two rent decrees, if one decree is executed first and the holding is sold in execution, it will pass subject to the charge created by the other decree. On general principle where there are two decrees of equal priority and in execution of one of them the judgment-debtor's property is sold,

1. R. C. Deb v. Lachmi Prasad Singh, (1934) 21 A I R Pat 350=150 I C 970.

the same property cannot be sold again in execution of the other decree. In 16 C W N 701[2] the identical question was raised. The facts of that case were almost similar to those of the present. Two rent suits were brought on the same day by different sets of cosharers under the provisions of S. 148-A, Bengal Tenancy Act. Decrees however were obtained on different dates. The second decree was executed first and the holding was purchased. It was held that the other decree-holder was not entitled to bring it to sale again. Their Lordships observed as follows:

The only principle which it seems possible to apply in a case like the present where two persons have decrees equal in priority is that the first who takes out execution is the first who is entitled to satisfy his decree by sale of the property and that the other person who delays to take out his execution loses his right to proceed against the property itself.

In my opinion this decision represents the correct view of the law. The result is that the appeal fails and must be dismissed with costs.

Rowland J.—I agree.

N.K./R.K. *Appeal dismissed.*

2. Nilambar Sahu v. Suttyo Priya Ghosal, (1912) 16 C W N 701=14 I C 568.

A. I. R. 1940 Patna 21

DHAVLE J.

Raja Inderjit Pratab Bahadur Sahi — Appellant.

v.

Suraj Narain Chaudhury and another — Respondents.

Appeal No. 270 of 1937, Decided on 26th July 1939, from appellate decree of Addl. Sub-Judge, Darbhanga, D/- 8th December 1936.

(a) Bengal Tenancy Act (8 of 1885), Section 170 (1) — Execution of rent decree — Third party claiming title to tenure cannot apply under O. 21, R. 58, Civil P. C.—But he can sue for declaration of title to holding.

It is true that in execution of rent decree a third party claiming title to the tenure is not competent to apply under O. 21, R. 58, Civil P. C. But S. 170 (1) does not bar a substantive suit by him for declaration of title to the holdings and that the landlord had no right to have them sold in execution of the decree : *A I R 1933 Pat 32 and A I R 1930 P C 193, Rel. on.* [P 22 C 1]

(b) Benami—Decree against benamidar binds real owner.

A decree obtained against the benamidar will bind the beneficial owner: *AIR 1918 P C 140, Rel. on.* [P 22 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 170 — Deposit of decretal amount by third party — Landlord's objection challenging depositor's right to make deposit overruled by executing Court—Withdrawal of deposit by landlord does not amount to recognition of depositor as tenant.

Where a third party has deposited the decretal amount and the landlord has challenged the depositor's right to make deposit but that objection has been overruled by the executing Court on the footing that the depositor had an interest voidable on the sale as he was the real purchaser of the land sought to be sold, the decision of the executing Court is a summary order and is not appealable. If in such circumstances the landlord chooses to withdraw the deposit the withdrawal does not amount to recognition of the depositor as tenant : *A I R 1917 Pat 518 and A I R 1924 Pat 669, Disting.; AIR 1932 Pat 192, Rel. on.* [P 23 C 1; P 24 C 1]

(d) Bengal Tenancy Act (8 of 1885), S. 170 — Execution of rent decree against benamidar — Sale certificate standing in name of benamidar — Merely because beneficial owner is allowed to deposit decretal amount and landlord withdraws it does not disentitle landlord to proceed against benamidar.

The benami character of the interest of a tenant in whose name ths sale certificate stands cannot, merely because the executing Court allowed the beneficial owner to deposit the decretal amounts and the landlord proceeded to withdraw them, disentitle the landlord to proceed against the certified auction-purchaser or entitle the beneficial owner to claim that he should have been sued instead of his benamidar and that the decrees obtained against the latter do not bind him. [P 24 C 1]

S. M. Mullick and Harnarayan Prasad— *for Appellant.*

S. K. Mitter — *for Respondents.*

Judgment. — This is an appeal by the defendant, the proprietor of the touzi in which lie three occupancy holdings, the subject-matter of the suit. Plaintiff's case was that these holdings had been purchased by his father in 1913 and that on the landlord putting them up to sale in execution of rent decrees, the plaintiff purchased them in 1914 benami in the name of his servant, the original defendant second party, who, on his death after the institution of the present suit, was replaced by his son. In 1925 the landlord (defendant 1) obtained decrees for the rent of the three holdings against defendant second party, and in the execution proceedings the plaintiff obtained permission to deposit the decretal amounts (under Sec. 170, Bengal Tenancy Act). He deposited the moneys accordingly, and the defendant landlord withdrew them. There were similar decrees and deposits and withdrawals in 1929. In 1931 the defendant landlord again sued defendant second party for arrears of rent, obtained decrees, and took out execution. Plaintiff filed objections

under O. 21, R. 58 but these were dismissed in 1934, and plaintiff thereupon brought the suit (out of which this appeal arises) for declarations that he is the raiyat of the three holdings and that these holdings are not liable to be sold in execution of the decrees obtained by the defendant landlord against defendant second party. The suit was contested by the defendant landlord on the grounds that it was not maintainable, that it was barred by Sec. 47, Civil P. C., and that the defendant had not recognized the plaintiff. The lower Courts have decreed the suit on the ground that the withdrawal of the moneys deposited by the plaintiff in 1926 amounted to the landlord's recognition of the plaintiff as the raiyat of the holdings and that it was therefore not open to the defendant landlord to sue defendant second party so as to bind the plaintiff.

It has been contended on behalf of the landlord appellant that the decrees obtained by him being rent decrees, it was not competent to the plaintiff respondent to apply under O. 21, R. 58 at all. This contention must plainly be accepted: *see* 11 Pat 790[1] for, there is no dispute that the appellant is the landlord of the holdings and that the rent for the years in suit had not been paid to him. It is also clear that as O. 21, R. 58 did not apply, it was not open to the plaintiff to sue under O. 21, R. 63 as he has done. But assuming for a moment that the plaintiff is not bound by the decrees obtained by defendant landlord against defendant second party, it cannot be pretended that no suit lay at all at the instance of the plaintiff. The effect of the provision in S. 170 (1) of our Tenancy Act, which makes Ss. 278 to 283, Civil P. C. (now O. 21, Rr. 58 to 63) inapplicable to holdings attached in execution of decrees for arrears due thereon, is, as was held by their Lordships of the Judicial Committee in 58 Cal 301[2]

that there can be no investigation in execution proceedings held under Ch. 14, Tenancy Act, of claims by third parties to an interest in the tenure (or holding), but it does not bar a substantive suit such as that for a declaration of the plaintiff's title to the holdings and that the appellant had no right to have them sold in execution of the decrees and for an injunction restraining them from selling.

The suit as framed was capable of being put into this form by slight amendments of the plaint and the payment of appropriate court-fees: *see* 39 Cal 704[3] though this aspect of the matter has not been pursued before me because of other considerations that arise in the case. That Rr. 58 and 63 of O. 21 had no application was urged in the lower Appellate Court; but the learned Subordinate Judge, who was apparently not aware of the express decision in 11 Pat 790,[1] held the suit to be maintainable because in his view it was incumbent on the landlord to sue the real tenant after the decision in the execution proceedings of 1925 that the plaintiff was the real tenant and was entitled to deposit the decretal amounts, and therefore the plaintiff was not represented in the rent suits which led to the present suit.

The substantial question before me thus is whether the plaintiff is bound by the rent decrees obtained by the appellant. It has been contended on behalf of the appellant that he was entitled to sue the benamidar and that decrees obtained against the benamidar do bind the beneficial owner. The lower Courts have, as against this, upheld the plaintiff's case that the landlord's withdrawal of the deposits made by the plaintiff in 1926 after obtaining a decision from the executing Court that defendant second party was only a benamidar of his amounted to his recognition as the tenant. That a decree obtained against the benamidar will bind the beneficial owner cannot be and has not been disputed before me: *see* 46 Cal 566.[4] But the substance of the plaintiff's claim is that since the decision of 1926 the landlord is not entitled to treat defendant second party as his benamidar. In support of the view that the withdrawal of the deposit under S. 170, Ben. Ten. Act, amounts to a recognition of the tenancy of the plaintiff the lower Appellate Court has cited two Patna decisions, 2 Pat L W 158[5] and 83 I C 203,[6] besides one ruling from Calcutta.

The learned advocate for the appellant has drawn my attention to a comparatively recent decision of this Court, 11 Pat 257,[7]

1. Deonandan Prasad v. Pirthi Narayan, (1933) 20 A I R Pat 32=142 I C 40=11 Pat 790=13 P L T 643.
2. Jitendranath Ghosh v. Manmohan Ghosh, (1930) 17 A I R P C 193=126 I C 422=58 Cal 301=57 I A 214 (P C).
3. Deokali Koer v. Kedar Nath, (1912) 39 Cal 704 =15 I C 427=16 C W N 838.
4. Gur Narayan v. Sheolal Singh, (1918) 5 A I R P C 140=49 I C 1=46 Cal 566=46 I A 1 (P C).
5. Motihari Concern Ltd. v. Lachmi Prasad, (1917) 4 A I R Pat 518=41 I C 885 = 2 Pat L W 158.
6. Rajendra Narayan v. Mahesh Chandra, (1924) 11 A I R Pat 669=83 I C 203=6 P L T 220.
7. Dina Nath Malla v. Dina Nath Gorain, (1932) 19 A I R Pat 192=138 I C 20=11 Pat 257= 13 P L T 387.

in which it was held by Macpherson and Scroope JJ., dissenting from the decision in 83 I C 203,[6] that the mere withdrawal by the landlord of rents decreed against the tenant and deposited by his transferee does not amount to a recognition by the landlord of the transferee as a tenant. It is true that in this case from 11 Patna the amount deposited had been withdrawn by the landlord under protest, but it is also unquestionable that the present case is itself distinguishable from 2 Pat L W 158[5] and 83 I C 203[6] (which, as I have already said, was dissented from in 11 Pat 257[7]) in that in these two cases there is nothing to show that the landlord had objected to the right of the transferee to make the deposit but had been overruled by the executing Court, as happened in the present case. The order of the executing Court in 1926 holding that the plaintiff had an interest voidable on the sale as he was the real purchaser of the land sought to be sold in execution was a summary order, and it was not appealable (15 C L J 388[8]) either as a decree or as an order, being passed on the footing not that the applicant was a representative of the judgment-debtor, but that he had an interest of his own which was voidable on the sale and therefore entitled him to make the deposits under Sec. 170 (3), Tenancy Act. The order thus left the landlord no choice but to withdraw the deposit, and was conclusive for the purposes of the execution proceeding. Can it be properly said that withdrawal in such circumstances also meant recognition by the decree-holder of the depositor as the tenant, and this in spite of the fact that the decree-holder had actually challenged the applicant't right to make the deposit?

It is as difficult to suppose that the executing Court was intended finally to pronounce in a summary manner on a question which would otherwise be debatable in a regular suit, subject to appeal, etc. as it is easy to see why the Legislature refrained from letting the proceedings in execution of a rent decree be complicated, even indirectly, by questions relating to title, so much so that it expressly excluded the application of O. 21, Rr. 58 to 63. The view that withdrawal amounts to recognition was rested on estoppel in 6 C L J 601,[9] and it was further developed in 12 C L J 609.[10] This was criticized by Coxe J. in the case from 15 C L J 388[8] to which I have already referred, and in 44 C L J 127[11] it was observed that the ground on which the principle of estoppel was applied in these and other cases was open to question. In 55 Cal 108[12] Rankin C. J. had to deal with the right of the transferee of a non-transferable occupancy holding to make a deposit under O. 21, R. 89. On the principle of *stare decisis* he upheld the right, but observed that

> if the withdrawal of the deposit made under R. 89 is to mean that the landlord has recognized the depositor as tenant of this non-transferable occupancy jote, then it does seem anomalous that such a person as the opposite party here should have the right to make the deposit. It clearly cannot be the law that the landlord by the machinery of R. 89 can be obliged either to go without his rent or to recognize the transferee whom he does not wish to recognize in the case of a non-transferable jote.

The learned Chief Justice also said that he doubted extremely

> whether it is true that a mere acceptance or withdrawal of this deposit would operate to oblige the landlord to recognize this tenant (transferee).

The weight of authority in Calcutta which appeared at one time to be in favour of the view that withdrawal imports recognition thus seems to be shaken, and in our own Court it has been pointed out that the withdrawal is not a withdrawal of rent paid as rent but of money deposited in Court to satisfy a decretal sum due: 38 I C 366,[13] a case which was approved on this point in 11 Pat 257.[7] As I have already said, the appellant did not withdraw the deposits under protest; but he had objected to the right of the plaintiff-respondent to make the deposits, and the order of the executing Court which was against him was non-appealable and left him to choose between dropping the execution proceedings altogether and withdrawing the deposit. If in such circumstances, he chose to withdraw the deposit, I do not see how it can be properly said that he chose to recognize the depositor as his tenant. As was pointed out by Scroope J. in 11 Pat 257,[7] there could be no estoppel, the depositor not having been induced by any action of the landlord

8. Nalini Behari Roy v. Fulmani Dasi, (1912) 15 C L J 388=13 I C 487=16 C W N 421.
9. Thomas Barclay v. Syed Hossein Ali Khan, (1907) 6 C L J 601,
10. Jugal Mohini Dasi v. Srinath Chatterjee, (1910) 12 C L J 609=7 I C 477.
11. Suckchand Das v. Giridhari Das, (1926) 13 A I R Cal 1215=97 I C 1016=44 C L J 127.
12. Fazoo Mia v. Sultan Ahmed, (1927) 14 A I R Cal 817=106 I C 143=55 Cal 108=31 C W N 1050.
13. Sheo Prasad Lal v. Lala Barhamdeo Lal, (1917) 4 A I R Pat 356=38 I C 366.

to change his position, and the withdrawal merely preserving the status quo ante,
whereas if the money is not withdrawn and the holding is sold, the depositor loses his interest in the holding completely.

In my opinion therefore the withdrawal of the deposits by the appellant in 1926 does not, as a matter of law, entitle the plaintiff-respondent to say that he was recognized by the landlord as the tenant of the holding. Further, if the benami character of the interest of defendant second party, in whose name the sale certificates of 1914 stand, be a fact, it cannot, merely because the executing Court allowed the plaintiff in 1926 (and again in 1929) to deposit the decretal amounts and the appellant proceeded to withdraw them, disentitle the appellant to proceed against the certified auction-purchaser or entitle the plaintiff-respondent to claim that he should have been sued instead of his benamidar and that the decrees obtained against the latter do not bind him. The lower Courts have in substance treated the decision of 1926 under S. 170 (3) as res judicata for the purpose of the suits which are now assailed. It was however not treated in that manner for the rent-decrees which were executed in 1929, and I have already given reasons why it cannot be so regarded for the purposes of the still later decrees now in question. The benami relation alleged by the plaintiff has in my opinion not been put an end to in such a way as to bind the landlord and compel him to sue not the benamidar but the plaintiff. The rent decrees in question cannot therefore be successfully assailed by the plaintiff. He cannot force himself upon the landlord and is not entitled to a declaration that he is the raiyat of the holdings merely because of the decision of 1926 and the consequent withdrawal of the deposits. The result is that this appeal must be allowed with costs of all Courts and the suit dismissed.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 24

FAZL ALI AND MANOHAR LALL JJ.

Commissioner of Income-tax, Bihar and Orissa

v.

Maharajadhiraj Kumar Visheshwar Singh

Assessee.

Misc. Judicial Case No. 41 of 1936, Decided on 25th August 1939; reference made by Commissioner of Income-tax, Bihar and Orissa, D/- 14th July 1936.

(a) Lease — Permanent lease— On construction lease held permanent.

By a lease certain lands were settled with the lessee to enable him to build a gola house and a platform for rice mill. The settlement was made for an indefinite (bemeyadi) period. It was agreed that neither the lessee nor his heirs would put any objection regarding payment of rent. In event of default of two consecutive instalments lessor and his representatives would have the power to realize the arrears of rent and dispossess the lessee. Lessee was bound not to sell residential rights to anyone without reference to the landlord or his heirs and representatives:

Held that the lease was a permanent lease: *AIR 1917 Pat 46, Expl.; A I R 1924 Pat 88 and A I R 1931 P C 207, Rel. on.* [P 25 C 2]

(b) Income-tax Act (1922), Sec. 4 — Salami received by lessor once for all at time of granting permanent lease held must be treated as capital receipt and not as income.

Per *Fazl Ali J.*—Income in the Income-tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium or salami which is paid once for all and is not recurring payment, hardly satisfies this test. If the premium represents the whole or part of the price of the land it cannot be income. [P 27 C 1]

Per *Manohar Lall J.* — It would be impossible to lay down a hard and fast rule that a salami can in no case be taxable. The question would depend upon the facts and circumstances of each case: *A I R 1930 Cal 1, Rel. on.* [P 30 C 2]

A lessor received certain amount as salami once for all at the time of granting a permanent lease:

Held that the lessor permanently parted with the direct enjoyment of the property by himself and the lessee though he was not a purchaser out and out of the entire interest in the land was undoubtedly a purchaser of a large interest therein. The salami therefore must be treated as capital receipt and not as income: *Case law reviewed.* [P 26 C 2 ; P 27 C 1]

(c) Income-tax — Income-tax does not tax capital but income.

Income-tax is a tax on income; it does not tax capital: *(1899-04) 4 Tax Cas 265, Rel. on.* [P 27 C 2]

(d) Income-tax Act (1922), S. 66—Case sent back to Commissioner for re-statement — Procedure to be followed stated.

When a case was sent back to the Commissioner he sent up a re-statement of the case, but without hearing the assessee. The case therefore was sent back to the Commissioner once again in order that the case might be re-stated with such further finding of fact as the Commissioner might consider necessary after hearing the assessee. The matter was then sent back to another Commissioner, who instead of re-stating the case, as he was ordered by High Court stated that he had no power within S. 66 (4) to vary an opinion given under S. 66 (2) if no new facts were admitted:

Held that the Commissioner was in duty bound to carry out the order of the High Court. He should have re-heard the parties, admitted such further evidence as he considered relevant on the point at issue and re-stated the case with his opinion thereon. It was also open to the Commissioner to make a submission that the High Court should

decide the case not upon the case which he was re-stating (as ordered) but upon the finding of fact already arrived at by the previous Commissioner.

[P 32 C 1]

S. M. Gupta —

for Income-tax Department.

Dr. Sir Sultan Ahmed, Murari Prasad, S. P. Srivastava, G. Misir and Prem Lall — *for Assessee.*

Fazl Ali J.—The question to be decided in this reference is whether a sum of Rs. 1800 received by the assessee as salami for the settlement of certain lands during the years of assessment is taxable. The lands settled are 4½ bighas in area, and the terms of the settlement are to be found in a kabuliyat which is printed at p. 16 of the paper book. Under this kabuliyat the settlement was made for an indefinite (bemeyadi) period with effect from the beginning of 1340 F. S. and it was provided that rent was payable by the lessee year after year, and

neither the lessee nor his heirs and representatives shall put forward any plea or objection with regard to the payment thereof.

It was further provided that in the event of default of two consecutive instalments,

the lessor or his heirs and representatives, shall have the power to realize the arrear rent with interest thereon and dispossess the lessee by taking proceedings in Court,

and that

the landlord or his heirs and representatives shall have the power to enhance the rent if at any time the area of the land, as specified in the lease, is on measurement found increased.

Lastly the lessee bound himself not to sell the residential right to anyone without a reference to the landlord or his heirs and representatives and without obtaining his or their permission in writing. The lease clearly stated that the lands had been settled with the lessee to enable him to build a gola house and a platform for rice mill. The first question which arose upon the terms of this lease was whether the lease was a permanent one or it created a mere tenancy-at-will or a tenancy from year to year. The learned Commissioner of Income-tax relying upon the decision of this Court in 2 Pat L J 180[1] held that the lease was not a permanent one. That case however is no authority for the proposition that a bemeyadi patta can in no circumstances be regarded as a permanent lease and it has been fully explained in two subsequent cases, viz. 6 Pat L J 687[2] and 2 Pat 452.[3] In the last-mentioned case where the lessee had obtained settlement of a parcel of land under a bemeyadi lease for the purpose of erecting a gola on the demised land, it was held that the lease was intended to be a permanent one and not from year to year. In 35 C W N 982[4] the Privy Council held a bemeyadi patta to be a permanent lease in the following circumstances: the lease recited that the executant was already in possession of the premises (a hat, bazar, bandar and ghat) under a meadi settlement, that his request for a bemeyadi settlement had been granted by the executee on receipt of a premium and on an annual rent being fixed, (such premium being a substantial sum and higher than previously), that the executant had been called upon to execute a kabuliyat whereupon he was executing the present bemeyadi kabuliyat and promising to abide by the terms as set forth therein. Among the terms was one for an enhancement of rent in specified circumstances and another forbidding bemeyadi settlements by the lessee whereas other imposed restrictions on the powers of the lessee to dig tanks and erect masonry structures and also provided for the lessor assuming khas possession in certain circumstances.

In my opinion the fact that the lands in the present case were let out for the purpose of enabling the lessee to build a gola and a platform for a rice mill strongly suggests that the lease was intended to be a permanent one. This inference is supported by two other facts, viz., (1) that no term was fixed in the lease and (2) provision was made for certain rights being exercised not only by the lessor and the lessee but by their heirs and legal representatives. It is abundantly clear on reading the lease that it was to continue as long as the terms settled between the parties were carried out by the lessee and his heirs or legal representatives, and this shows that the lease was intended to be a permanent one. Besides, the settlement was described as a mukarrari settlement in the landlord's own chalan, a contemporaneous document, to which reference has been made by the Commissioner of Income-tax as evidencing the payment of the salami of Rs. 1800.

The next question to be determined is whether this salami is to be treated as capital receipt or as income. It may be

1. Mt. Parshan Kuer v. Mt. Tulsi Kuer, (1917) 4 A I R Pat 46=39 I C 658=2 Pat L J 180.
2. Kangali Charan v. Surja Narain, (1922) 9 A I R Pat 161=65 I C 303=6 Pat L J 687.
3. Forbes v. Hanuman Bhagat, (1924) 11 A I R Pat 88=77 I C 32=2 Pat 452=4 P L T 414.
4. Janaki Nath Roy v. Dina Nath Kundu, (1931) 18 A I R P C 207=133 I C 732=35 C W N 982 (P C).

stated here that this is not the first time that this case has come up before this Court. There was an earlier reference to this Court by another learned Commissioner of Income-tax, and in that reference the main argument advanced by him in favour of the view that the salami was taxable, was that the lease was not a permanent one but for a period of three years only. It was subsequently discovered that the learned Commissioner of Income-tax had by mistake overlooked the lease under which the salami was received and had proceeded to refer to another lease with which we are not at all concerned in this case. The case was then sent back to the Commissioner and in the second reference also the learned Commissioner justified the taxation of salami on the ground that the lease was not a permanent one. The implication of the argument clearly was that if the lease was a permanent one, there was room for holding that the salami was a capital receipt and not income. Before us however learned counsel for the Income-tax Department has adopted a bolder line of argument and contends that even if the lease is held to be permanent, the sum of Rs. 1800 received as salami must be treated as income and not as capital receipt and he relies, in support of this contention, on the following observations made by Mookerjee Ag. C. J. in 48 Cal 766[5] at p. 780 :

> When a new tenancy is created in respect of unoccupied waste land or lands which had been abandoned by a previous tenant, the premium represents essentially the capitalized value of a portion of the rent. We are not unmindful that in 13 W R 307,[6] it was ruled that the money payable by a lessee in consideration of a lease granted, whether called nazar or salami, cannot be looked upon as rent, but is simply a debt due upon a contract and is recoverable by a suit in a Small Cause Court on the money bond executed in that behalf by the tenant in favour of his landlord. It is not necessary to hold that such salami is rent within the meaning of the definition given in the Bengal Tenancy Act or the Transfer of Property Act. The expression used in the Income-tax Act is "rent or revenue," and this is obviously wider than rent as defined in the Bengal Tenancy Act or the Transfer of Property Act . . . There can be little doubt that when a lease is granted, the amount fixed for periodical payment is not independent of the amount paid in a lump sum as premium. The capitalized value of the sum periodically payable taken along with the premium constitutes in the aggregate the consideration for the grant . . . From this point of view, we must hold that the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as "rent or revenue" derived from land, within the meaning of that expression as used in the definition of "agricultural income" in S. 2 (1) (a).

The view put forward by Mookerjee Ag. C. J., was however, not accepted by this Court in 1 I T C 384.[7] In that case the question was, whether a sum of money received by the assessee by way of salami or premium for granting a mining lease was taxable. Sir Dawson Miller who delivered the judgment in the case dealt with the question as follows :

> There is a vast difference between a sum paid once for all for the lease of mineral rights and a rent or royalty paid annually to the lessor. The lessor in this case who holds an unfettered right of disposal would appear, in granting these leases, to have had two objects in view which are distinguishable. In so far as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successors, but with regard to salami it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn but in exchange for the long term transferred. Possibly it may be objected that the distinction is one of degree rather than of kind, recurring payments at short periods being treated as income and a single payment of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledged in S. 4 of the Act itself, and, as has been observed, the Income-tax Acts are not cast upon absolutely logical lines. Nor does there appear to be any reason why we should extend the exception made in the case of rent and royalty to the case of a non-recurring payment made to cover a long period.

In my opinion these observations fully apply to the present case. If the document with which we are concerned in the present case is a permanent lease, then there can be no doubt that the lessor has by this document permanently parted "with the direct enjoyment of the property by himself and his successors," and the lessee though he is not a purchaser out and out of the entire interest in the land was undoubtedly purchaser of a large interest therein. In my opinion, there is no difference in principle between the salami realized under the present lease and the salami realized on a lease for 999 years in regard to mineral rights. In both cases the real question is whether the salami or premium represents the price for parting with the land, or it is only advance rent. If it

5. Birendra Kishor v. Secretary of State, (1921) 8 A I R Cal 262=61 I C 112=48 Cal 766 = 32 C L J 433=25 C W N 80.

6. Dinanath Mookerjee v. Debnath Mullick, (1870) 13 W R 307=5 Beng L R App 1.

7. Raja Shiva Prasad Singh v. Emperor, (1924) 11 A I R Pat 679=82 I C 653 = 4 Pat 73=5 P L T 497=1 I T C 384.

can be argued that the salami is in fact advance rent, I think that it will be equally plausible to say that rent is to be regarded as "deferred price" of the land. In my opinion there is vital distinction between a single payment made at the time of the settlement of the land and recurring payments made during the period of its enjoyment by the lessee. The distinction is clearly recognized in S. 105, T. P. Act, which defines both premium and rent. In this Section, a lease of immovable property is defined as "a transfer of a right to enjoy such property" and it is clearly stated that "the price is called the premium and the money, share, service or other thing to be so rendered is called the rent". It is obvious that if the premium represents the whole or part of the price of the land it cannot be income. As pointed out by Sir George Lowndes in 6 I T C 178[8] income in the Income-tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium or salami which is paid once for all and is not recurring payment, hardly satisfies this test. I concede that in some cases where the rent is ridiculously low and the premium abnormally high, it may be possible to argue that the premium includes advance rent, but it has not been suggested anywhere that this is one of such cases. In my opinion, upon the facts stated by the learned Commissioner of Income-tax the sum of Rs. 1800 received in this case must be treated as capital receipt and not as income. I would therefore answer the question pronounced by the learned Commissioner in the negative. The assessee will be entitled to a hearing fee of ten gold mohars.

Manohar Lall J.—I have come to the same conclusion. I have no difficulty whatsoever in construing the kabuliats printed at pp. 16 and 18 of the paper-book. The terms of these kabuliyats have a close resemblance to the kabuliyat construed in 2 Pat 452.[3] By these kabuliats a settlement was made for erecting a gola house and for putting a platform for the rice mill given in lease to the lessee by the assessee by another document. The settlement was for an indefinite period and was expressly made descendible to the heirs and representatives of the lessee. The usual covenant against alienation is also to be found obviously in the interest of the lessor so that he may not be compelled to recognize an undesirable tenant. In such circumstances the principle enunciated by their Lordships of the Judicial Committee in 35 C W N 982[4] assists in coming to a decision. I hold in agreement with my learned brother that the terms of these kabuliats coupled with the description thereof given in the contemporaneous document, namely the chalan of 14th September 1932, point to the clear conclusion that the settlement was in perpetuity. By the settlement evidenced by these kabuliats the assessee admittedly received a sum of Rs. 1800 by way of salami or premium and also secured to himself a fixed annual income calculated at the rate of Rs. 100 a bigha. The question which arises for consideration is whether the amount of Rs. 1800 received by the assessee as the result of these transactions for a permanent settlement attracts income tax. I propose in the first instance to examine some cases which are of assistance in order to decide how this question is to be approached, bearing in mind that income-tax, as has been stated over and over again, is a tax on income, it does not tax capital : *see* (1899-04) 4 Tax Cas 265[9] at p. 293. In the very recent case reported in (1938) 22 Tax Cas 29[10] the Master of the Rolls pointed out the difficulty which arises in a large number of cases like the present, which fall upon the border line. At page 43 he makes this observation :

> Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons, but that class of question is a notorious one, and has been so for many years.

As I stated before the only question which has to be decided in the present case is whether the amount of Rs. 1800 which was admittedly received by the assessee is an income for the purpose of the Income-tax Act. The term income, as has been often pointed out, has not been defined in the Indian Act. It is always a matter of difficulty and embarrassment to draw a line between what is a capital receipt and what is a revenue receipt, but there is well known distinction and a line must be drawn clearly and firmly.

8. Commissioner of Income-tax, Bengal v. Messrs. Shaw, Wallace and Co., (1932) 19 A I R P C 138=136 I C 742=59 I A 206=59 Cal 1343=6 I T C 178 (P C).

9. Attorney-General v. London County Council, (1899-04) 4 Tax Cas 265.

10. Commissioners of Inland Revenue v. British Salmson Aero Engines, Ltd., (1938) 2 K B 482=107 L J K B 648=159 L T 147=82 S J 433=54 T L R 904=(1938) 3 All E R 283=22 Tax Cas 29.

The case already referred to (1938) 22 Tax Cas 29,[10] is useful and will be of assistance in deciding the present case. In that case the assessee by a certain agreement granted to the licensees an exclusive right for a period of ten years to construct, use and sell in a certain territory Salmson aero engines. The consideration for the licence was that the licensees were to pay a fixed sum of £25,000 payable in three instalments and in addition to these payments and as royalty a sum of £2500 and a like sum each twelve months during the following nine years. The question which required consideration was whether any of these sums, namely the fixed amount paid in a lump sum in three instalments and the fixed sum to be paid annually for nine years, were assessable to income-tax—the Crown contending that all these payments were income and the assessee insisting, on the contrary that all these payments were in the nature of capital receipts. The Master of the Rolls approached the subject in this way. He pointed out that in the agreement there was

a fundamental difference in the nature of the two classes of sums in this sense, that the former class starts off by being a lump sum payment, definite and fixed, which is then to be payable by instalments. The other class is not of that description; no lump sum payment is referred to; it is on the face of it, nothing but an undertaking to pay yearly sums as royalty. Speaking quite apart from any close examination of authority, and simply regarding the distinction between those two things, it would appear upon the face of it that, with regard to the latter class, the parties are creating an obligation as between themselves which they choose to describe as a royalty payable each year at a fixed rate.

He then considers the argument that it is illegitimate to look outside the terms of the contract under which the licence was granted and observes:

I do not wish to lay down any such proposition. What has to be ascertained in these cases is the true nature of a payment, that is to say, the true nature from an accountancy point of view, and that is a question of fact. I do not wish to say anything which will have the effect of circumscribing the matters which may properly be looked into in answering that question of fact.

I now give another quotation from p. 43:

It seems to me that in the case of patents, as in the case of any other matters, the fundamental question remains in respect to any particular payment: is it capital or is it income? and that question has to be decided, as it has to be decided in reference to other subject-matters, upon the particular facts of each case, including in those facts the contractual relationship between the parties. It has been said that the question is one of fact and it is when one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, one does not mean that, in deciding it, questions of law may not have to be discussed and decided. For example, the construction of a contract may be one of the elements which must be taken into consideration in deciding that question; there may be cases where the construction of the contract is of itself the really decisive matter in answering the question. In this case the question of the contract and the terms of the contract is of cardinal importance. . . .

(1883-90) 2 Tax Cas 76[11] was a converse case but some observations of Grove J. are relevant. In that case the question was as to the annual expenditure which should be allowed to an assessee who had taken a lease after paying £34,000 as a premium with a liability to pay a ground rent of £250 a year, the lease being for 20 years. Grove J. makes this observation at p. 79:

But in this case the lessee pays a ground rent of £250 a year and he paid £34,000 as a premium for the lease. The lease has virtually put him almost in the position of a free holder with a quit rent, though not quite that, because it is terminable at a certain time, but the rent is swallowed up, or what we may call the rent is swallowed up in the premium, leaving really a very small rent, much less than what would be the real rent of the premises if they were let from year to year.

At the bottom of that page he states:

I thought the fair mode would be taking the premium into consideration and the ground rent to take what an actuary would put as the fair rent for that lease for the time over which that lease extended; that is supposing a party had taken the lease upon an annual rent, and had paid no premium, and the ground rent was, so to speak, absorbed in the rack-rent or the annual rent of the premises. I still adhere to that idea as the fair mode of compensation.

He puts the question to be decided at page 80 thus:

Therefore we have virtually got to this question. Is that the proper sum to be deducted from the Income-tax, or is whatever fancy price the party pays for a speculative purchase to be deducted? I think the former of these two is the proper alternative, that is to say, the one insisted upon by the Crown in this case. The other would lead to extreme difficulty, and it would lead possibly to a great deal of fraud, because fictitious prices would be given; £50,000 would be handed over for a lease, and £20,000 out of that would be returned the next day, or some arrangement of that sort would be made, and the price paid would afford no reasonable criterion for saying what annual deduction ought to be made from the annual profits or gains.

He finally adopts the test at p. 82 that the real and proper basis of calculation is the trade value or rent of these premises paid by persons who would take these premises as they would take any other premises which are in the market or for sale, a willing lessee and a willing lessor, the one anxious to make the most of his premises, and the other anxious to get the lease, who would settle the bargain upon fair terms, that is the proper criterion.

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11. Gillatt and Watts v. Colquhoun, (1883-90) 2 Tax Cas 76.

I take this case as deciding that such questions are really questions of fact which have to be determined by taking into consideration all the circumstances. Smith J. at the end of his observations states :

> It also seems to me that this case, as my brother Grove says, resolves itself into a question of fact and not of law.

(1928) 14 Tax Cas 34[12] dealt with a situation where the assessee had obtained a right to deposit soil on a definite area of land at a certain rate for a period of eight years by agreeing to pay to the owner a sum of £3200 payable in two instalments of £200 each at the end of every six months each year. The question was whether the assessee was entitled to deduct from his assessable income of a sum of £400 which he had paid in the year under consideration. The Lord President pointed out that in a question of this sort both form and substance must be considered and he pointedly referred to the fact that £3200 and the instalments of £200 were payable whether the quantities referred to in the contract were actually deposited or not and came to the conclusion that in considering this difficult question, which was on the border line, his opinion on the whole was that the price of £3200 whether paid in instalments or in a lump sum did not alter the character of the price as a capital outlay and that the assessee could not be entitled to say that the instalments were paid out in each year for the purpose of earning the profits of that year, in any other sense than it would be true to say that any capital outlay is made for the purpose of earning profits of the years which follow its expenditure. Lord Sands took the same view and agreed that in a matter of this kind one cannot altogether ignore the form because

> when parties contract in certain forms different results may flow according to the form of the contract however little difference there may be in substance.

Lord Blackburn took a different view and gave a dissenting opinion. He makes some pertinent observations at page 43 :

> If the site has been depreciated in value by the deposits laid upon it, it may very well be that the landowner was fully justified in attributing each and all of the payments to be made to him as capital payments. But if the converse is the case and the value of the land remains unaltered, or possibly has appreciated for building purposes, it would hardly appear to be a good answer to a claim against him for income-tax on the sums of £400 received annually, to refer to the agreement as evidence that he had received them as capital payments and not as fruits of his land.

This case was recently considered in (1938) 22 Tax Cas 182.[13] (1927) 11 Tax Cas 730 is the well known case of *Codstantinesco* v. *Rex*.[14] The question there was as to the assessibility of certain sums received by the patentee as the result of an award made in his favour by the Royal Commission on Awards to Inventors. The award was made after the user of the patent had taken place and the claim which had been settled was a claim by the assessee for successive uses of the invention. Lord Cave in giving his opinion in the House of Lords stated as one of the facts in the case that the corpus of the patent was not taken away from the assessee and having regard to a number of facts he stated :

> In view of all the facts I am satisfied that the sum awarded is to be treated as profits or gains, and annual profits or gains, within the meaning of the Income-tax Act.

Rowlatt J. who decided the case in the first instance and whose view was upheld by the Appellate Court and House of Lords gives an apposite illustration at p. 740. Suppose a patentee demands £25,000 as a sum down and tells the licensee "use it as much as you like for a definite time or for the whole length of the patent." In such a case the decision was :

> That will clearly be a lump sum. It would not be parting with the patent . . . but it would be clearly a capital sum in my judgment.

The Master of the Rolls at p. 743 notices one or two cases where a capital sum is reached by an estimate derived from income, e. g., so many years' purchase for a piece of land. I will make reference to only one more case; it is needless to refer to the very large number of cases which are to be found in the English Reports in deciding whether the annual payment concerned in this case was in the nature of a capital payment or a capital receipt or was in the nature of revenue payment or revenue receipt. For instance see the Annuity cases beginning from (1858) 3 H and N 769;[15] the Tikari case which went up to the Privy Council from this Court 7 I T C 257[16]

12. The Commissioners of Inland Revenue v. Adam, (1928) S C 738=(1928) Sc L T 476=14 Tax Cas 34.
13. Race Horse Betting Control Board v. Wild, (1938) 22 Tax Cas 182.
14. (1927) 11 Tax Cas 730=43 T L R 727.
15. Foley v. Fletcher, (1858) 3 H & N 769=28 L J Ex 100=5 Jur (N S) 342=7 W R 141=33 L T (O S) 11 = 117 R R 967.
16. Commr. of Income-tax v. Gopal Saran Narain Singh, (1934) 21 A I R Pat 384 = 151 I C 477 = 13 Pat 661 = 15 P L T 325 = 7 I T C 257 (F B).

and 8 I T C 340,[17] the Railway cases of which the leading type is (1902) 4 Tax Cas 478[18] and lastly (1933) A C 684,[19] sale of land for cash and 10 per cent. mineral oil was decided as a question of fact.

The case which I wanted to refer was the case in (1938) 22 Tax Cas 175,[20] a case decided in July 1938, by the Court of Session Scotland. The facts of the case were that the assessee company lent a sum of money to an Indian company under an agreement which provided that interest was to be paid at 3 per cent. per annum and that on repayment of the principal sum or any part thereof there should also be paid a premium varying with the date of repayment. The premiums prescribed by the agreement for each of the ten years of the currency of the loan are set out in the agreement, the first of them is at the rate of 2 per cent.; the second is at 4 per cent.; in each of the next five years there is an increase of $2\frac{1}{2}$ per cent. in arithmetical progression and for the last three years of the ten the rate of increase per annum is 3 per cent. The full amount of the loan was ultimately repaid to the assessee together with the accrued interest and the premiums payable under the agreement. The contention raised by the assessee was that the premiums were part of the principal sums repaid and were capital payments. The Lord President decided the question as a question posed on the particular terms of the contract. In his opinion the premiums were in the nature of annual profits or gains being part of the consideration given by the borrowers for the use of the capital lent to them, and part of the creditor's share of the profit which the borrower is presumed to make from the use of the money and observed:

> It is not irrelevant to notice that the agreement provides for a payment by way of premium which may be made in each year of the currency of the loan, and that, taken along with the stipulated interest, the effect of this provision is to give the lenders a return on their capital varying between 5 per cent. in the earlier years and something over $5\frac{1}{2}$ per cent. in later years, a rate which can only be regarded as a reasonable return for the use of their capital and not as to any extent an accretion to it.

It was however pointed out that

> the fact that the borrowers would, under the contract pay a premium only when they chose to make a capital payment does not necessarily have the effect of making the premium a capital payment any more than the lenders' waiver of their right to exact payment of interest each year as the effect of converting the payment of arrears of interest into a capital payment.

This case therefore may also be taken as deciding that each case ought to be decided by the facts and circumstances of that case. I respectfully agree with the observations made by Sir George Rankin in 4 I T C 146[21] where that learned and distinguished Chief Justice pointed out that it would be impossible to lay down a hard and fast rule that a salami can in no case be taxable but that the question would depend upon the facts and circumstances of each case. I think that the above review of some leading cases suggests this as the proper way of approach while deciding a question like the present before us. But the learned Standing Counsel wanted to rely, in support of his argument that a salami like the present is always taxable as an income upon the observation to be found in 48 Cal 766[5] where it was stated that a salami is a capitalised rent. But this decision was expressly overruled by a later Full Bench decision of that very Court in 29 C W N 969.[22] Walmsley J. who was one of the learned Judges in the case reported in 48 Cal 766[5] adhered to the opinion which he expressed in that case, but he was overruled by his other learned colleagues. In a case of this Court in 4 Pat 73[7] this decision of the Calcutta High Court was disapproved. The Patna case dealt with a lease of a coal field for 999 years for a fixed premium at an annual rent. The learned Chief Justice pointed out that the essence of the transaction was (1) that the salami was really in the nature of a premium paid for granting a lease, in other words it was the purchase price of a leasehold interest, and (2) that

> in so far as rent and royalty are reserved he the assessee is founding an annual increment to the income of the Raj for himself and his successors but with regard to salami it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to per-

17. Gopal Saran Narain Singh v. Commr. of Income Tax B & O, (1935) 22 A I R P C 143 = 156 I C 856=14 Pat 552=62 I A 207=8 I T C 340 (P C).
18. Scoble's case, (1902) 4 Tax Cas 478.
19. Minister of National Revenue v. Catherine Spooner, (1933) 20 A I R P C 211 = 146 I C 747 = (1933) A C 684 = 102 L J P C 205=50 T L R 11 (P C).
20. Commissioners of Inland Revenue v. Thomas Nelson and Sons, Ltd., (1938) 22 Tax Cas 175.
21. Gooptu Estates Ltd. v. Commr. of Income-tax, Bengal, (1930) 17 A I R Cal 1=126 I C 193 = 57 Cal 910=34 C W N 327=50 C L J 375 = 4 I T C 146 (F B).
22. Nawabzadi Meher Bano Khanum v. Secretary of State, (1925) 12 A I R Cal 929=89 I C 997 =53 Cal 34=29 CWN 969=42 CLJ 151 (FB).

sons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn but is paid in exchange for long term transferred.

With respect I agree with these observations and would hold that this applies in proprio vigore to the salami obtained by the permanent settlement in the present case. I notice that the Commissioner, Mr. H. D. Chatterji, was inclined to take the same view in his order of reference to this Court which is to be found at pp. 9-10 of the original paper book dated 24th July 1936, but as he thought that the period of the settlement in the document which he was considering was for three years only he came to the conclusion that the amount of salami was merely a rent in advance. That Commissioner expressly referred to the case in 4 Pat 73,[7] also reported in 1 I T C 384,[7] and sought to distinguish it on the ground that in the present case the lease was for three years only and did not cover a long period.

The provisions of S. 105, T. P. Act, were referred to in the course of the argument before this Court in the *Raja of Jharia's case*.[7] S. 105 distinctly defines a lease in this country as a transfer of a right to enjoy immovable property for a time or in perpetuity in consideration of a price paid or for a recurring rent or annual services or both ; and also mentions that "the price is called the premium." The Legislature has thus drawn the very distinction between a price and a recurring payment which the eminent Judges in England have drawn while deciding cases under Income-tax Act. In the present case there is no suggestion that the term embodied in the contract evidenced by the chalan and the kabuliats was not a fair expression of what the parties intended. It was argued however that the amount of premium will always bear some proportion to the amount of rent which is ultimately fixed and therefore it ought to be held that the premium should be taken in law as an advance payment of rent. I think the argument is fallacious; the premium or the price will always be fixed on taking into consideration the amount of rent the lessor will receive, and he may vary it as he does in practice with the amount of salami which he insists on receiving as a condition precedent for the parting with the land in favour of the lessee. It may be that in some cases the evidence might show that the parties fixed a particular salami as an advance payment of rent. In those cases I would not hesitate to treat that reciept as income but I am of opinion that it is not open to me to treat a premium in the nature of a salami as in this case as a revenue receipt. It should be noticed that the amount of Rs. 1800 was received not because of the use of the land but before the land was put into use by the assessee. For these reasons I have no hesitation in holding that this amount of Rs. 1800 was a capital receipt in the hands of the assessee as it was a capital payment on behalf of the lessee.

I wish to make a few observations regarding the procedure adopted by the Commissioner of Income-tax in sending up the present reference. It appears that the assessee has been considerably harassed by the manner in which the proceedings for a reference to this Court were conducted by the Commissioner. On 16th November 1937 when the reference came up for hearing before the learned Chich Justice and Agarwala J., it was discovered that by some unfortunate slip there was an error in the statement of the case. The learned Judges in agreement with the submission on this point by the learned advocates for the assessee and the income-tax department directed that the case should be sent back to the Commissioner in order that he may restate the case with such finding of fact as may be considered necessary. The assessee was in no way to blame when the Commissioner gave his opinion regarding a document which admittedly referred to some other case. When the case went back to the Commissioner he sent up a re-statement of the case, but unfortunately without hearing the assessee. The re-stated case came up before this Court once again on 28th November 1938 when the order which we passed was that the Court was compelled to send the case back to the Commissioner once again in order that the case might be restated with such further finding of fact as the Commissioner may consider necessary after hearing the assessee. The matter then went back to another Commissioner, who instead of re-stating the case, as he was ordered by this Court to do, sent up a letter to this Court to the address of the Deputy Registrar (p. 2 of the Supplementary paper-book). In that letter he says:

> I have not heard the party in regard to the opinion of the Commissioner. In any event I should not consider that I had power within S. 66 (4) to vary an opinion given under S. 66 (2) if no new facts were admitted.

In my opinion the Commissioner was in duty bound to carry out the order of this Court. He should have re-heard the parties, admitted such further evidence as he considered relevant on the point at issue and re-stated the case with his opinion thereon. It was also open to the Commissioner to make a submission that the High Court should decide the case not upon the case which he was re-stating (as ordered) but upon the finding of fact already arrived at by the previous Commissioner on 4th August 1938. I do not agree with the view expressed by the Commissioner that the case did not stand at large, whether under S. 62 (2) or S. 66 (4). It was within the jurisdiction of the High Court to require the Commissioner to re-state the case which was not found satisfactory by this Court; and, if the Commissioner was dissatisfied with this order, he should have moved their Lordships of the Judicial Committee against the order passed by this Court. But so long as that order stood, this Court expected that it should be carried out to the very letter and in the spirit in which the order was worded. The result of the procedure adopted by the Commissioner has been that a third hearing in this Court has been inflicted upon the assessee. The further evidence which Sir Sultan Ahmed wanted us to consider was the affidavit of the Chief Manager of the Raj regarding which upon being supplied with a copy the standing counsel agreed that this would amount to a decision on the construction of the document in favour of the assessee. I am doubtful however how this affidavit can be used to supply the meaning of the terms in this document which are in no way ambiguous, or to help us in construing the document. I have therefore ruled this affidavit out of my consideration entirely in coming to a conclusion as to the meaning to be attached to the word "bemeyadi" in the documents or kabuliats which fall to be construed. For these reasons I agree that the answer to the question should be in the negative and I also agree to the order of costs proper by my learned brother.

D.S./R.K. *Answer in negative.*

A. I. R. 1940 Patna 32

AGARWALA J.

Ramsagar Yadav and another

— Petitioners.

v.

M. Yunus and another—Opposite Party.

Criminal Revn. No. 369 of 1939, Decided on 15th August 1939, from order of Sub-Divisional Officer, Patna City, D/- 22nd May 1938, 20th January and 15th March 1939.

Criminal P. C. (1898), Ss. 523, 144—Magistrate refusing to take proceedings under S. 144 and on that ground holding that he was not competent to investigate question as to who was in possession of property seized by police — This is failure to exercise discretion conferred on him by Sec. 523 and High Court would interfere with his order.

Where a Magistrate who has refused to take proceedings under Sec. 144 considered that, having refused to take proceedings under Sec. 144 he was not competent to investigate the question as to who was in possession of the property seized by the police and has therefore directed the police to retain it in their custody, and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court, the High Court would interfere with his order as he has not judicially exercised the discretion which Sec. 523 confers on him. The Magistrate ought in such a case to exercise the discretion conferred on him by Sec. 523 that is if the Magistrate decides that one or other of the parties was in possession at the time the police seized the property, the proper order to be passed would be to restore that party to possession. If the Magistrate is unable to decide who is in possession, it would be his duty to issue a proclamation under sub-s. (2) of S. 523 and proceed in accordance with the provision of that sub-section. [P 33 C 1, 2]

Hareshwar Prasad Sinha, D. P. Sinha and R. P. Jaruhar — *for Petitioners.*

K. Sahay and J. Rahman — *for Opposite Party.*

Order. — In 1933 a certain plot of land was settled with the petitioners by the landlord for one year. Although the settlement was for this limited period, it appears that the petitioner did not give up possession on the expiry of the period. In 1938, the landlord purported to settle the land with the opposite party. The present proceedings date from a letter which the landlord wrote to the police informing them that the petitioners were cutting the unripe paddy growing on the plot. On receipt of this information, the Sub-Inspector went to the plot in question and found both parties there and that the crop had been cut. In view of the allegations in the landlord's letter to the police it would appear that the crop had been cut by the petitioners.

The police reported the matter to the Magistrate apprehending that there might be a breach of the peace and suggesting that proceedings should be taken under S. 144, Criminal P. C. As the crop had already been cut, the Magistrate disagreed with the police suggestion that there might be a breach of the peace. He ordered that the paddy should be returned to the person from whom it had been recovered. The police thereupon reported that they had not recovered the paddy from any of the parties, meaning that they had merely taken it from the land on which it had been lying after having been cut. They therefore asked for the Magistrate's direction. The Magistrate then observed that it was not possible to pass an order about the disposal of the property without coming to a definite conclusion about its possession. He considered that, having refused to take proceedings under S. 144, Criminal P. C., he was not competent to investigate the question as to who was in possession of the paddy. He therefore directed the police to retain it in their custody; and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court. It is against that order that the petitioners have moved this Court. The Sections of the Criminal Procedure Code empowering a police officer to seize property are Ss. 51, 54, 165, 166 and 550. The last mentioned Section is in these terms :

> Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

It is clear that neither S. 51 nor S. 54 nor S. 165 nor S. 166 applied to the facts of this case. On the other hand the landlord had written to the police, informing them that the petitioners were cutting unripe paddy on land which did not belong to them. This allegation, if true, was an allegation that the petitioners were committing mischief and therefore would have entitled the officer to seize the paddy under Sec. 550, Criminal P. C. As there appears to be no other authority for the seizure of the paddy in this case, it must be presumed that it was in the exercise of the powers under this Section that the police acted. The question now is as to how the money which represents the paddy that was seized is to be disposed of. The only Section of the Code which appears to have any application is S. 523. The material portion of the first sub-section of that Section is as follows :

> The seizure by any police officer of property taken under S. 51 . . . . . or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

The second sub-section is in this language:

> If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation.

Had the Magistrate in this case purported to act under the powers conferred by this Section, this Court would not have interfered with his order. But as the Magistrate has taken the view that he has no power at all to deal with the matter, it is clear that he has not judicially exercised the discretion which the Section confers on him. The case must therefore go back to the Magistrate to enable him to exercise the discretion conferred on him by S. 523, Criminal P. C. In considering the matter the Magistrate will bear in mind S. 110, Evidence Act, which provides :

> When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

If the Magistrate decides that one or other of the parties was in possession at the time the police seized the property, the proper order to be passed will be to restore that party to possession. If the Magistrate is unable to decide who is in possession, it will be his duty to issue a proclamation under sub-s. (2) of Sec. 523 and proceed in accordance with the provision of that sub-section. The order of the Magistrate complained against is set aside and the case will be sent back to be disposed of in accordance with the directions given in this judgment.

D.S./R.K. *Case sent back.*

A. I. R. 1940 Patna 33

ROWLAND J.

Bhagwan Singh — Appellant.

v.

Ujagir Singh and others — Respondents.

Second Appeal No. 377 of 1938, Decided on 13th April 1939, from appellate decree of Special Sub-Judge, Chaibassa, D/- 15th February 1938.

(a) Civil P. C. (1908), O. 41, R. 2—Defences not raised in written statement or memorandum of appeal — Appellate Court should not base its judgment on such defences.

An appellant should not be allowed to raise and succeed on defences not raised in the written statement or in the memorandum of appeal. It is true that the Appellate Court under O. 41, R. 2 in deciding the appeal is not confined to the grounds of objection in the memorandum but it is not permitted to rest its decision on any other ground unless the party affected thereby has had a sufficient opportunity of contesting the case on that ground. When an appellant seeks to raise a point not taken in the Courts below or in the memorandum of appeal, the propriety of allowing him to do so and of basing the appellate decision on such a ground is a matter which the Appellate Court ought to decide : *A I R 1925 Pat 57, Rel. on.*

[P 35 C 1, 2]

(b) Second Appeal—Error of procedure must be error affecting merits of case.

It does not follow that in second appeal an error of procedure will always lead to reversal of the lower Appellate Court's decision. It must be an error affecting the merits of the case but under S. 100, Civil P. C., High Court can interfere on the ground of any substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. [P 36 C 1]

(c) Tort—Defamation—Suit for damages for defamation — Burden to prove justification for defamation is on defendant.

On the question of justification for defamation the burden of proof lies on the defendant. The burden of proof on this point is not shifted nor does the presumption of good conduct cease to be available in favour of the plaintiff in consequence of his having given evidence on his own behalf.

[P 36 C 1; P 37 C 1]

(d) Appeal — Duty of first Appellate Court regarding matters of fact explained.

The Legislature has thought fit to entrust to the first Appellate Court the final decision of all matters of fact on which the disposal of the suit turns. Every officer in this position should realize that the confidence thus reposed in him implies a corresponding duty and trust, that he will to the best of his power weigh and balance the evidence, facts and considerations appearing on both sides. He should endeavour so to decide his cases that his judgment may carry a conviction if not of its correctness, at least of a fair endeavour to place a correct valuation on the merits of the cases of both sides. He should never let it appear either to the public or to a superior Court that he has chosen to accept the evidence of one side or the other without due consideration of the salient facts established and contrary to the conclusion to which the outstanding facts point, arbitrarily or on patently inadequate grounds. [P 36 C 2]

S. Mustafi — *for Appellant.*

A. N. Lal and K. P. Varma — *for Respondents.*

Judgment.—This appeal arises out of a suit to recover damages for libel. The claim was Rs. 300. The Munsif found that the alleged libel had been made and published by the first three defendants and gave the plaintiff a modified decree against them assessing the damage at a hundred rupees. On appeal the Subordinate Judge has reversed this decision and dismissed the suit. Of the issues framed by the Munsif the first was whether the defendants or any of them had made and published the defamatory statements in the libel which took the form of a petition to the Town Superintendent of Messrs. Tata & Co. Issue 2 was whether the plaintiff's reputation was lowered thereby and issue 3 was whether the plaintiff was entitled to damages and, if so, how much. The defence of defendant 1 was denial of the alleged publication. He did not plead either justification or privilege. The defences put forward in the written statement of defendants 2 to 4 raise a plea of justification that the imputations were true and an issue as to this might well have been framed by the Munsif; but as he dealt with it on the merits the omission is not of importance. Before the Munsif the further contention was raised at the hearing that the occasion was one of absolute privilege. The Munsif held that publication was proved against defendants 1 to 3 but not against defendants 4 and 5; that it was not shown that the plaintiff was a man of bad character; that it was not at all proved that he sells women or that he keeps Chattisgarhia girls. The Munsif further held that the allegations in the petition were reckless and false, were not made bona fide and were not made with belief in their truth. He held that no case of privilege was made out and that the plaintiff was entitled to damages which he assessed at Rs. 100 against those of the defendants who had published the libel; that is to say, defendants 1 to 3.

Against this decree defendants 1 to 3 preferred an appeal jointly to the District Judge and it is to be noticed that in the memorandum of appeal it is nowhere contended either that the libel was justified or that the occasion was privileged. The appeal was directed against the finding regarding publication and the finding regarding damages. The contentions were that defendants 1 to 3 had not in fact signed the petition and the document was a collusive one and a ground was taken that the respondent's evidence was inadequate and the question of damages was not proved. The learned Subordinate Judge was not content to discuss the correctness of the findings appealed against. He stated the points for determination in the following terms.

(1) Whether the defendants or any one of them made defamatory statements against the plaintiff in the petition sent to the Town Superintendent of Messrs. Tata & Co., under whom both the parties were admittedly employed as servants. (2) If so, whether the defamatory statement which the defendants published was true. In other words, if it was justified. (3) If the occasion of the defamatory statements may be a valid defence of a qualified privilege. (4) If the defendants established that the occasion was so privileged, whether the plaintiff succeeded in showing actual or express malice on the part of the defendants which would negative any defence of privileged communication. He held that the publication alleged in the plaint had been fully established. He even went on to observe that the lower Court should have found the publication proved against defendants 4 and 5—a question not arising before him at all. He held that the occasion was one which might give rise to a defence of qualified privilege. He held in that view the burden of proof was on the plaintiff to establish malice and that the plaintiff had failed to discharge the burden. He said that the plaintiff having given his own evidence that he was a man of good character the presumption of law regarding good conduct of an individual could not be invoked in his favour and concluded that the allegations made in the libel were true. He reversed the decision of the Munsif and dismissed the suit.

In second appeal it is contended that the Subordinate Judge should not have allowed the appellants to raise and succeed on defences not raised in the written statement or in the memorandum of appeal. It has also been contended that the Subordinate Judge's findings were vitiated because he has misplaced the burden of proof and the view taken by him is against the weight of the evidence. I have pointed out above that neither justification nor privilege was raised as a defence in the memorandum of appeal. O. 41, R. 2, Civil P. C., lays down that

> the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal.

The appellants were therefore not entitled to urge justification or privilege at the hearing of the appeal. They might of course ask the Appellate Court for leave to urge such grounds and it would be for the Appellate Court to decide whether such leave should be granted or refused. The Appellate Court under the same rule in deciding the appeal is not confined to the grounds of objection in the memorandum but is not permitted to rest its decision on any other ground unless the party affected thereby has had a sufficient opportunity of contesting the case on that ground. When an appellant seeks to raise a point not taken in the Courts below or in the memorandum of appeal the propriety of allowing him to do so and of basing the appellate decision on such a ground is a matter which the Appellate Court ought to decide. In 3 Pat 818[1] it was held that a point not taken in the pleadings or the memorandum of appeal ought not to be allowed to be raised in appeal. It was the duty of the Subordinate Judge to consider the propriety of permitting these defences to be raised and of basing the decision on them.

As regards qualified privilege it is pointed out that the publication alleged was not only publication to the Town Superintendent but publication to a number of the neighbours of the parties who were asked to give their signatures on the petition. This publication was held to have been established and the finding of the Munsif on this has been accepted by the Subordinate Judge. Therefore no question of privilege of any kind could arise and the Subordinate Judge was wholly in error both in allowing it to be raised and in basing his decision on it. As regards the defence of justification the propriety of allowing this defence to be raised ought to have been considered with reference to the state of the pleadings and of the evidence and of the findings of the learned Munsif. The plea of justification had not been raised by defendant 1. It was raised in para. 12 of the written statement of defendants 2 and 3 which runs as follows :

> That the plaintiff sold women to some men which fact is known to these defendants and that public policy needs that it should be revealed and defendants think that the plaintiff being detected in doing so brought this case against them to feed fat his grudge.

Side by side with this plea defendants 2 to 4 also put forward a denial of publication. Thus as between the plaintiff and defendant 1 the question of justification was not raised in the Munsif's Court. As between the plaintiff and defendants 2 and 3 the plea had been taken and negatived and in the

1. Sri Kanta Prasad v. Jag Sah, (1925) 12 A I R Pat 57=84 I C 293=3 Pat 818=6 P L T 237.

appeal defendants 2 and 3 associated themselves with defendant 1 who had not pleaded justification and abstained from raising it on their own behalf. The position then was that defendant 1 had never taken this defence and the other defendants had abandoned it. The procedure followed by the Subordinate Judge in allowing it to be argued and to succeed without permission being asked or given and without considering and deciding first whether leave ought to be given was erroneous. It does not follow that in second appeal an error of procedure will always lead to reversal of the lower Appellate Court's decision. It must be an error affecting the merits of the case (S. 99, Civil P. C.), but under S. 100 this Court can interfere on the ground of any substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. In the present case I am unable to say that the procedure followed has not affected the merits of the decision. If before giving permission for new grounds to be raised the learned Subordinate Judge had had clearly before him the state of the pleadings and of the record he might (even if in the result he gave permission) have taken a different view of the facts. He would, or should, have appreciated that on the question of justification the burden of proof lay on the defendants, not one of whom had had the courage to say either that the libel was true or that he believed it to be true, though three of the defendants had gone into the witness box. The plaintiff had the presumption of good conduct in his favour, had been in steady employment for eight years and had himself deposed that the libel was false; while the principal witness whom the defendants put up to support the truth of the libel was no other than a brother-in-law of defendant 1, and had been out of a job for nearly two years. He would, or should, have attached weight to the fact that on a local inquiry by P. W. 1, the Circle Officer, the allegations had been found to be false. He would, or should, have noticed the relevance to the question of motive of the fact that defendant 1 was prosecuted and convicted for beating the buffalo of the plaintiff, an incident which occurred three days before the libel. He would, or should, have attached weight to the opinion of the trial Court which had the advantage of hearing the witnesses and observing their demeanour. He might have inferred that at the time of presenting their appeal defendants 2 and 3 had thought their case of justification too hopeless to be worth presenting to an Appellate Court, and had therefore abandoned it. He might then either have refused permission to raise additional grounds, or if he granted it, would have addressed himself to the facts from a very different point of view, and possibly with a different result.

I do not propose to decide the questions of fact arising in this case, or to go into the details of the depositions to see whether the substantial facts I have referred to can be outweighed by points scored in a contest of wits between cross examiner and witness in the box. The proper place for that is the Court of Appeal below. The Legislature has thought fit to entrust to the first Appellate Court the final decision of all matters of fact on which the disposal of the suit turns. Every officer in this position should realize that the confidence thus reposed in him implies a corresponding duty and trust, that he will to the best of his power weigh and balance the evidence, facts and considerations appearing on both sides. He should endeavour so to decide his cases that his judgment may carry a conviction if not of its correctness, at least of a fair endeavour to place a correct valuation on the merits of the cases of both sides. He should never let it appear, either to the public or to a superior Court that he has chosen to accept the evidence of one side or the other without due consideration of the salient facts established and contrary to the conclusion to which the outstanding facts point, arbitrarily or on patently inadequate grounds. In short the judgment ought to show that the Judge has been led to a particular conclusion by the force of the facts and not that he has had a fancy to adopt a particular conclusion and then made a one-sided presentation of the facts to support that conclusion. The danger that in any particular case a decision on facts may be against the weight of evidence and hardship may result is one that the Legislature has deliberately chosen to take relying on the good sense, experience, honesty and impartiality of the officers selected to discharge these important duties. All the more therefore it is incumbent on such an officer to see that in the discharge of his functions not only are none of these important qualities wanting but none shall even appear to be wanting. And particular care should be taken to avoid even the suspicion of bias in dealing with the rights of parties

or the decision of a subordinate officer of a different religion or community from oneself.

The appeal is allowed, the judgment and decree of the Subordinate Judge set aside and the appeal remanded to him for disposal according to law. He will have to decide (a) whether the publication alleged is proved; (b) whether the defendants or any of them ought to be heard in appeal in support of the plea of justification; (c) if so whether they have proved it, the burden of proof being wholly on them. I should state that the burden of proof on this point is not shifted nor does the presumption of good conduct cease to be available in favour of the plaintiff in consequence of his having given evidence on his own behalf; (d) the amount of damages. Costs will abide the result.

D.S./R.K. *Appeal remanded.*

A. I. R. 1940 Patna 37

MOHAMAD NOOR AND MANOHAR LALL JJ.

Surja Mohan Thakur and others — *Plaintiffs* — Appellants.

v.

Rama Prasad Pandey and others, Defendants and others, Plaintiffs — Respondents.

Appeal No. 75 of 1934, Decided on 3rd August 1939, from original decree of Sub-Judge, Mongyr, D/- 15th December 1933.

(a) Registration Act (1908), S. 49—Unregistered kabuliat or patta—Value.

The terms of a tenancy cannot be determined by looking at an unregistered kabuliat or patta. [P 38 C 2]

(b) Record of Rights—Onus to prove incorrectness is on party alleging it to be so.

An entry in the survey Record of Rights carries with it a statutory presumption of correctness and the onus is upon the person, who alleges that the entry is incorrect to prove by evidence that it is so. [P 39 C 2]

(c) Landlord and Tenant — Tenant let into possession for limited term whether can acquire, by mere assertion, higher title *(Quære)*.

Whether a tenant who is let into occupation for a limited term can, during the continuance of that term, by mere assertion, acquire a higher title than what was given to him on the date of his entering into possession. [P 40 C 1]

(d) Landlord and Tenant—Terms of tenancy not proved — In absence of evidence to contrary tenancy must be presumed to be from year to year or tenancy-at-will.

Where a person is unable to prove the terms of the tenancy it must be assumed in the absence of evidence to the contrary that the tenancy was tenancy from year to year or a tenancy-at-will. Such a tenancy can be determined on the expiry of the year or by a mere demand for or suing for possession: *(1853) 9 Ex 50, Rel. on.* [P 40 C 1]

P. R. Das, J. M. Ghose and Prem Lall — *for Appellants.*

Dr. Sir Sultan Ahmed, B. C. De, P. B. Ganguli, A. B. Jha and A. N. Lal, and S. N. Bose, Rameshwar Prasad Jaruhar, Rameshwar Choudhry and B. N. Rai — *for Respondents (defendants first and second party respectively).*

Manohar Lall J.—This is an appeal by the plaintiffs arising out of a suit instituted by them for declaration of title to and for recovery of possession of the lands in suit, which are 25 bighas in area, together with mesne profits. The suit was decreed by the learned Subordinate Judge in part by granting a decree to the plaintiffs to recover the rent entered in the Record of Rights from the defendants second party who was held to be occupancy raiyat in respect of the suit lands. The plaintiffs have preferred this appeal in which they ask for a decree for recovery of khas possession against the defendant second party also and in any case they claim a decree for mesne profits which in their contention had been wrongly refused. The defendants first party have preferred a cross-objection and by it they pray that the decree of the learned Subordinate Judge be reversed so far as it has decreed the suit in part in favour of the plaintiffs so that the suit should be dismissed in its entirety.

It will be convenient to state the facts very shortly. The case of the plaintiffs is that their ancestors had purchased 8 annas share in taluqa Masudanpur from one Mt. Sahodra, who was the proprietor at that time, by a registered deed of sale dated 22nd February 1872, and soon after the sale the vendees gave 25 bighas of land in that taluka in mokarari for life to the same Mt. Sahodra by means of an unregistered patta bearing date 18th March 1872. Mt. Sahodra having died on 1st January 1926 the plaintiffs entered into khas possession of these lands which till then were in the possession of the Musammat. Defendants 1 and 2 claiming themselves to be gotias of Mt. Sahodra cut and removed the paddy crops which had been grown on the suit lands on behalf of the plaintiffs on 18th November 1926, thereby completely ousting the plaintiffs from possession of the same. Hence the plaintiffs instituted the present suit for recovery of possession of

these 25 bighas of land after ousting defendants 1 and 2 and they claimed certain amount of mesne profits. Defendants 1 and 2 in their defence asserted that the suit was barred by limitation, that the kabuliat which had been propounded by the plaintiffs in support of the case that Mt. Sahodra was granted a mokarari enuring for her life only was not genuine, and that the disputed land was given by the ancestors of the plaintiffs in perpetual mokarari istamrari by an unregistered patta on 18th March 1872. Reliance was placed on the entry in the Record of Rights of the year 1908. These defendants also stated in their defence that defendants second party was an occupancy raiyat in possession of the suit lands and has been so recognized in the Survey Department. The allegations of the plaintiffs regarding possession were seriously disputed. The appellants after the filing of the written statement just referred to impleaded Govind Prasad Pandey as defendant second party who filed a separate written statement supporting in the main the allegations of the defendants first party.

The learned Subordinate Judge in an elaborate judgment has come to the conclusion that the kabuliat (Ex. 1) relied upon by the plaintiffs was a genuine document executed by Mt. Sahodra, that the mukarari rights, which were conferred upon the Musammat by means of the patta, (not produced), of which the kabuliat is a counterpart, were to last for the lifetime of Mt. Sahodra only and that the oral and documentary evidence regarding the plaintiffs having obtained possession of the disputed lands in 1926 and their having been dispossessed in November 1926, was utterly unreliable and not worthy of credence. The learned Subordinate Judge further held that the survey entry regarding the possession of the defendants second party as an occupancy raiyat of the lands in suit was correct. Upon these findings, which cannot be seriously assailed, supported as they are by good oral and documentary evidence, the appeal of the plaintiffs must fail. We have heard Mr. P. R. Das in support of the appeal. He has been unable to satisfy us that the judgment of the learned Subordinate Judge can be successfully assailed, even assuming that the plaintiffs have been able to prove that the mukarari granted to the Musammat conferred upon her rights enuring for her life only. This was seriously challenged by the respondents and this contention will be considered at some length while considering the cross-appeal. In the result the appeal of the plaintiffs fails and must be dismissed.

I now come to the cross-appeal filed by the respondents, namely defendants 1 and 2. The contention which has been seriously put forward on their behalf is that the learned Subordinate Judge was in error in holding upon a construction of the kabuliat that Mt. Sahodra obtained rights enuring for her lifetime only by means of the mukarari grant of 1872 and that he should have held that the rights conferred upon the Musammat were in the nature of a mukarari grant for perpetuity so that on her death the right to remain in possession of the suit lands was with these appellants who have been found to be in possession ever since in their capacity as reversioners of the estate represented by her. In the alternative it was argued on their behalf that the Musammat asserted a permanent mukarari right on 23rd February 1908, at the attestation stage before the survey authorities and since then she was in possession under open assertion of an adverse right and that by the lapse of 12 years ending in 1920 or 1921 before her death the Musammat must be held to have acquired a permanent mukarari right.

At the outset it must be observed that neither of the parties in the Court below urged, nor the learned Subordinate Judge took into consideration that the kabuliat (Ex. 1) could not be used in evidence in order to determine the nature and terms of the tenancy created admittedly on 18th March 1872; because it is unregistered. Similarly the patta (although it has not been produced) being unregistered could not be considered by virtue of S. 49, Registration Act, to determine the terms upon which this tenancy was created. The law is quite clear upon this point. The learned advocates for both sides appearing before us conceded that the terms of the tenancy could not be determined by looking at the unregistered kabuliat or the patta and that the present controversy must be decided upon such other admissible evidence as may be found upon the record. What then is the evidence which could be relied upon? Mr. J. M. Ghosh who appeared for the plaintiffs on the first day of the hearing before us attempted to show that the entry in the survey Record of Rights dated 13th August 1908 (Ex. H) was erroneous. That entry records Mt. Sahodra as a tenure-holder for 16.37 acres of land liable to pay Rs. 16-1-9

as rent under patta dated 18th March 1872 to the superior landlord, namely the predecessors of the plaintiffs. The entry in col. 11 which indicates the nature, conditions and incidents of the tenure is "mokarrari istamrari." It was argued on the basis of Ex. 27 and Ex. 29 that this entry was incorrect. Ex. 27 is a petition of objection filed by Mt. Sahodra on 23rd February 1908, under S. 103-A, Bengal Tenancy Act, asking for a relief in the following words:

> Khewat No. 1 relates to istimrari mukarari interest of the first party. At the time of attestation through the mistake of the karpardaz of the first party the words "for life" have been written in col. 10. It is prayed that the word "perpetual" may be substituted for the words "for life" in col. 10 of khewat No. 1 relating to istimrari mukarari interest of the first party.

Exhibit 29 is an order sheet of the survey officer. On 10th April 1908 that officer ordered a notice to the parties to appear before him on 18th April 1908 to dispose of the objection petition (Ex. 27). On 18th April 1908 the order runs "objector absent, case struck off." It was therefore argued by Mr. J. M. Ghosh that in the absence of any evidence adduced on behalf of Mt. Sahodra the survey authorities were not justified in making the entry as indicated already. He also pointed out that Exs. 26 and 28 showed that there was no record of any proceedings under Secs. 105 and 106, Ben. Ten. Act, in respect of this entry. In other words the argument before us on the first day was that the entry in the Record of Rights is based upon no materials whatever and should be held to be incorrect in face of the previous petition (Ex. 27) which was disposed of in the absence of the objector. Mr. P. R. Das who appeared for the plaintiffs on the following day adopted a different line of reasoning. He argued that the entry in the survey Record of Rights (Ex. H) must be presumed to be correct as provided by S. 103-B, Ben. Ten. Act. But he argued that the entry only describes Mt. Sahodra as "mukarari istimraridar" and on referring to a number of cases decided by their Lordships of the Judicial Committee he submitted that the words "istimrari mukarari" did not necessarily mean a mukarari which is perpetual but it may mean mukarari to enure for life only. The difficulty in accepting this argument is that cases which were relied upon by the learned counsel are cases which deal with the construction of a document of title in which the words 'mukarari istimrari' were used but do not help us in deciding the matter when the term is used by the survey authorities. Now looking to the Guide and Glossary of the Survey and Settlement Operations in the Patna and Bhagalpur Divisions (in which the land in suit lies) of the year 1907, it is clear that the survey authorities used the words "istimrari mukarari" as having a special meaning. At page 18 the words "istimrari mukarari" are definitely used to mean "a tenure held in perpetuity at a fixed rent" and in the remarks column it is stated that when the words "mukarari istimrari" are found in the records by itself unqualified, it should be held to mean "a tenure held in perpetuity at fixed rates." I therefore conclude that the survey authorities intended to convey by the expression used in col. 11 of Ex. H that Mt. Sahodra was a permanent mukararidar at fixed rent. It can be reasonably assumed that there are other papers, which have not been produced before us, which would show why the survey authorities, notwithstanding their having rejected the application of objection of Mt. Sahodra on 18th April 1908, in default of her appearance, ultimately decided that her claim was correct. It is well known that an entry in the survey Record of Rights carries with it a statutory presumption of correctness and the onus is upon the person, who alleges that the entry is incorrect, to prove by evidence that it is so. In the present case I am satisfied that the entry has not been proved by any evidence to be incorrect; and indeed as pointed out above, Mr. Das appearing for the plaintiffs relies upon the entry as being correct but wanted to place a different interpretation thereupon.

The pleadings of the parties show that the plaintiffs' case was that Mt. Sahodra was a mukararidar for her life only. The defendants on the other hand in para. 11 of the written statement asserted that the settlement with Mt. Sahodra was a perpetual mukarari. Both parties therefore agreed that there was a settlement but they do not agree as to the terms and incidents of that settlement. In these circumstances, it is for the plaintiffs, who sue in ejectment, to establish satisfactorily the nature of the grant. The plaintiffs are unable to give any evidence apart from the kabuliyat, which is inadmissible in evidence, and therefore the suit for recovery of possession must fail upon the simple ground that they have been unable to show that the entry in the survey Record of Rights is incorrect, and that the rights of Mt. Sahodra termina-

ted in law on her death in 1926 and that the defendants first and second party obtained no right after her death.

The defendants argued as an alternative case that in any event the assertion by Mt. Sahodra in 1908 by means of the petition (Ex. 27) gave the plaintiffs a cause of action to institute a suit for recovery of possession and as they failed to do so the Musammat must be held to have acquired title as a permanent mukarariдar by mere assertion of that right and by continuing in possession thereafter of the lands in suit under that right from that date for a period of more than 12 years. It is unnecessary to consider whether a tenant who is let into occupation for a limited term can, during the continuance of that term, by mere assertion, acquire a higher title than what was given to her on the date of her entering into possession. But in the circumstances of this case I must conclude that as the plaintiff has been unable to prove the terms of the tenancy created in favour of Mt. Sahodra on 18th March 1872 it must be assumed in the absence of evidence to the contrary that the tenancy was tenancy from year to year, *see* (1853) 9 Ex 50[1] at p. 52, or a tenancy-at-will. Such a tenancy can be determined on the expiry of the year or by a mere demand for or suing for possession. When Mt. Sahodra asserted in 1908 that she was not a tenant-at-will or a yearly tenant but was a mukarariдar in perpetuity she asserted title hostile to the plaintiffs' ancestors and cause of action accrued to them to resume possession of the 25 bighas of land either immediately or at least on the expiry of that year of tenancy. No such suit was instituted nor is there any evidence that the terms upon which the Musammat was to hold the lands in future were altered by any agreement; but on the other hand the entry in the survey Record of Rights being distinctly to the knowledge of the plaintiffs' ancestors recording her as a permanent mukarariдar, was allowed to remain unchallenged. It must follow that the suit of the plaintiffs which has been instituted in 1931 is hopelessly barred by time.

I would therefore allow the cross-appeal of the respondents and dismiss the suit of the plaintiffs. In dealing with the question of costs it must be remembered that the defendants first party have succeeded because it was discovered by my learned brother when the argument began that the documents of title were inadmissible in evidence for want of registration and this point was never agitated in the Courts below. I would accordingly order that the defendant second party should have his costs of this Court and the Court below. The appeal of the plaintiffs will be dismissed with costs in this Court. The plaintiffs will bear their own costs throughout and the cross-appeal is allowed without costs.

Mohamad Noor J.—I agree.

D.S./R.K. *Appeal dismissed.*

1. Martin v. Smith, (1853) 9 Ex 50=43 L J Ex 42=30 L T 268=22 W R 336.

A. I. R. 1940 Patna 40

VARMA AND MANOHAR LALL JJ.

Smt. Indu Prova Debi — Appellant.

v.

Durga Charan Mitra and another — Respondents.

Appeal No. 120 of 1937, Decided on 28th August 1939, from original decree of Sub-Judge, Deoghar, D/- 31st March 1937.

(a) Administration —Person obtaining letters of administration with will annexed—It cannot be presumed that all legacies or at least legacy in favour of that person has not been paid.

The mere fact that a person obtained letters of administration with will annexed from the Court is no evidence to prove that the estate must be assumed to have been still unadministered nor that the Court should presume that all the legacies or at least the legacy in favour of that person has not been paid in accordance with the tenor of the will: *A I R 1918 Cal 1035* and *A I R 1937 Cal 1204*, *Rel. on.* [P 43 C 1]

(b) Administration —Mortgage of immovable property by legatee before obtaining assent of executor to legacy is valid.

Where a legatee under a will mortgages an immovable property left to him by the testator before obtaining the assent of the executor to the legacy, the property can form the subject-matter of a valid mortgage and the mortgagee is entitled to cut off the equity of redemption. The reason for the rule is that although the legatees have no property in the legacies by the devise until the assent of the executor is obtained, they have an interest in them which is capable of being transferred. In other words though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the will: *AIR 1923 Cal 21*, *Rel. on.* [P 43 C 2]

(c) Administration — How residue is ascertained stated.

There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore until the costs

have been paid the net residue cannot be arrived at all : *(1876) 4 Ch D 53 and (1920) 1 K B 468, Rel. on.* [P 44 C 1]

(d) Succession Act (1925), S. 335 (2) —Executor executing mortgage in his individual capacity as legatee and applying money to his own use—His assent to legacy in his own favour is inferred.

Where an executor executes a mortgage in his individual capacity as a legatee with respect to the properties bequeathed to him and applies the money to his own use, the executor can be taken to have assented to the legacy in his own favour. [P 44 C 1]

(e) Succession Act (1925), S. 332 —Executor can give assent to legacy even before obtaining probate of will.

The estate of the testator vests in the executor, if he accepts office, from the date of the testator's death and he has the powers of an executor under the Probate and Administration Act even though probate has not been obtained. Hence, the executor has power to give assent to a legacy as an executor even before he obtained the probate of the will : *A I R 1932 P C 92, Rel. on; 27 Cal 683, held, Overruled.* [P 44 C 2]

(f) Administration — Legatee can recover his specific legacy by suing for amount from persons in possession of property of testator as transferees.

If the testator left no other property than the property in suit it is always open to the legatee to recover his specific legacy, if he brings an appropriate action and there is no other obstacles by way of limitation or otherwise in his way by suing for the amount from the persons in possession of the property of the testator as transferees. The transferees of the residuary legatee or residuary legatees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees : *A I R 1923 Cal 21, Rel. on.* [P 44 C 2]

S. N. Bose, S. S. Rakshit and S. K. Sarkar — *for Appellant.*

P. R. Das and S. Mustafi — *for Respondents.*

Manohar Lall J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Deoghar dismissing the suit of the plaintiff which was instituted by her as a person to whom letters of administration were granted, for recovery of possession of the properties in suit belonging to the estate of the testator (who left a legacy in her favour) which passed to the possession of the respondent in the circumstances narrated below. The case of the plaintiff very briefly stated is this. One Gopal Chandra Chatterji had three sons, namely (1) Kali Prasanna Chatterji, (2) Siva Prasanna Chatterji and (3) Sarda Prasad Chatterji who died leaving the plaintiff as his widow and one Ganesh Chandra Chatterji as their son. Some time before 1923, Siva Prasanna Chatterji, after the death of his father, executed a will regarding his property in favour of his nephew Ganesh Chandra Chatterji and nominated him as his executor. Siva Prasanna died on 18th September 1923. In the same year on 8th December Kali Prasanna Chatterji executed another will in which he left a legacy to the plaintiff for Rs. 2000 and three other legacies for a total sum of Rs. 4200. By this will Ganesh was appointed as the executor. Kali Prasanna died on 13th November 1924 leaving the aforesaid will as his last will and testament which is Ex. 1 in this case. In the will he after setting out the specific legacies stated by me just now, bequeathed

> all the rest residue and remainder of my estate . . . after payment of my funeral and testamentary expenses and just debts and the legacies bequeathed . . . . . unto and to the use of my said nephew Ganesh Chandra Chatterji for his own absolute use and benefit.

In other words Ganesh Chandra Chatterji was both the executor and residuary legatee under this will of his uncle. On 10th September 1925 Ganesh Chandra executed a mortgage (Ex. 2) by which he mortgaged the properties in suit in favour of the Hindustan Co-operative Insurance Society, Ltd., (hereinafter referred to as the society) who is defendant 2 and the only contesting respondent before us. The mortgage was to secure an advance of Rupees 1,05,000. The purpose of the loan was to administer the estate of Siva Prasanna, who appointed the mortgagor as his executor under the will of 18th September 1923, already referred to. So far as the properties in suit are concerned, the mortgagor expressly stated that he was absolutely seised and possessed of or otherwise well and sufficiently entitled to them and that he was executing the mortgage in his individual capacity. So far as other properties of Siva Prasanna were included in this mortgage bond, the mortgagor expressly purported to give the mortgage in his own capacity as executor of Siva Prasanna. It was further stipulated in this document that the mortgagor will within six months obtain a probate of the will of his uncle Kali Prasanna under which he claimed the properties described in Sch. 3 and will execute a deed in favour of the mortgagees confirming these presents and in case the mortgagor failed to do that within the period of six months, he will repay to the mortgagees a sum of Rs. 30,000 out of the principal sum of Rs. 1,05,000 on the said terms. The mortgagor did not carry out

this undertaking and the mortgagee instituted a suit in 1927 in the Calcutta High Court to enforce the mortgage of 1925. The society duly obtained a preliminary decree in January 1928, the decree was made final in December 1928. The properties mortgaged were ordered to be put to sale and the date fixed for the sale was 19th June 1931. The properties were accordingly sold and were purchased by defendant 1 who subsequently transferred his interest to the society, defendant 2. The sale certificate was duly granted on 5th August 1931 to the auction-purchaser. The sale certificate was transferred to the Court of Dumka for delivery of possession on 23rd July 1932. An objection by the plaintiff to this delivery of possession was rejected and the delivery of possession was ordered on 8th September 1932. That matter came to this Court and by an order of 28th March 1933 (Ex. F) in Civil Revn. No. 619 of 1932, Macpherson J. affirmed the order of the lower Court but set it aside in so far as the property consisted of the holdings of a raiyat or a part thereof on the ground that transfers of this kind of property were invalid under S. 27 of Regn. III of 1872.

In the meantime, the plaintiff on 16th June 1931, applied for letters of administration with the will of the late Kali Prasanna annexed before the District Judge of Dumka. A notice was issued to the executor named in the will who renounced his executorship on 18th of July 1931. The letters of administration were granted without any opposition on 21st September 1932, and the present suit was instituted on 5th September 1933 asking for reliefs in the form that the plaintiff has a right to hold possession over the properties in suit as administratrix of the estate of Kali Prasanna Chhatterji. She desired possession of those properties from the society after vacating the order of the learned Subordinate Judge which was affirmed by this Court to the extent indicated by the order of 28th March 1933. The events narrated above are strong indications of the correctness of the view that the appellant applied for letters of administration simply with a view to avoid or obstruct the contemplated sale fixed for 19th June 1931; but this consideration is wholly irrelevant. The plaintiff is always entitled to rely upon her rights and if these are established in accordance with law the Court is bound to give proper relief to her irrespective of the motive which induced her to obtain letters of administration and then to institute the suit.

The real question is whether a legatee, to whom letters of administration with copy of the will annexed have been granted, is entitled to institute a suit for recovery of possession of the estate which has passed out of the possession of the executor as a result of a transaction entered into with the defendants by the executor in his character as the residuary legatee before he renounced the executorship without taking out probate. It is necessary in the first instance to determine whether the estate of Kali Prasanna Chatterji was unadministered on the date of the present suit. The plaintiff alleged in para. 5 of the plaint that the executor Ganesh Chandra Chatterjee did not take any steps for obtaining probate of the will of the testator, nor did he make any payment to the plaintiff and other persons according to the directions in the will and subsequently he openly renounced the executorship. The defendants refused to admit the correctness of these allegations in para. 4 of the written statement and they asserted that no legacies remained to be paid out of the estate of Kali Prasanna Chatterji. In the face of these pleadings the onus was upon the plaintiff to prove that the estate remained unadministered. No evidence at all was offered by the plaintiff in the present case; it is significant that neither of the three legatees are made parties to this action, nor has any of them, including the executor and the plaintiff, chosen to come forward to give evidence to support the allegation of the plaintiff that the legacies still remained unpaid. But it was argued by the learned advocate for the appellant that as soon as it is established that letters of administration with will annexed have been granted by the Court of the District Judge to the plaintiff it must be presumed in law that the specific legacies, or at least the legacy in favour of the plaintiff, was still due on the date when the letters of administration were granted on 16th June 1931 and that the same state of affairs should be assumed to continue on 5th September 1933, the date when the present suit was filed. The current of authority however is against this view. It is enough to refer to two cases of the Calcutta High Court, namely 21 C W N 1129[1] and 41 C W N

1. Adwait Ch. Mondal v. Krishnadhone Sarkar, (1918) 5 A I R Cal 1035 = 42 I C 933 = 21 C W N 1129.

1204.[2] In the former case it was held that
where a will has been propounded and proved, the Probate Court should grant probate even though it should appear that there were no debts due to or by the testator and the legatees have been in possession in accordance with the directions of the will for a long time, it being absolutely necessary for the legatees to establish their title by proving the will,
and it was observed by the learned Judges that
the probate Court cannot go into the question whether the legatees have acquired independent title by adverse possession.

The case in 41 C W N 1204[2] expressly follows the case just referred to and it is directly laid down in this case that
in cases of testamentary succession, where there is a will and it has never been probated, the question whether the estate has or has not been already fully administered is not relevant and cannot be gone into by the Court in dealing with an application for probate or letters of administration.

In my opinion, therefore, the mere fact that the plaintiff obtained letters of administration with will annexed from the learned District Judge is no evidence to prove that the estate must be assumed to have been still unadministered nor that this Court should presume that all the legacies or at least the legacy in favour of the plaintiff has not been paid in accordance with the tenor of the will. The respondent, as already stated, obtained a title to remain in possession of the lands in suit by virtue of the sale in execution of a mortgage decree obtained on the footing of a mortgage bond which in my view must be taken to be executed by the executor in his personal capacity as a residuary legatee. Mr. P. R. Das, relying upon the case in 129 E R 87,[3] argued that it must be held that the mortgage was executed by the mortgagor in his capacity as an executor ; but I am not able to place such a construction upon the mortgage bond as this will involve, apart from straining the language used in the document, the inference that the executor committed a breach of trust. The recitals in the bond are clear that Ganesh Chandra Chatterji was executing the mortgage in order to raise funds not to administer the estate of Kali Prasanna Chatterji but to administer the estate of Shiva Prasanna Chatterji. Unless I am forced to come to the conclusion by the clear words used in the bond I must hold that no breach of trust was committed by the executor.

It is now well settled that where a legatee under a will mortgages an immovable property left to him by the testator before obtaining the assent of the executor to the legacy, the property could form the subject-matter of a valid mortgage, and the mortgagee is entitled to cut off the equity of redemption. The reason for the rule is that although the legatees have no property in the legacies by the devise until the assent of the executor is obtained, they have an interest in them which is capable of being transferred. In other words, as pointed out in 50 Cal 171[4] at p. 176 :

Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the will.

The question which is relevant to consider in these circumstances is whether the executor assented to the legacy. The facts speak for themselves. A useful illustration of how to determine whether there was an assent by an executor, which may be by conduct, to a legacy is afforded by the case in (1930) 1 K B 713.[5] The Master of the Rolls at page 733 observes :

All the relevant matters must be taken into consideration and, as Rowlatt J. says in his judgment in the present case, you may have an assent by conduct : 'When it is said that the executor 'assents to a bequest,' what is meant is not that he assents to the disposition of the testator, but that he assents to its taking effect upon the specific property if the bequest is specific, upon a sum of money if it is pecuniary, or upon the residue brought out by the executor at the end of the administration if it is a residuary bequest. Lord Haldane's exposition in (1913) A C 76[6] makes this clear. The assent of the executor, it is important to add, may be inferred, when there is clearly nothing more to be done by way of administration.

The other Lord Justices took the same view. It was faintly argued that until the residue is ascertained the residuary legatee was not in a position to transfer his rights to the defendants. In the present case it is admitted and proved that all the outgoings, as provided by the testator in the will, had been paid off before the mortgage of 1925, at least there is no evidence to the contrary. The principle applicable is expressed by Sir George Jessel in (1876) 4 Ch D 53[7] at p. 56 where he says :

2. Durgapada Bera v. Atul Chandra Bera, (1937) 24 A I R Cal 595=I L R (1938) 1 Cal 75=41 C W N 1204.
3. Doe v. Sturges, 129 E R 87.
4. Khagendra Nath Mookerjee v. Khetra Nath Pal, (1923) 10 A I R Cal 21=71 I C 314 = 50 Cal 171=36 C L J 21.
5. Commissioners of Inland Revenue v. Smith, (1930) 1 K B 713 = 99 L J K B 361 = 142 L T 517.
6. Attenborough v. Solomon, (1913) A C 76 = 82 L J Ch 178=107 L T 833 = 57 S J 76 = 29 T L R 79.
7. Trethewy v. Helyar, (1876) 4 Ch D 53 = 46 L J Ch 125.

> It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle.

See also (1920) 1 K B 468.[8] Applying these tests to the present case as I have stated just now the facts speak for themselves. There is no proof in the present case that any of the specific legacies remained to be paid out. S. 332, Succession Act (Act 39 of 1925), provides that the assent of the executor is necessary to complete the legatee's title to his own legacy and by S. 335 it is provided that when the executor is a legatee his assent to his own legacy is necessary to complete his title to it and his assent may be express or implied. Sub-cl. (2) provides that assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor. The illustration to the Section is of an executor who took the rent of a house or the interest of Government securities bequeathed to him and applied it to his own use and this is stated to be an assent. In the present case the mortgage was by the executor in his individual capacity as a legatee with respect to the properties bequeathed to him. He applied the money to his own use, because as I have pointed out already, the loan was taken by him not to administer the estate of his testator Kali Prasanna Chatterji. It follows by applying the principles in the English cases referred to above and also as provided by the Sections of the Succession Act referred to above that the executor assented to the legacy in his own favour on the date he gave the mortgage to the defendants. It was then argued by Mr. S. N. Bose appearing for the appellant that the executor has no power to give assent as an executor before he obtained the probate of the will and as in this case no probate was ever obtained the assent given by the executor to himself as a residuary legatee was no assent in the eye of the law. A short answer to this contention is afforded by the case in 59 I A 112[9] where their Lordships have authoritatively laid down that

> the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor under the Probate and Administration Act, 1881, even though probate has not been obtained.

In the present case the will has been duly proved before the Probate Court anterior to the suit. Mr. Bose sought to get over the difficulties thus created in his way by arguing that Ganesh Chandra Chatterji, the executor, having renounced his executorship in July 1931 and he never having taken out any probate, the assent by him would be inoperative to pass any title to the defendants. He relied upon the case in 27 Cal 683[10] where the learned Judges made this observation at page 688 :

> It is only the executors who have obtained probate that can act as representatives of the testator; and we think it but reasonable that an executor who renounces or refuses or is unable to act should be regarded as if he had never been appointed.

This view seems to have been the older view of the Calcutta High Court but this was negatived by their Lordships of the Judicial Committee in the case referred to above. The present suit is not a suit by a legatee to recover his specific legacy from the person in possession of the testator's estate. The learned Subordinate Judge observes that Kali Prasanna Chatterji left two other houses worth about Rs. 4000 in Jasidih Bazar. Be that as it may, if the testator left no other property than the property in suit, it is always open to the legatee to recover his specific legacy, if he brings an appropriate action and there is no other obstacles by way of limitation or otherwise in his way, by suing for the amount from the persons in possession of the property of the testator as transferees. The transferees of the residuary legatee or the residuary legatees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees : *see* 50 Cal 171[4] already referred to. For the reasons given above I am of opinion that the appeal fails and should be dismissed with costs.

Varma J. — I agree.

D.S./R.K. *Appeal dismissed.*

8. The King v. Commissioners for the special purposes of the Income-tax Acts, (1920) 1 K B 468=89 L J K B 194=122 L T 389=36 T L R 123=64 S J 107.
9. Venkata Subamma v. Ramayya, (1932) 19 AIR P C 92= 59 I A 112 = 55 Mad 443 (PC).
10. Satya Prashad Pal v. Motilal Pal, (1900) 27 Cal 683.

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ROWLAND AND CHATTERJI JJ.

Mir Wajid Ali and another —
Plaintiffs — Appellants.

v.

Alidad Khan and others — *Defendants* — Respondents.

Appeals Nos. 5 and 17 of 1938, Decided on 3rd August 1939, from appellate decree of Dist. Judge, Manbhum, D/- 20th June 1937.

(a) Mortgage—Redemption—Shares of some mortgagors purchased by mortgagee in execution of money decree—Other mortgagors not impleaded in that suit cannot claim redemption of these shares.

Where a mortgagee brings a suit omitting a necessary party and obtains a decree and purchases the mortgaged property in execution thereof, the mortgage decree and the execution sale are of no effect as against the person who was not impleaded in the mortgage suit, and he is entitled to treat the entire mortgage as subsisting and can therefore ask for its redemption in its entirety. The position is quite different where the equity of redemption of some of the mortgagors has been effectively sold and purchased by the mortgagee himself, at a private sale or in execution of a money decree. [P 46 C 1]

Where the shares of some of the mortgagors are effectively sold and purchased by the mortgagee in execution of money decrees the equity of redemption with respect to those shares is extinguished and redemption of those shares cannot be claimed by the other mortgagors whose interests were unaffected by the decrees or the execution proceedings: *32 Cal 296 (P C), Applied.* [P 46 C 2]

(b) Adverse possession—Mortgagee's possession during continuance of mortgage is not adverse to mortgagor.

A mortgagee who enters into possession of the mortgaged property in his capacity as a mortgagee can never during the continuance of the mortgage assert any adverse possession against the mortgagor. The mortgagor's right to redeem remains alive for sixty years and no question of adverse possession arises until after the expiration of that period: *32 Cal 296 (P C) and A I R 1925 All 133, Rel. on ; A I R 1922 Mad 407, Disting.* [P 47 C 1]

R. S. Chatterji and Majibur Rahman (in No. 5) and M. Yunus and S. C. Mazumdar (in No. 17) — *for Appellants.*

M. Yunus and S. C. Mazumdar (in No. 5) and R. S. Chatterji and Majibur Rahman (in No. 17) — *for Respondents.*

Chatterji J.—These two appeals arise out of a suit for redemption of four annas share in certain properties described in schs. 1 and 2 of the plaint. The entire sixteen annas belonged in equal shares to four persons, Eshan Ali, Junab Ali, Kurban Ali and Imdad Ali, of whom the first three were brothers and the fourth was their nephew. These four persons executed an usufructuary mortgage on 26th August 1875 in respect of sch. 1 properties in favour of Maddey Khan, father of defendants 1 to 4. Again, on 30th June 1877, the same four persons executed another usufructuary mortgage in respect of schedule 2 properties in favour of Maddey Khan. Later in 1877 Kurban Ali's $\frac{1}{4}$th share was released and again in 1907 Imdad Ali's $\frac{1}{4}$th share was released on payment of their respective quotas of the mortgage debt. Similarly, Junab Ali's $\frac{1}{4}$th share was also released and it was subsequently purchased by the mortgagee. Thus the mortgage was left only with respect to the four annas share of Eshan Ali. After Eshan Ali's death, some of his sons dispossessed the mortgagee from some of the mortgaged plots. The mortgagee then brought a suit for recovery of possession against those sons and obtained a decree with costs. The decree for costs was put in execution in Execution Case No. 80 of 1881 in which the mortgagee purchased the entire four annas share of Eshan Ali in April 1881. On 10th April 1920 the plaintiffs of whom No. 1 is a grandson and No. 2 is a great-grandson of Eshan Ali deposited $\frac{1}{4}$th share of the mortgage money under the provisions of S. 83, T. P. Act; but the mortgagee appeared and denied the right of the plaintiffs with the result that the case was struck off. The plaintiffs brought the present suit for redemption on 9th April 1936. As between them No. 1 claims three annas and No. 2 one anna.

The suit was contested on various grounds but those with which we are concerned in these appeals are that Maddey Khan had purchased the entire share of Eshan Ali in 1881 in execution of his decree for costs and therefore the plaintiffs have no subsisting interest and are not entitled to redeem and that Maddey Khan since his purchase was in possession of the purchased share as a full owner adversely to the heirs of Eshan Ali and therefore acquired a title by adverse possession. There was some dispute with regard to the share of Eshan Ali, but the finding of fact is that he had four annas. It has also been found by the Courts below that Mardan Ali, grandfather of plaintiff 2, was a surviving son of Eshan Ali but he was not a party to the decree in execution of which Maddey Khan purchased the four annas share in 1881 and therefore his

interest was not affected by the decree or the execution sale. It has been further found that his interest was one anna which now belongs to plaintiff 2. As regards the remaining three annas share which is claimed by plaintiff 1, the learned Munsif, for reasons which need not be stated, held that the auction-purchase of Maddey Khan was inoperative. In this view he decreed the suit and allowed redemption in respect of the entire four annas. On appeal the learned District Judge, taking a contrary view as to the effect of Maddey Khan's auction-purchase of the three annas share claimed by plaintiff 1, has held that plaintiff 2 alone is entitled to redeem his one anna share. He has made a decree accordingly. Against that decree these two appeals have been preferred, Appeal No. 5 by the plaintiffs and Appeal No. 17 by defendants 1 to 3.

In the plaintiffs' appeal No. 5 the only substantial point urged by Mr. Chatterji is that plaintiff 2 not being bound by the proceedings as the result of which Maddey Khan purchased the four annas share in claim, his right as a co-mortgagor to redeem the entire four annas remained unaffected as the mortgage was indivisible. In support of this contention reliance is placed on the decision of this Court in 8 P L T 81[1] and the decision of the Privy Council in 48 Cal 22.[2] What was held in both these cases was that where a mortgagee obtained a mortgage decree without impleading the purchaser of a portion of the mortgaged properties and in execution of such decree purchased the mortgaged properties, it was open to the purchaser who was omitted from the mortgage suit to sue for redemption of the entire mortgage. The principle underlying these decisions is well settled. Where the mortgagee brings a suit omitting a necessary party and obtained a decree and purchases the mortgaged property in execution thereof, the mortgage decree and the execution sale are of no effect as against the person who was not impleaded in the mortgage suit, and he is entitled to treat the entire mortgage as subsisting and can therefore ask for its redemption in its entirety. The position is quite different where the equity of redemption of some of the mortgagors has been effectively sold and purchased by the mortgagee himself, at a private sale or in execution of a money decree.

In the present case the mortgagee in execution of a money decree validly purchased the equity of redemption with respect to a three annas share out of the four annas in question. Plaintiff 2 can on no account object to the decree or the execution sale so far as the three annas share is concerned. It is not open to him to contend that he is entitled to treat the entire mortgage of the four annas as still subsisting. The effect of the mortgagee's purchase of the three annas share was to wipe out the equity of redemption in respect of that share. The mortgage cannot be said to be subsisting so far as that share is concerned.

In the Privy Council case in 32 Cal 296[3] though the facts were peculiar and somewhat different, their Lordship held that where the shares of some of the mortgagors were effectively sold and purchased by the mortgagee in execution of decrees the equity of redemption with respect to those shares was extinguished and redemption of those shares could not be claimed by the other mortgagors whose interests were unaffected by the decrees or the execution proceedings. In that case the plaintiffs sued for redemption of two usufructuary mortgages of 1878. The defence inter alia was that the mortgagees had purchased the mortgaged properties in execution of two decrees and therefore the plaintiffs had no subsisting right of redemption. One of the decrees was a simple money decree and the other was obtained by one of three mortgagees under an earlier mortgage of 1874 in a suit for recovery of his share of the earlier mortgage debt. It is not clear whether the latter decree was regarded as a mortgage decree or was enforced as such. It was found as a fact that some of the mortgagors or their representatives were not parties to the decrees or the execution proceedings in which the mortgagees purchased the properties and therefore their interests were not affected by the execution sales. The first Appellate Court allowed redemption of the entire mortgages though the plaintiffs, rather some of them, were found to be interested in certain shares only of the mortgaged properties. Their Lordships of the Judicial Committee reversed that decree holding that the plaintiffs were not entitled to redeem the shares of those persons who were parties to the decrees or the execution proceedings and

1. Promotha Nath Mitter v. Ram Kishun Singh, (1927) 14 A I R Pat 25=97 I C 386=8 P L T 81.

2. Yadalli Beg v. Tukaram, (1921) 8 A I R P C 125=57 I C 535=47 I A 207=48 Cal 22 (P C).

3. Khiarajmal v. Daim, (1905) 32 Cal 296=32 I A 23=1 C L J 584=8 Sar 734 (P C).

accordingly their Lordships allowed redemption only in respect of those shares which were found not to have passed by the execution sales. Though the question of indivisibility of a mortgage was not expressly raised in the case, the principle on which the decision was based, I think, can be equally applied in the present case. In my opinion therefore the learned District Judge was quite right in holding that plaintiff 2 was entitled to redeem his one anna share only.

I may observe that it is open to question whether the principle of indivisibility of a mortgage can apply in the present case because the integrity of the mortgage was already broken when the respective shares of Junab, Kurban and Imdad were separately released.

Another small point has been urged on behalf of the appellants which relates to the form of the decrees. It appears that in the decree which has been passed by the learned District Judge it has been ordered that plaintiff 2's right to redeem will be barred in case he fails to deposit the amount found due within the time allowed; but O. 34, R. 7 provides that in default of payment within the time specified, the defendant will be entitled to apply for a final decree of the kind mentioned in sub-r. (1), cl. (c) (2), sub-cls. (a) and (b). The decree must be in accordance with these provisions.

Coming now to the defendants' appeal No. 17, the only point urged is that the mortgagee acquired a title by adverse possession to the one anna share of plaintiff 2. It is urged that since his purchase in April 1881, Maddey Khan asserted his rights as a full owner and he was recorded as such in the Record of Rights finally published on 26th July 1921, the entry being made after contest. The simple answer is that a mortgagee who enters into possession of the mortgaged property in his capacity as a mortgagee can never during the continuance of the mortgage assert any adverse possession against the mortgagor. The mortgagor's right to redeem remains alive for sixty years and no question of adverse possession arises until after the expiration of that period.

Mr. Yunus had relied upon a decision of the Bombay High Court in 24 Bom L R 287[4] and a decision of the Madras High Court in 42 M L J 144.[5] Indeed the Bombay case does support his contention; but it stands by itself and does not refer to any reported decision. The trend of decisions however goes the other way. In the Privy Council case, 32 Cal 296[3] cited above, the question of adverse possession was raised but their Lordships held that as between the mortgagor and mortgagee exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years will be no bar or defence to a suit for redemption if the party is otherwise entitled to redeem. I may also refer to the decision of the Allahabad High Court in 47 All 73[6] which is to the same effect. The facts of the Madras case, 42 M L J 144,[5] were quite different because in that case there was a previous decision of a Court *inter partes* that the relationship of mortgagee and mortgagor never in fact existed. In my opinion there is no merit in the defendants' appeal which must be dismissed with costs.

Subject to the modification in the form of the decree mentioned above, I would also dismiss the plaintiffs' appeal with costs.

Rowland J. — I agree.

D.S./R.K. *Appeals dismissed.*

4. Ibrahim Ghulamhusain v. Mohiuddin Balku, (1922) 9 A I R Bom 1 = 67 I C 219=24 Bom L R 287.

5. Omayurupagam Mutt v. Sivasooria Thevan, (1922) 9 A I R Mad 407=70 I C 33=42 M L J 144.

6. Bakha Singh v. Ram Narain Singh, (1925) 12 A I R All 133 = 80 I C 935 = 47 All 73 = 22 A L J 905.

A. I. R. 1940 Patna 47

AGARWALA J.

Hari Mohan Ojha and another — Appellants.

v.

Bansdhaj Pathak and another — Respondents.

Second Appeal No. 554 of 1937, Decided on 17th August 1939, from appellate decree of Sub-Judge, Purulia, D/- 4th August 1937.

Civil P. C. (1908), O. 41, R. 33 — Appellate Court can alter decree of trial Court in favour of plaintiff who is respondent to appeal even if he had not appealed from it.

Order 41, Rule 33 confers upon the Appellate Court very wide powers to pass such orders as may dispose of the dispute between the parties to the litigation. The Rule expressly empowers a Court to pass an appropriate decree not only in favour of the appellant but in favour of any of the respondents or parties although such respondents or parties may not have filed an appeal or objection.

There is no bar therefore to the Appellate Court altering the decree of the trial Court in favour of the plaintiff who was a respondent to the appeal even if he had not appealed from it and even to the detriment of other respondents. [P 48 C 2]

R. S. Chatterji — *for Appellants.*

S. C. Mazumdar and N. N. Roy — *for Respondents.*

Judgment. — This second appeal was preferred by defendants 2 and 3 against the decision of the Subordinate Judge of Purulia reversing a decision of the Munsif. Since the filing of the appeal, defendant 3 has died. His heirs have been brought on the record as respondents. The appeal arises out of a suit brought by the plaintiff on a usufructuary mortgage executed by defendant 1. The plaintiff sought to obtain a money decree against the mortgagor for recovery of possession against defendants 2 and 3 who he alleged had dispossessed him from the mortgaged property. The mortgaged property belonged to three brothers, Jadu, Banamali, father of defendant 2 and Ananta, father of defendant 3. Jadu executed a kobala purporting to transfer his interest to his brother-in-law, defendant 1, the mortgagor. At the same time, defendants 2 and 3 executed a kobala purporting to transfer their interests to a relation. The defence of defendants 2 and 3 was that they and Jadu were joint and that on Jadu's death they succeeded by survivorship to his interest in the property. The sale by Jadu in favour of defendant 1 was said to be a benami transaction and it was alleged that after Jadu's death his wife took possession of his interest and remained in possession of it by way of maintenance until 1341. Defendant 1 denied that the sale to him was a benami sale and supported the case of the plaintiff mortgagee.

The first Court held that the sale to defendant 1 and the sales by defendants 2 and 3 were benami and that the three brothers were joint. Consequently, the first Court held that defendant 1 had no power to execute the mortgage in favour of the plaintiff and that he alone was liable to refund the money borrowed. Against that decision there was an appeal by defendant 1 alone. At the trial he sought to establish that the three brothers were separate and that the sale to him by Jadu was a real and not a benami transaction. This case has been accepted by the Court of Appeal below which consequently held that the mortgage was a good mortgage and awarded the plaintiff a decree for possession against defendants 2 and 3 with mesne profits.

In second appeal it is contended by the learned advocate for the appellants that the Court of Appeal below was wrong in regarding the sales as amounting to separation between the three brothers. The fact that the three brothers purported to deal with their interest independently of each other is certainly some evidence of separation. The matter is put beyond doubt by an admission by one of the appellants at the trial that he and the other appellant partitioned their interests between themselves. This admission also disposes of another point raised on behalf of the appellants. It was contended that the Court below had come to no finding that there was actual partition by metes and bounds of the interests of the three brothers. But if the appellants partitioned their interests between themselves, they could only have done so after the interest of Jadu had already been definitely separated. The last point urged in support of the appeal is that the Court of Appeal below should not have passed a decree for possession in favour of the plaintiff in an appeal by defendant 1 alone. It is urged that as plaintiff did not appeal from the decision of the trial Court giving him a money decree only against defendant 1, the Appellate Court had no power to alter the decree in his favour. O. 41, R. 33 however confers upon the Appellate Court very wide powers to pass such orders as may dispose of the dispute between the parties to the litigation. The Rule expressly empowers a Court to pass an appropriate decree not only in favour of the appellant but in favour of any of the respondents or parties although such respondents or parties may not have filed an appeal or objection. There is no bar therefore to the Court below altering the decree of the trial Court in favour of the plaintiff who was a respondent to the appeal. It was contended that although the Appellate Court may alter a decree in favour of a respondent who has not appealed, it has no power to do so to the detriment of other respondents. To adopt that contention would be to nullify the Rule altogether. There is no other point in this second appeal and it is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 49

HARRIES C. J. AND FAZL ALI J.

Khub Lal Chaudhuri and others —

Appellants.

v.

Bechan Mandal and others —

Respondents.

Second Appeal No. 315 of 1938, Decided on 21st September 1939, from appellate decree of Sub-Judge, Purnea, D/- 29th January 1938.

Evidence Act (1872), S. 92, Proviso (4) — Mortgage deed registered — Subsequent oral agreement varying terms of deed is inadmissible to prove discharge of mortgage.

Though it is always open to a mortgagor to prove that on a certain day he paid the sum due under the mortgage, still when in the registered mortgage deed there is an express term that payment should be made in a certain way and unless endorsed on the deed it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage. [P 50 C 1]

Hareshwar Prasad Sinha and R. K. Chaudhuri — *for Appellants.*

Harihar Prasad Sinha for Saiyid Hasan — *for Respondents.*

Harries C. J.—This is a plaintiffs' appeal against concurrent decrees of the Courts below passed in favour of the defendants. It appears that defendant 1 and his cousin Zalim owed a sum of Rs. 400 to one Darsan Mandal. To pay off this sum each of them borrowed Rs. 200 from the plaintiffs, and on 21st October 1928, defendant 1 and Zalim each executed mortgage bonds in favour of the plaintiffs. By these bonds they mortgaged their respective shares in certain holdings. The landlord of defendant 1 and Zalim obtained a rent decree against both of them and in due course put the property to sale. This was part of the property covered by the mortgages executed by defendant 1 and Zalim. On 8th May 1935, the property was to be put up for sale in satisfaction of the rent decree, the decretal amount being Rs. 93. On that day defendant 1 paid Rs. 45 in part satisfaction of the decree and obtained an adjournment of the sale to 3rd June 1935. On 3rd June 1935, the property was put up for sale and purchased by one Ramnath, a relation of the plaintiff, for Rs. 70. In August 1935 Ramnath took delivery of possession of the property. In the year 1936 the plaintiff brought two mortgage suits, one against Zalim and the other out of which this appeal arises against defendant 1. Zalim did not contest the suit and allowed it to be decreed ex parte. Defendant 1 however hotly contested the suit brought against him and alleged that the mortgage had been fully satisfied and discharged.

According to defendant 1, the mortgage was discharged by an arrangement entered into between the parties. As I have stated earlier, the holding in question in the present case was being put up for sale by the landlord in execution of a rent decree. Part of that decree had been satisfied and adjournment of the sale obtained. Defendant 1 had until 3rd June 1935, to pay the balance of the decree amounting to some Rs. 48; but it is said by arrangement between the plaintiffs and defendant 1 the latter refrained from paying the balance of the decree or from bidding at the sale and allowed the property which was worth, according to defendant 1, about Rs. 1500 to be sold to Ramnath as benamidar of the plaintiff for Rs. 70. It was agreed that this forbearance on the part of defendant 1 should be regarded as a complete discharge of the mortgage. Both the Courts below have accepted the defendant's version of the facts and have held that the mortgage was discharged. In second appeal however it has been urged that no oral evidence was admissible of this subsequent agreement which led to the discharge of the mortgage. Reliance has been placed upon Sec. 92, Proviso (4), Evidence Act, and that proviso is in these terms:

> The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

The plaintiffs contend that defendant 1 in this case has sought to prove an oral agreement rescinding or modifying the original agreement or contract between the parties. The mortgage was a transaction required by law to be in writing and was in fact registered. That being so, it is urged that no oral agreement can be proved varying the terms of that document. On the other hand, it is argued by the respondents that it is always open to a mortgagor to prove discharge or satisfaction of a mortgage by oral evidence. It is always open to a mortgagor to prove that on a certain day he paid the sum due under the mortgage. Such is not evidence of a subsequent oral agreement varying the terms of the mort-

gage. In the present case however defendant 1 cannot prove the discharge of this mortgage without proving an oral agreement varying one of the express terms of this contract. In the mortgage itself there is a stipulation as to payment and discharge and that term is in these words :

> And whatever money or interest I will pay for this bond will be first set off towards interest and compound interest and after this set off towards interest and compound interest the remainder will be set off towards the principal, that is to say no payment will be set off towards principal so long as the dues towards interest and compound interest will remain unpaid. The payment (that will be made), I will at once write and get it written on the back of this bond. I will not raise any objection (regarding payment) without its being endorsed on the back of the bond. That is to say I will not produce any receipt or evidence of witnesses regarding plea of payment. If I produce it, it will be deemed useless and incorrect.

In short there is an express term in this mortgage that payment towards either principal or interest could only be made in a certain way, and unless endorsed on the mortgage it should not be regarded as a payment at all. In these circumstances is it open to the mortgagor to attempt to prove discharge or satisfaction in any other manner? As long as this term remains payment can only be proved by endorsements on the mortgage bond. What defendant 1 now seeks to do is to establish that the mortgage has been discharged by reason of a verbal agreement which is in conflict with the express terms of the mortgage. Until the term as to payment in the mortgage is varied, a transaction such as is put forward by defendant 1 can never amount to a discharge. In my view the whole case of defendant 1 depends on a verbal agreement which modifies and varies the terms of this written and registered document. No such variation or modification is admissible in evidence unless it has been made by a written and registered document. In my judgment the Courts below should not have admitted oral evidence in this case to prove the agreement alleged by defendant 1 which amounted to satisfaction of the mortgage. Once any evidence of this agreement is excluded, then there is nothing to establish satisfaction of the mortgage. All that remains is the fact that Ramnath purchased the property and that defendant 1 neither paid the small balance of the decree nor bid for the property nor interfered in any way with Ramnath's purchase. There is even nothing to show that Ramnath was in any way benamidar of the plaintiffs. Unless the evidence, which I hold is inadmissible, is admitted, the case made by defendant 1 that he has discharged the mortgage wholly fails.

The result therefore is that this appeal must be allowed and the decrees of the lower Courts set aside. I would pass a mortgage decree in favour of the plaintiffs for the principal amount together with interest at the rate of nine per cent. per annum simple from the date of the mortgage to the end of the period of grace. Three months is given to defendant 1 to pay the sum due. After the expiry of the period of grace the amount due will carry interest at the rate of six per cent. per annum simple. I would direct that each party pay their own costs here and in the Courts below.

Fazl Ali J.—I agree.

D.B./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 50

HARRIES C. J. AND FAZL ALI J.

Surajmal Marwari and another — *Defendants* — Appellants.

v.

Bhubaneshwar Prasad and others, *Plaintiffs and others*, *Defendants* — Respondents.

Second Appeal No. 177 of 1938, Decided on 18th September 1939, from appellate decree of Sub-Judge, Bhagalpur, D/- 11th December 1937.

Civil P. C. (1908), S. 148—Court can extend time fixed by its decree when decree is not final.

It is a general rule that where a party is required to do something under a decree and time limit is prescribed for doing it, the Court which passed the decree has no jurisdiction to extend the time limit but it is subject to the qualification that where the decree or order which fixes the time is not intended to be final and the Court still retains control over the proceeding, the Court may extend time under S. 148. Whether the Court still retains control over the proceeding or not must be determined upon the nature of the proceeding and the order passed therein. [P 51 C 1, 2]

Where the Court decreed plaintiffs' suit and ordered to pay deficit court-fees in these words: "The plaintiffs must file deficit court-fee within a fortnight from to-day otherwise they will not be entitled to have the aforesaid decree and the suit will be dismissed:"

Held that a final order had not been passed in the suit and so the Court, having still retained control over the proceeding had jurisdiction to accept the deficit court-fee after the period fixed: *A I R 1928 Mad 154 and (1896) 1 Ch D 644, Rel. on.* [P 51 C 2; P 52 C 1]

S. N. Sahay and K. P. Sukul — *for Appellants.*

Rajkishore Prasad and A. Sashishekhar Sinha — *for Respondents.*

Fazl Ali J.—This appeal arises out of a suit brought by the respondents against the appellants and certain other defendants in the Court of the Munsif of Banka for a declaration of their title to and recovery of possession of certain lands. On 21st December 1936, the Munsif decreed the suit in the following terms :

> Considering the evidence on record, I decide that the plaintiffs are entitled to a declaration of their title as sudhbharnadars over the land and they are entitled to recover possession as such over the same. The suit accordingly is decreed on contest against the contesting defendants with costs including pleader's fee at five per cent. . . . The plaintiffs must file the deficit court-fee within a fortnight from to-day otherwise they will not be entitled to have the aforesaid decree and the suit will be dismissed.

The deficit court-fee was deposited by the plaintiffs on 5th January 1937 along with a petition in which they asked the Munsif to amend the plaint by inserting therein the name of their father which had been omitted by mistake. The Munsif thereupon passed the following order : "Amend and draw up decree." On 8th January 1937 the appellants, who were defendants first party in that suit, filed a petition before the Munsif stating that the deficit court-fee had been filed a day too late and the suit must accordingly be dismissed. The learned Munsif however after hearing the parties rejected the petition and held that as the court-fee had been deposited before any final order dismissing the suit was passed, the order accepting the court-fee and directing the preparation of the decree must stand. The decision of the Munsif was questioned by the appellants in appeal before the Additional Subordinate Judge of Bhagalpur, but the learned Subordinate Judge affirmed it and dismissed the appeal. The appellants have accordingly preferred this second appeal and the only ground urged on their behalf is that the Munsif having pronounced his judgment in the suit on 21st December 1936 had no jurisdiction to accept the court-fee after the expiry of the time fixed in the judgment. Learned counsel for the appellants cited a number of cases to support his contention that where a party is required to do something under a decree and a time limit is prescribed for doing it, the Court which passed the decree has no jurisdiction to extend the time limit. That is undoubtedly the general rule, but it is subject to the qualification that where the decree or order which fixes the time is not intended to be final and the Court still retains control over the proceeding, the Court may extend time under S. 148, Civil P. C. As was pointed in A I R 1928 Mad 154,[1] by Curgenven J., the test to determine whether power still exists in the Court to extend time is whether the proceeding in which time was originally granted is still pending or has been disposed of. The same view was expressed by Kekewich J. in (1896) 1 Ch D 644[2] in these words :

> I think I ought to relieve the applicant if I can. Mr. Lemon says I cannot, because the action is dead. If that is the right view, the matter is beyond my power. It appears to me however that this action is not dead . . . . . but a final stroke is required to effect death. That final stroke has not been delivered, and therefore, in my opinion, the application is properly made and the order asked for may be granted.

The learned Judge after making the above observations added :

> There is another form of order available and appropriate where the Court thinks that severe terms should be imposed, namely that on failure to do certain acts within a specified time, then "the action do stand dismissed without further order." In this case no such words are in the order.

Thus a distinction is to be drawn between a case where the proceeding has terminated and one in which it has not terminated and the Court still retains control over it. Whether the Court still retains control over the proceeding or not must be determined upon the nature of the proceeding and the order passed therein. If that order is a final order, the Court is functus officio and it cannot enlarge time. In such cases if any relief is necessary, it can be granted only upon review by that Court or on appeal by a Court to which an appeal lies from that Court. To quote Curgenven J. once more

> the power to extend time given by Sec. 148, Civil P. C., cannot be invoked (in such cases) because not only has the period originally fixed or granted expired, but there is no previous order still current upon which an order extending time could operate.

If, on the other hand, the decree or order is not final, then Sec. 148, Civil P. C., does apply and the Court may enlarge time in a proper case. Now, when we examine the order passed by the Munsif in the present case on 21st December 1936, we find that it did not state that in the case of failure on the part of the plaintiff to pay the deficit court-fee within a fortnight, the suit was to be dismissed automatically. It merely stated that "the plaintiff will not be entitled to a decree and the suit will be dis-

1. S. A. Balkrishna Ayyar v. Parvathammal, (1928) 15 A I R Mad 154=110 I C 702.
2. Collinson v. Jeffery, (1896) 1 Ch D 644=65 L J Ch 375=74 L T 78=44 W R 311.

missed." That the Munsif still retained control over the proceeding is clear from the fact that he had stayed the preparation of the decree in the meantime. It was only after the court-fee had been deposited on 5th January 1937 that he ordered the decree to be drawn up. In my opinion therefore on the peculiar facts of this case it must be held that a final order had yet to be passed in the suit on the date when the Munsif accepted the court-fee and that he had jurisdiction to accept it. As the only point which was raised in this appeal fails, I would uphold the judgment and decree of the Courts below and dismiss this appeal with costs.

Harries C. J.—I agree.

D.B./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 52

ROWLAND AND CHATTERJI JJ.

Kamaleshwari Prasad and another — *Plaintiffs* — Appellants.

v.

Gangadhar Mal and others — *Defendants* — Respondents.

Appeal No. 286 of 1938, Decided on 23rd August 1939, from appellate decree of Sub-Judge, Monghyr, D/- 17th December 1937.

Contract Act (1872), S. 61 — Successive advances by creditor and successive payments by debtor — Each item of debt if unpaid becomes time-barred on expiry of three years — Balance outstanding in favour of creditor is not considered to consist of oldest items of debts.

Where there had been successive advances by the creditor and successive payments by the debtor, the legal position is that each item of debt if unpaid becomes time-barred on the expiry of three years from the date on which it is incurred; but the balance outstanding in favour of a creditor is not generally considered to consist of the oldest items of debt. Under S. 61, each payment ought to be appropriated to the satisfaction of the oldest then outstanding debt : *A I R 1933 Pat 267 and A I R 1916 Pat 326, Rel. on ; A I R 1934 P C 147, Disting.* [P 53 C 1, 2; P 54 C 1]

Mahabir Prasad and R. S. Chatterji — *for Appellants.*

S. M. Mullick, Rameshwar Jaruhar and Rajeshwari Prasad— *for Respondents.*

Rowland J. — This is an appeal by the plaintiffs in a money suit. The claim was to recover the balance due as the net result of a series of transactions between the parties between the years 1341 and 1343 Fs. It is common ground that the plaintiffs had a Hindu joint family firm and the defendants had another. Between these there had been business relations for a long time. On 20th Asin 1341 the accounts between the parties were closed and entered up as being fully satisfied; and no balance due to either party. Then on 21st Asin 1341 the plaintiffs made an advance of Rs. 2500 to the defendants. In witness of this advance a handnote was executed which bears dates according to the Fasli and English calendars, that is to say 21st Asin 1341 corresponding to 25th October 1933. The difficulty is that these two dates do not correspond. 21st Asin 1341 was 25th September 1933. After this the parties continued to do business with each other. The transactions in suit which are the transactions at Jhajha in District Monghyr consisted of further advances by the plaintiffs to the defendants and some payments by the defendants to the plaintiffs. Transactions up to Baisakh 1343 are summarized in the plaint and the net result according to the plaintiffs was a liability of the defendants to the plaintiffs of Rs. 2949-8-6 on account of principal together with some interest. The correctness of the books of account and the genuineness of the transactions were not seriously challenged by the principal defendant though the guardian ad litem for the minor defendants who are sons of defendant 1 filed a written statement putting the plaintiffs to strict proof. The substantial defence taken by all the defendants was limitation.

Of the transactions to which the suit relates the only one that was beyond three years from 27th November 1936, the date of suit, is the advance of Rs. 2500 on 21st Asin 1341. The plaintiffs' case was that this loan was not time-barred because though the advance was made on 25th September the handnote was executed on 25th October. On this point both Courts have held that the advance was in fact made and the handnote executed on 21st Asin 1341 corresponding to 25th September 1933 and that the English date 25th October 1933 is merely a mistake. The plaintiffs contend that they are entitled to count limitation from the date which the handnote bears calculated according to the Gregorian calendar under S. 25, Limitation Act, and that the parties should not have been allowed to enter into evidence to prove that the date of execution was another date than that written according to the English calendar in the handnote. We have considered this contention which appears to be a matter of first impression. It may be that if the document had borne a single date evidence would be inadmissible to prove that

it was in fact executed on a different date or it may be that limitation would have run from the date which the document bears irrespective of whether in fact it had been signed on that date or on another date. But in the present instance we are not prepared to go behind the concurrent findings of fact that the date of the document is 21st Asin 1341, that is to say 25th September 1933. That being so, the finding of the lower Appellate Court must stand that the claim for anything which may be still due on the handnote either for principal or interest is barred unless otherwise saved.

It is next contended that this is a mutual, open and current account between the parties to which Art. 85 of the Schedule to the Limitation Act is applicable and in support of this contention reference has been made to the decision of the Privy Council in 56 All 376.[1] That however was not a case under Art. 85 but under Art. 64 and it dealt with a balance struck and acknowledged over the signature of the defendant. The plaintiff has not obtained an adjustment of account over the signature of the defendant at any period which would give him an available start for limitation for the purposes of the present suit. Indeed the Articles applicable to the suit appear to be Art. 52 for goods sold and delivered and Article 57 for money lent. Then it is contended that the suit was in substance not a simple suit on the handnote but a suit on the balance of liability; that there had been successive advances by the plaintiffs and successive payments by the defendants. In such a case the legal position is that each item of debt if unpaid becomes time-barred on the expiry of three years from the date on which it is incurred; but the balance outstanding in favour of a creditor is not generally considered to consist of the oldest items of debt. To do so would be to appropriate the payments made from time to time towards the satisfaction of the latest debts. No doubt under S. 59, Contract Act, a debtor who owes several distinct debts to one person and makes a payment to him is entitled to demand that the payment is to be applied to the discharge of any particular debt and if he does so, the payment if accepted must be applied accordingly. S. 60 deals with the case where the debtor has given no such intimation and there are no other circumstances indicating to which debt the payment is to be applied. In that case the creditor has his discretion to apply it to any lawful debt actually due and payable to him from the debtor; and he may apply it even to a debt which is barred by the law in force for the time being as to limitation. S. 61 deals with the legal consequence when neither party has chosen to exercise his rights of specific appropriation of the payment to any particular debt. The Section directs that in this case the payments shall be applied in the discharge of the debts in order of time whether they are or are not barred by the law in force for the time being as to limitation of suits. These Sections were construed and applied in this Court in 14 P L T 654.[2] Against the suggestion for the appellants that moneys paid ought to be appropriated in the manner indicated by S. 61, Contract Act, Mr. Mullick's reply was that the advance of Rs. 2500 constituted a separate debt and a separate transaction. The very same contention was advanced on behalf of the defendant in 14 P L T 654[2] which I have just cited; but the Court held that the plaintiff had treated the account as a running account (as in this case); and in those circumstances it was said that there was no question of appropriation.

It is assumed as a matter of law that the payment would go towards the earlier items in the account. But assuming for the moment that this did not constitute a running account, the method of accounting adopted by the plaintiffs quite clearly amounts to an appropriation in law and as they have appropriated, as is clearly seen from the accounts, the debt which would otherwise be barred by limitation has been saved from limitation and the plaintiffs are entitled to recover the balance.

This decision is in full accord with an earlier decision of this Court in 1 Pat L J 474[3] where S. 61, Contract Act, was applied, and it was held that no specific appropriation having been made by the parties, the Court can apply the payments to discharge the debts in the order in which they were contracted. All the payments were directed to be applied in the discharge of the debts in order of time. Mr. Mullick for the respondents objected that the plaintiffs themselves had not made the appropriation now suggested by them. There might be some force in this if S. 60 stood alone; but the

1. Bishun Chand v. Girdhari Lal, (1934) 21 A I R P C 147 = 150 I C 6 = 61 I A 273=56 All 376 (P C).

2. Jiban Ram Ramchander v. Sagarmal Khemka, (1933) 20 A I R Pat 267 = 145 I C 611 = 14 P L T 654.

3. Bishun Perkash Narain Singh v. Muhammad Siddique, (1916) 3 A I R Pat 326=35 I C 375 =1 Pat L J 474.

argument ignores S. 61. Mr. Mullick pressed his argument further and contended that in paras. 5 and 6 of the plaint, the plaintiffs in fact had made an appropriation of the payments towards the contemporaneous and recently incurred debts; but I am unable to read these paragraphs in this sense. It is more correct to say that in these paragraphs the transactions between the parties are dealt with as constituting a running account in which case clearly each payment ought to be appropriated to the satisfaction of the oldest then outstanding debt. The amount to which the plaintiffs will be entitled on calculation of the accounts on this basis has not been found by the Courts below and it is necessary to remit the record to the lower Appellate Court for a finding under O. 41, R. 25. The finding should be returned to this Court within two months after which this appeal will be put up for final hearing.

Chatterji J.—I agree.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 54

HARRIES C. J. AND MANOHAR LALL J.

Pratap Udai Nath Shah Deo — *Decree-holder* — Appellant.

v.

Sukhdeo Prasad Bhagat and others — *Judgment-debtors* — Respondents.

Second Appeal No. 325 of 1938, Decided on 2nd May 1939, from appellate order of Judicial Commissioner, Chota Nagpur, Ranchi, D/- 20th June 1938.

(a) Practice—Appeal—Appellate Court cannot call for private report from lower Court.

An Appellate Court is not entitled to call for a private report from the lower Court for its information. An Appellate Court must decide an appeal from the materials before it and if it cannot do so it can only act in the manner provided by the Civil Procedure Code. [P 54 C 2; P 55 C 1]

(b) Execution — Executing Court wanting to dispose finally application—Proper phrase to be used stated.

If an executing Court wants to dispose finally of an application, it should use clear and unambiguous language such as "the application is dismissed." "Striking off an application" is a phrase which is capable of a number of meanings. [P 55 C 1]

(c) Chota Nagpur Tenancy Act (6 of 1908), S. 215 (3) — Orders passed on applications to set aside sale are within S. 215 (3).

The terms of S. 215 (3) make it clear that orders passed on applications to set aside sales are within the Section. An appeal therefore lies in such case : *A I R 1919 Pat 573, Rel. on.* [P 55 C 2]

S. M. Mullick and B. C. De — *for Appellant.*

N. N. Sen — *for Respondents.*

Harries C. J. — This is a miscellaneous second appeal from an order of the learned Judicial Commissioner of Chota Nagpur dismissing an appeal from an order of the Rent Suit Deputy Collector. The facts of the case can be shortly stated as follows: The appellant obtained a decree for rent against a tenure-holder and in execution of that decree the property was sold and purchased by Gangadhar, respondent 3. The purchaser however did not have his name recorded in the landlord's sharista. Further arrears of rent accumulated, and the plaintiff brought another suit against his original tenure-holder and obtained a decree. In execution of that decree he again put the property up for sale, and on 16th November 1937, he purchased it himself. On 18th December 1937, the respondent Gangadhar presented a petition praying that the sale should be set aside on the ground that he had purchased it at an earlier sale and that the property could not be resold. The learned Rent Suit Deputy Collector upon this petition passed the following order : "Put up on 22nd December 1937 with execution record referred to." The matter was adjourned and finally came for decision before the Rent Suit Deputy Collector on 2nd February 1938, when he passed the following order :

This holding has already been sold and the man to whom it has been sold is not a party in any of the proceedings taken since. Strike off.

It is to be observed that in the typewritten paper-book before us the words "strike off" have been incorrectly typed as "struck off." From this order the present appellant preferred an appeal to the Court of the Judicial Commissioner who dismissed it. The judgment reads as follows :

Parties heard and record perused. On the facts as recounted in the Deputy Collector's report (and the accuracy of his report is not disputed) the landlord appellant has no case. At his instance the holding was sold at Court auction and purchased by the objector-respondent who got a sale certificate and delivery of possession. The holding cannot be sold again in execution of another decree against the original tenant (obtained without making the auction-purchaser a party). I dismiss this appeal with costs and pleader's fee Rs. 10 to the contesting respondent.

In this judgment the learned Judicial Commissioner refers to some report made by the Deputy Collector. What this report was is not clear, and it would appear as if the Judicial Commissioner had called upon the Deputy Collector to make a report to supplement the orders appearing on the order-sheet. This seems to me to be a most unusual proceeding, and an Appellate Court

is not entitled to call for a private report from the lower Court for its information. An Appellate Court must decide an appeal upon the materials before it and if it cannot do so it can only act in the manner provided by the Civil Procedure Code. I presume this report was shown to the parties; but if it was not, then the procedure was highly irregular. My difficulty in this case is to know what precisely was the order of the Deputy Collector which was upheld on appeal by the learned Judicial Commissioner. It must be remembered that Gangadhar had presented a petition praying that the second sale should be set aside on the ground that he had purchased the property in the earlier sale and that it could not be resold. The learned Deputy Collector's order is "strike off," but strike off what ? Did he mean to strike off the petition to set aside the sale or the application for execution ? I think it is clear that what he must have intended was to strike off the whole execution case. It has been argued that he could not do that on the application to set aside the sale. He should have dealt with that application and either allowed it or dismissed it. Quite obviously, the learned Deputy Collector was of opinion that the sale should be set aside ; but, as I have stated, he merely passed an order striking off something.

I should like to make it clear that the phrase "strike off" is really meaningless and has led to endless litigation in these Courts. In other Courts it has been held time and again that the phrase "strike off" does not mean "dismissed" and in a decision of their Lordships of the Privy Council an order striking off was construed as an order staying execution rather than dismissing it. If an executing Court wants to dispose finally of an application, it should use clear and unambiguous language such as "the application is dismissed." "Striking off an application" is a phrase which is capable of a number of meanings. In the present case however it appears that the Deputy Collector desired to put an end to something, and it may be that that something was the whole execution case. It is also tolerably clear from the judgment of the learned Judicial Commissioner that he regarded the order striking off as something passed in connexion with a petition to set aside the sale. However it is clear that if any meaning can be given to the phrase "strike off" it must mean that the execution application or the execution case in its entirety was dismissed. The Courts have not considered whether or not such an order could be made. In my judgment the order made by the learned Judicial Commissioner must be set aside and the case remanded to him to be heard and determined according to law.

Before ending this judgment, I must refer to a point raised by the learned advocate for the respondents that no second appeal lay to this Court. It was contended that this was an order which was not appealable to the learned Judicial Commissioner and consequently that no appeal lay from that judgment to this Court. In my judgment this case falls within S. 215 (3), Chota Nagpur Tenancy Act, which provides that orders passed after decree and relating to the execution thereof with certain exceptions are appealable to the Court to which an appeal from the decree itself would lie. It has been strenuously argued that as the property here had been sold this is not a decree relating to execution, because the execution came to an end when the property was purchased by Gangadhar. Reliance has been placed on cases dealing with the construction given to a similar phrase in S. 47, Civil P. C. In my view however the terms of S. 215 (3), Chota Nagpur Tenancy Act, make it clear that orders passed on applications to set aside sales are within the Section, because certain of those orders are by the terms of the Section excluded from its ambit, for example, orders passed under S. 212 (2) of the Act are not to be treated as orders relating to execution. A perusal of S. 212 (2) of the Act makes it clear that such an order is an order setting aside a sale. Had that order not been expressly excluded, it would have been within the ambit of the Section. In my view the language of S. 215 (3) is wide enough to permit an appeal in this case. In any event if the order is an order striking off the execution application, then clearly it is an order relating to execution and is therefore appealable under S. 215 (3), Chota Nagpur Tenancy Act. For the reasons which I have given, I would allow this appeal, set aside the decree of the learned Judicial Commissioner and remand the case to him to be heard and determined according to law. In the circumstances of this case, I would make no order as to costs.

Manohar Lall J. — I agree. In my opinion the language of S. 215 (3), Chota Nagpur Tenancy Act, is wide enough to make an appeal competent in a case like the present. This was the view expressed by

Mullick J. in 49 I C 389[1] although his remarks are in the nature of obiter. For the reasons which have just been given by my Lord the Chief Justice, there cannot be any doubt that the Legislature in enacting S. 215 intended to depart from the interpretation put upon similar words in S. 47, Civil P. C.

D.S./R.K. *Case remanded.*

1. Nilmani Nath Sahi Deo v. Pratap Udai Nath Sahi Deo, (1919) 6 A I R Pat 573=49 I C 389.

A. I. R. 1940 Patna 56

VARMA AND ROWLAND JJ.

Sah Radha Krishna — Appellant.

v.

Mt. Bechni Debi — Respondent.

Appeal No. 49 of 1938, Decided on 13th January 1939, from original order of Sub-Judge, Patna, D/- 24th January 1938.

(a) Res Judicata—Execution of decree resisted on ground of satisfaction—Objection rejected by executing Court and not pressed in appeal before High Court — Objection cannot be raised in subsequent execution proceedings.

The execution of a decree was resisted on the ground that the decree was already satisfied. The executing Court did not entertain the objection as it came too late and the objection was not pressed when the matter was before the High Court in appeal. The record having gone back to the executing Court for continuing the execution proceedings a fresh objection on the same ground was taken:

Held that the objection was not maintainable its maintainability being concluded by the decision of the High Court affirming the decision of the executing Court in the first execution proceedings.

[P 57 C 1]

(b) Civil P. C. (1908), O. 21, R. 2 (3)—Objection as to adjustment of decree by amount appropriated by decree-holder enjoying usufruct in interval between sale and its setting aside taken by purchaser in execution of another decree falls under O. 21, R. 2 (3).

Objection by a purchaser of a property in execution of his decree that another decree-holder in the interval between the sale obtained by him (the latter decree-holder) and its setting aside was enjoying the usufruct of the property and the amount so appropriated by such decree-holder was more than sufficient to satisfy the entire dues under his decree is a plea which falls within the description in O. 21, Rule 2 (3) of a payment or adjustment, which has not been certified or recorded and no such payment or adjustment can be recognized by a Court executing the decree.

[P 57 C 1]

Rai Guru Saran Prasad and Kameshwar Dayal — *for Appellant.*

Baldeo Sahay and Rajkishore Prasad — *for Respondent.*

Rowland J.—The appellant objected in the Court of the Subordinate Judge against the execution of a decree against his property. The objection was dismissed; hence he presents this appeal. The facts leading up to this position are that the respondent Bechni Debi, a Hindu widow, and another lady had brought a pauper suit against the male members of a Hindu joint family and obtained a decree on 27th September 1932, for maintenance at Rs. 100 per month to each of the plaintiffs together with arrears of Rs. 2,090. The decree was made effective as a charge on all the properties of the members of the joint family, including Maksudpur tauzi No. 7499. This property was put up for sale in execution of a money decree obtained by the present appellant on 19th August 1930 for Rs. 35,000. He purchased the property on 19th December 1932, for Rs. 47,000 and the sale was confirmed on 24th August 1933. In the present execution the respondent seeks to realise the money due to her under the maintenance decree, by enforcing it as a charge decree against this property, Maksudpur. The appellant resisted that execution on several grounds, but mainly on the ground that the respondent, to enforce her right of maintenance against him, was bound to bring a separate suit. In that objection petition no mention was made of the point which the appellant seeks to raise before us, but before its disposal he applied to the Subordinate Judge to permit amendment of the objection petition by adding two more grounds, viz., (a) that the decree of the opposite party stands fully satisfied and she has got a huge amount, at least Rs. 20,000 after satisfying the decree and defraying the legitimate expenses from the income of the property purchased by him in her execution case No. 101 of 1933, Subordinate Judge II, Patna, and as such the decree is unexecutable, and (b) that the decree is collusive and unexecutable against your petitioner (the appellant) and is not binding upon him.

The Subordinate Judge in dealing with the objection held that no separate suit was necessary. As for the additional grounds he said "the objection about satisfaction cannot be entertained at this stage" meaning apparently that it came too late, and he declined to treat the amendment petition as a part of the previous objection petition. In appeal to the High Court the question argued apparently was whether the respondent was bound to bring a separate suit, and this point was answered in the negative. Wort J. added: "It is agreed, no other

question arises and therefore in my judgment the appeal fails and must be dismissed with costs." It is reported in 18 P L T 834.[1] The record having gone back to the Subordinate Judge for continuing the execution proceedings, the appellant presented a fresh petition of objection taking this ground that the decree-holder could not execute the decree because it must be considered to be fully satisfied in consequence of some proceedings taken by her in 1933. The Subordinate Judge rejected the objection holding that it was not maintainable, its maintainability being concluded by the decision of the High Court affirming the decision of the Subordinate Judge. What the Subordinate Judge had said was that the objection about satisfaction cannot be entertained, and by not pressing any objection to this observation, when the matter was before the High Court in appeal, the correctness of that decision must be taken to be affirmed by the High Court and no longer capable of being called in question.

I may however explain the nature of the objection a little further, by stating the facts. In execution of her maintenance decree Mt. Bechni Debi put up for sale a certain property Asarhi, which was purchased in execution. The sale was confirmed and she got delivery of possession on 12th November 1933. She was apparently in possession until the sale was set aside on 30th June 1934. The objection of the appellant is that the decree-holder in the interval between the sale and its setting aside was enjoying the usufruct of the property, and the amount so appropriated by her was more than sufficient to satisfy her entire dues under the decree. Such a plea seems to me to fall within the description in O. 21, R. 2 (3), Civil P. C., of a payment or adjustment, which has not been certified or recorded in the manner provided in the rule, and no such payment or adjustment can be recognized by any Court executing the decree. Whatever the decree-holder may have received from the property in her hands was received by her before the end of June 1934. The petition of the judgment-debtor asking the Court to take an account from the decree-holder was in June 1936. If an objection similar to the present had been presented by the owners of Asarhi, it is possible that equities might lead to a different consequence. They might be entitled to have the amount ascertained and eventually set off, but it might still be questioned whether pending ascertainment they could cause execution to be stayed, while the amount to be set off was still uncertain.

Mr. Rai Guru Saran Prasad for the appellant begged the sympathy of the Court on the ground that the lady and her agnates were colluding to throw on him the entire burden of a maintenance decree for which the agnates were primarily responsible. But he expressly said he was not in this objection and appeal claiming any right of marshalling (S. 56, T. P. Act) or of contribution (S. 82) against the other judgment-debtors, but was resisting executing simply on the ground above discussed. He can get no relief on this ground. Both on the principle of res judicata and also because it is correct in law, I would affirm the decision of the Subordinate Judge and dismiss the appeal with costs.

Varma J.—I agree.

N.K./R.K. *Appeal dismissed.*

1. Radha Krishna v. Mt. Bechni Debi, (1937) 24 A I R Pat 654=172 I C 234=18 P L T 834.

A. I. R. 1940 Patna 57

AGARWALA J.

Lachmi Narayan Singh — Petitioner.

v.

Nandkishore Singh—Opposite Party.

Criminal Revn. No. 497 of 1939, Decided on 22nd September 1939, against order of District Magistrate, Patna, D/- 13th September 1939.

Criminal P. C. (1898), Sec. 144—Magistrate can pass mandatory order on persons in possession of property if necessary.

Section 144 not only empowers a Magistrate to direct a person to abstain from a certain act but also empowers a Magistrate to pass a mandatory order on persons in possession of property if it is necessary in the opinion of the Magistrate that such action should be taken for the purposes enumerated in the Section: *A I R 1937 Cal 406, Rel. on.* [P 58 C 1]

C. P. Sinha — *for Petitioner.*

Mohd. Hasan Jan and Syed Ali Khan — *for Opposite Party.*

Order. — This is an application which arises in the following circumstances : The Sub-Divisional Magistrate of Bihar, in view of an imminent danger of a breach of the peace between the petitioner and the opposite party, issued notice under S. 144, Criminal P. C., prohibiting either party from going near the subject-matter of the dispute. On cause being shown by the parties, the Magistrate confirmed the order against the

second party and discharged it as against the first party. The dispute was with respect to the erection of a bundh which prevented the water of a river from flowing into a pyne. The bundh is said to be on the land of the second party. Having prohibited the second party from going to the bundh, the order went on to say that the first party were permitted to remove the obstruction to the flow of water, that is to say, the bundh. Later the Magistrate directed the Local Police to assist in the removal of the bundh. The second party moved the District Magistrate against the order under S. 144 and asked for the stay of the order for the removal of the bundh. The District Magistrate having refused to order a stay, this Court was moved and an ad interim stay was granted.

The question now for consideration is whether the cutting of the bundh shall be stayed or not. It has been contended that the order of the Magistrate with regard to the cutting of the bundh is itself illegal and therefore its execution should be stayed. The argument was based on the contention that Sec. 144, Criminal P. C., empowers a Magistrate only to pass a prohibitory order and not a mandatory order. A number of cases have been referred to in which this contention has been upheld. But when the facts of those cases are examined, it is found that what the learned Judges, who dealt with those cases, were considering was the effect of the words in para. 2 of S. 144 "to abstain from a certain act" and they were considering whether the power conferred upon the Magistrate by the Section authorizing him to direct a person to abstain from a certain act includes a power to direct the doing of an act. It is to be observed however that the Section not only empowers a Magistrate to direct a person to abstain from a certain act but also empowers a Magistrate to direct a person "to take certain order with property in his possession or under his management," if the Magistrate considers that such direction is likely to prevent, or tends to prevent, amongst other things, a disturbance of the public tranquillity. This part of the Section, it seems to me, clearly empowers a Magistrate to pass a mandatory order on persons in possession of property if it is necessary in the opinion of the Magistrate that such action should be taken for the purposes enumerated in the Section. That view is supported by the decision of a Division Bench of the Calcutta High Court in A I R 1937 Cal 406.[1] That was a case in which the conviction of a person who had disobeyed the order of the Magistrate passed under S. 144 directing him to cut a certain bundh was upheld, on the view that the direction to cut the bundh was a legal order under S. 144.

It was, in my view, within the power of the Magistrate in the present case to direct the cutting of the bundh; but in point of fact this case is even stronger than that. It is not the petitioners who were directed to cut the bundh. In fact as the disputed land is not in their possession, a mandatory order could not be passed against them. The Section only authorizes a mandatory order to be passed against a person who is, "in possession of the property." Now the property in the present case is in the possession of the second party and it is the second party that has been directed to cut the bundh. The second party did not complain against this order but it is the first party which consider themselves aggrieved. However that may be, the question is whether in the circumstances of the present case the execution of the order should be stayed. The facts found were that the night before the Magistrate passed the conditional order, under S. 144, the second party, anticipating the order, endeavoured to frustrate it by erecting the bundh on land which was not in their possession and to which they had no right whatsoever. In these circumstances as the order of the Magistrate is found to be legal and the object of the petitioners found to be to frustrate such order, I do not feel justified in granting the petitioner's prayer that execution of the order for removal should be stayed. The rule is discharged.

D.S./R.K. *Rule discharged.*

1. Balaram Dey v. Pran Ram, (1937) 24 A I R Cal 406=170 I C 499=38 Cr L J 915=I L R (1937) 2 Cal 475=65 C L J 460=41 C W N 897.

A. I. R. 1940 Patna 58

ROWLAND AND CHATTERJI JJ.

Ramdeyal Babu Lal Firm — Appellant.

v.

Lakhu Sao — Respondent.

Appeal No. 198 of 1938, Decided on 4th August 1939, from original order of Dist. Judge, Monghyr, D/- 14th May 1938.

(a) Civil P. C. (1908), O. 9—Applicability to insolvency proceedings.

The provisions of Order 9 may perhaps be held to be applicable to insolvency proceedings : *AIR 1930 Lah 996, Rel. on.* [P 59 C 1]

(b) Provincial Insolvency Act (1920), Ss. 35, 27—Ex parte order of adjudication should not be made on clearance day.

The orders and circulars issued by the High Court should be followed by the lower Courts. The Court should not hear the case and pass an ex parte order of adjudication on the last clearance day. [P 59 C 2]

G. P. Sahi — *for Appellant.*

R. S. Ojha for S. C. Misra — *for Respondent.*

Chatterji J. — This is an appeal against an order refusing an application of creditor 1 to set aside an ex parte order of adjudication which was passed on 30th April 1938. The debtor having filed an application for adjudication, notices were duly served on the creditors fixing 23rd April 1938 as the date of hearing. On that date creditor 1 appeared and filed a petition for time to file objection. His petition was allowed and the case was adjourned to 30th April 1938 for hearing when he was to file his objection, if any. On 30th April he did file his objection, but at the time when the case was actually taken up he did not respond to repeated calls and the case was heard and disposed of ex parte. Thereafter creditor 1 made an application for setting aside the ex parte order of adjudication. That application was treated by the learned District Judge as an application for review and it has been dismissed. The present appeal is by creditor 1 against that order. A preliminary objection is taken on behalf of the respondent on the ground that the order appealed against being an order rejecting an application for review is not appealable. The answer is that though the expression "review" has been used by the learned District Judge, the application really purported to be one under the provisions of O. 9, Civil P. C. Having regard to the provisions of S. 5, Provincial Insolvency Act, the provisions of O. 9, Civil P. C., may perhaps be held to be applicable to insolvency proceedings. In 121 I C 303,[1] it was held by the Lahore High Court that the provisions of O. 9, Civil P. C., are applicable to proceedings under the Insolvency Act. The case may however be looked at from another point of view. S. 35, Provincial Insolvency Act, gives the Court power to annul an adjudication if in the opinion of the Court it appears that the order of adjudication should not have been made. We may therefore in this appeal consider the propriety of the ex parte order of adjudication that was made on 30th April 1938. In this view the preliminary objection must be overruled.

The contention on behalf of the appellant is that 30th April 1938 being the last Saturday was a clearance day and under the circular of the High Court which lays down that no cases should be heard except part-heard Sessions cases and other urgent criminal work, the Court should not have heard the case ex parte on that day. The learned District Judge in his order remarks that 30th April was definitely fixed for hearing and the objector had no excuse for not appearing when the case was called on; but it appears from the order-sheet that the case was fixed for hearing in the usual course. Indeed the objector did file his objection on that date and when that was the date fixed for hearing he should have waited, but there may be some justification for his leaving the Court-room as it was a clearance day on which judicial work was presumed not to be done. In my opinion the orders and circulars issued by the High Court should be followed by the lower Courts and although I think there was some negligence on the part of the objector, the Court should not have heard the case ex parte, on the last clearance day. In this view I would allow the appeal, set aside the ex parte order of adjudication and direct that the case be disposed of according to law. In the circumstances there will be no order for costs.

Rowland J.—I concur in the order.

D.S./R.K. *Appeal allowed.*

1. Bhagwan Das v. Chuni Lal, (1930) 17 A I R Lah 996=121 I C 303.

A. I. R. 1940 Patna 59

ROWLAND AND CHATTERJI JJ.

Umar and others — Appellants.

v.

Mahabir Lal Sahu and others — Respondents.

Misc. Appeal No. 91 of 1939, Decided on 28th July 1939, from order of Sub-Judge, Muzafferpur, D/- 27th March 1939.

(a) Civil P. C. (1908), O. 32, Rr. 5, 7 (2)—Reference to arbitration by person not guardian of minor and award — Decree thereon against minor is not void but voidable at instance of minor.

Under the provisions of O. 32, Rr. 5 and 7 the application for reference to arbitration can be made only by the guardian for the suit after obtaining the necessary leave of the Court and, if the person who makes the application is not the guardian, there is no valid reference. But in view of O. 32, R. 7 (2) the award and decree passed on such reference are only voidable at the instance of

minor and not wholly void : *A I R 1939 Pat 278, Disting.; A I R 1931 Bom 500, Not foll.*
[P 61 C 1]

(b) Civil P. C. (1908), S. 47 and O. 32, R. 7 — Objection to validity of decree passed in contravention of O. 32, R. 7 cannot be taken by minor in execution proceedings.

An executing Court cannot go behind the decree; if it appears that the Court had no jurisdiction to pass the decree, the decree would be altogether void and in that case, it would be open to the executing Court to disregard it and refuse to execute it. Where however the Court has complete jurisdiction to hear a case but passes a decree in disregard of some provisions of law, the decree is voidable and is binding until it is set aside in an appropriate proceedings. [P 61 C 1]

Hence, where a decree is passed in contravention of the provisions of O. 32, R. 7, the validity of the decree cannot be questioned in execution proceedings by the minor as the decree is only voidable and not void as against the minors : *Case law discussed.* [P 61 C 1, 2]

(c) Minor—Decree against—Validity—Minor effectively represented and no prejudice caused —Decree against him is not invalid even though no formal order of appointment of guardian is passed.

Where a guardian for a minor defendant appears in the suit and effectively represents him although no formal order of appointment is made, the decree cannot be said to be invalid against the minor unless prejudice is shown : *5 Bom L R 822, Rel. on.* [P 62 C 1]

(d) Civil P. C. (1908), S. 47—Decree against minor—Whether minor is effectively represented in suit and whether prejudice is caused to him cannot be investigated.

Where a decree passed against a minor is sought to be executed, the questions whether the minor is effectively represented and whether he has suffered any prejudice cannot be investigated in execution proceedings. [P 62 C 1]

B. C. De — *for Appellants.*

S. K. Mitra — *for Respondents.*

Chatterji J. — This appeal which arises out of an execution proceeding is by Umar Mia and Bibi Asma, two of the judgment-debtors who are minors. In the original suit which was for dissolution of partnership and accounts, they were defendants 2 and 3 and in the plaint they were represented by their mother Mt. Sahebzadi who was herself a defendant as their guardian. It appears that Mt. Sahebzadi did not appear in the suit at all but at the very earliest stage the minors' step-brother Muhammad Sadiq, who was also a defendant, appeared on his own behalf and also as guardian of the minors. However, in the preliminary decree that was passed against them, the minors were shown to be under the guardianship of their mother. In the course of subsequent proceedings in the suit, there was an application by the parties concerned for reference to arbitration. In that application Muhammad Sadiq signed for himself and as guardian of the minors. He also made a separate application for permission to refer the matter to arbitration. Permission was accorded and the matter was referred to arbitration. In due course an award was submitted and on the basis of the award, a final decree was passed against the minors and other defendants in the suit. Against that decree Muhammad Sadiq for self and as guardian of the minors presented an application for revision to the High Court with the result that their liability was reduced to some extent. Subsequently the decree-holder took out execution which was resisted by the minors on the ground that the final decree was not binding against them inasmuch as the reference to arbitration was invalid because their mother who was their guardian did not join in the reference. This objection was overruled by the Subordinate Judge and he ordered the execution to proceed. Against this order the present appeal has been preferred by the minors.

The contention raised by Mr. De on behalf of the appellants is that under the provisions of O. 32, Rr. 5 and 7, Civil P. C., the application for reference to arbitration could be made only by the guardian for the suit after obtaining the necessary leave of the Court and as Muhammad Sadiq who made applications for the purpose was not the guardian, there was no valid reference and therefore the award and the decree were wholly void. O. 32, R. 7, sub-rule 2 however provides that any agreement or compromise entered into by the guardian without the leave of the Court shall be voidable against all parties other than a minor. Obviously this means that a decree based on such agreement or compromise is not void but only voidable at the instance of the minor. Mr. De relies on a decision of this Court in 18 Pat 271[1] where their Lordships had to deal with a suit brought by a minor to set aside a decree based on an award which was made on a reference obtained by his guardian without the requisite sanction under O. 32, R. 7. It was held that in view of the provisions of O. 32, R. 7, which were applicable to the case the decree based on the award was not binding on the minor. Mr. De has referred to certain observations in the judgment of his Lordship

1. Kedar Nath Sahu v. Basant Lal Sahu, (1939) 26 A I R Pat 278=183 I C 422 = 18 Pat 271 = 20 P L T 170.

the Chief Justice, to the effect that the decree was invalid against the minor. Nowhere from that decision it appears that their Lordships decided or were required to decide whether the decree was void or only voidable at the instance of the minor. What their Lordships actually decided was that the express provisions of O. 32, R. 7, having been contravened, the decree was not binding on the minor. Indeed in A I R 1931 Bom 500,[2] which was referred to in that decision, their Lordships of the Bombay High Court observed that the award and decree based in terms of the award were void. But this observation cannot be taken to be an authority in view of the plain language of sub-r. 2, of O. 32, R. 7. In this Bombay case also their Lordships were dealing with a suit to set aside a decree.

The position is quite different where objection to the validity of a decree passed in contravention of the provisions of O. 32, R. 7, is taken in the execution proceeding. It is a well settled principle of law that an executing Court cannot go behind the decree. No doubt if it appears that the Court had no jurisdiction to pass the decree, the decree would be altogether void and in that case, it would be open to the executing Court to disregard it and refuse to execute it. This was the view taken by a Full Bench of this Court in 4 Pat L J 240,[3] where a decree passed against a dead man was held to be a nullity and therefore inexecutable against his legal representatives. Sir Dawson Miller C. J., in that case very clearly pointed out the distinction between a void decree and a voidable decree. A void decree can be treated as non-existent and of no binding force or effect; a voidable decree is valid and binding until it is declared to be invalid by a competent tribunal. A decree is void when the Court which passed it had no jurisdiction whether territorial or pecuniary or over the subject-matter or in respect of the judgment-debtor's person to make it. Where however the Court had complete jurisdiction to hear a case but passes a decree in disregard of some provisions of law, the decree is voidable and is binding until it is set aside in an appropriate proceeding.

In this connexion reference may be made to the decision of this Court in 2 Pat 335.[4] Again in 12 Pat 117[5] it was clearly pointed out that there is a distinction between an inherent lack of jurisdiction in a Court and lack of jurisdiction on grounds which have to be determined by the Court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable; such a decree can be set aside by adopting the proper procedure, but cannot be collaterally impeached. It was further held in that case that where minors were properly represented in a suit but there was no formal order for the appointment of their guardian, it was a case of a mere irregularity which did not vitiate the decree. In the present case there is no justification for holding that the decree in question is a nullity. It is futile to suggest that the minors were not before the Court and therefore the Court had no jurisdiction over them; in fact they did appear in Court through a guardian who acted for them though there might be no formal order appointing him. The decision of the Privy Council in 32 Cal 296[6] relied on by Mr. De is distinguishable because in that case what was decided by their Lordships was that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. There also the question was raised in a suit and not in an execution proceeding.

There is an equally effective answer to Mr. De's contention. We are not quite sure on the face of the records before us if any order was at all made by the Court appointing the mother as guardian for the suit. On the other hand, we find that at the earliest stage before the time for filing written statement came, Muhammad Sadiq appeared for self and as guardian of the minors and at subsequent stages also he appears to have acted as their guardian. The application for reference to arbitration was signed by him for self and as guardian of the minors and he also asked for leave of the Court as required by O. 32, R. 7, Civil P. C., which was allowed. Though there might be no formal order of the Court appointing him as the guardian of the minors, the question may arise whether they were effectively represented in the

2. Sadashivappa Gangappa, v. Sangappa Chanvirappa, (1931) 18 A I R Bom 500=134 I C 1221=33 Bom L R 1033.
3. Jungli Lal v. Laddu Ram, (1919) 6 A I R Pat 430 = 50 I C 529=4 Pat L J 240 (F B).
4. Satdeo Narain v. Ramayan, (1923) 10 AIR Pat 242=71 I C 705=2 Pat 335=4 P L T 147.
5. Girwar Narayan v. Kamla Prasad, (1933) 20 A I R Pat 104=142 I C 113 = 12 Pat 117 = 13 P L T 737.
6. Khiaraj Mal v. Dain, (1905) 32 Cal 296 = 32 I A 23=1 C L J 584=8 Sar 734 (P C).

suit. It has been held by their Lordships of the Judicial Committee in 30 Cal 1021[7] that where a guardian for a minor defendant appeared in the suit and effectively represented him although no formal order of appointment was made, the decree could not be said to be invalid against the minor unless prejudice was shown. Whether in the present case the minors were effectively represented and whether they suffered any prejudice are questions which cannot be investigated in the execution proceeding. For these reasons I must hold that the objection was rightly disallowed by the Subordinate Judge. I would therefore dismiss the appeal with costs.

Rowland J. — I agree. All Mr. De's research and his interesting argument failed to produce before us any instance in which in a case of this nature the judgment-debtor against whom a decree had been passed had successfully objected to its execution on the ground of its being a nullity. The cases which he cited were cases in which the minors against whom a decree had been passed had brought suits and obtained declarations that the decree was not binding on them or had obtained a judgment and decree setting aside the decree. In one instance the minors had appealed from a preliminary decree and this decree was set aside on appeal. The mere fact that in A I R 1931 Bom 500[2] and A I R 1934 Cal 845[8] the word 'void' appears along the observations of the learned Judges will not suffice to make them authority for what was not decided and was not necessary to be decided in those cases. The decisions in 32 Cal 296[6] and 4 Pat L J 240[3] were cases affecting the estate of a deceased party whose estate after his death was not represented. That is quite a different position from the one before us.

N.K./R.K. *Appeal dismissed.*

7. Bibi Walian v. Banke Behari Prasad Singh, (1903) 30 Cal 1021=30 I A 182=7 C W N 774 =8 Sar 512 (P C).
8. Nurul Anwar v. Golenoor Bibi, (1934) 21 A I R Cal 845=153 I C 289=59 C L J 521.

A. I. R. 1940 Patna 62

ROWLAND AND CHATTERJI JJ.

Bachoo Prasad Singh and others — Appellants.

v.

Gobardhan Das and others — Respondents.

Appeal No. 295 of 1938, Decided on 18th August 1939, from original order of Sub-Judge, Patna, D/- 11th July 1938.

(a) Civil P. C. (1908), O. 21, R. 22—Suit against members of joint family, minor members being represented by *M* as guardian ad litem—In execution proceeding notice under O. 21, R. 22 not served on *M* but execution sought to be taken against minors by describing them as under guardianship of *G* without removing *M* from guardianship—Sale held unsustainable against minors.

Once the Court has found that the legal conditions do not exist for proceeding with an execution, then there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly constituted in the absence of proper notice under O. 21, R. 22 must fall to the ground. [P 64 C 1]

In a suit against members of a joint family the minor members were represented by a pleader *M* appointed by the Court to be their guardian-ad-litem; but in the execution application no reference was made to the above named pleader. Execution was sought to be taken against the minors describing them as under the guardianship of *G*. No notice was issued to *M* under O. 21, R. 22 and to the minors through him. There was no order of the Court either removing him or appointing *G* as guardian-ad-litem so as to authorize the latter to represent the minors in the execution proceedings and to make any admissions on their behalf or any terms with the decree-holders with reference to the proceedings in the execution and to such matters as adjournments on conditions:

Held that the sale of the share of the minors was unsustainable: *30 Cal 1021 (P C) and 25 Bom 337 (P C), Disting.* [P 64 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Sale of entire joint family property found to be without title in respect of shares of minor members—Sale not confirmed by the time of objection by minors that sale did not affect their interest—No mutual understanding between Court and bidders as to what was being sold—Sale held should be set aside in its entirety.

A sale of entire joint family property was found to be without title as against the share of minor members. The sale was not confirmed by the time when the minors objected that the sale did not affect their interest. There was no mutual understanding between the Court and the bidders as to what was being put to sale:

Held that the sale should be set aside in its entirety and not only as against share of the minors. [P 64 C 2]

Mahabir Prasad and Chowdhury Mathura Prasad — *for Appellants.*

C. P. Sinha and Kaushal Kishore Sinha — *for Respondents.*

Rowland J.—This is an appeal by the decree-holders who in execution of a money decree against a number of members of a joint family put up to sale certain properties of the joint family. After the sale three of those members presented objections under S. 47, Civil P. C., and also under O. 21, R. 90 contending that the execution as against them was not properly constituted at its inception and the

Court had no jurisdiction to proceed with it. The Court allowed the objection and declared that the sale which had been held should not affect the interest of the minor judgment-debtors who were petitioners before it. The facts as to representation of these minors are that in the original suit they were represented by a Pleader, Babu Jagdish Chandra Mitra, appointed by the Court to be their guardian ad litem ; but in the execution application no reference is made to the above-named pleader. Execution was sought to be taken against the minors describing them as under the guardianship of Gobardhan Das who is brother of one and uncle of others of the minors and is the managing member of the joint family. In the course of the proceedings in execution Gobardhan appeared. He took time and he obtained adjournments of the sale from date to date, asking for adjournments on some of these occasions in the name of all the judgment-debtors including the minors and waiving all objections regarding the necessity of issuing a fresh sale proclamation in consequence of the sale having been adjourned. The sale was eventually held on 5th May 1938 and the property knocked down to the decree-holders and the objection under S. 47 and the application under O. 21, R. 90 was presented on 4th June 1938. It is presented in the name of the minors through Babu Radha Kishun Daga their maternal uncle. An application was presented for the discharge of Babu Jagdish Chandra Mitra and appointment of the maternal uncle as their next friend. It is obvious that the failure in the execution petition to name Babu Jagdish Chandra Mitra as the guardian ad litem of the minor and to issue notice to him under O. 21, R. 22 and to the minors through him was in contravention of the correct procedure. It is clear too that there is no order of the Court either removing him or appointing Gobardhan Das as guardian ad litem so as to authorize the latter to represent the minors in the execution proceeding and to make any admissions on their behalf or any terms with the decree-holders with reference to the proceedings in the execution and to such matters as adjournments on conditions. The question is whether these defects are to be considered fatal to the proceedings.

Mr. Mahabir Prasad has relied on the Privy Council decision in 30 Cal 1021[1] in which a decree and sale in execution had been obtained against minors whose mother had been nominated by the opposite party to be guardian ad litem and had in fact appeared and acted as such throughout the proceedings, but the Court had never passed a formal order appointing her to be guardian ad litem. In a suit brought by the minors years afterwards to set aside the sale and recover possession of the property the Privy Council held that the sale was not a nullity, that the alleged irregularities had not caused prejudice to the plaintiffs and they could get no relief. The position here, however, is not quite on all fours. In 30 Cal 1021[1] all the parties had for years acted on the supposition that the mother had been properly appointed and had acted as guardian lawfully and regularly. The proceedings were held not to be bad merely because that understanding proved in fact to be mistaken. In effect, an arrangement had been proposed and carried out for the representation of the minor, an arrangement which, if the attention of the Court had been given to it, would have been clearly unobjectionable and would have been approved. But in the case before us, it is not so; on the face of the record it was apparent that the proposal to appoint Gobardhan to represent the minors was highly objectionable for the obvious reason that there was already a guardian ad litem appointed for the suit, including the execution proceedings also, therefore an order appointing Gobardhan can hardly be supposed to have been made by implication when in the circumstances it could not be made. No doubt it was possible for the Court to remove the pleader and thereafter to appoint Gobardhan, but the Court at this stage was not asked to remove the pleader. So the condition precedent to Gobardhan being appointed or acting as guardian ad litem did not exist. Along with the difficulty arising out of O. 32, Civil P. C., we have also to consider the bearing of O. 21, R. 22 which requires a notice to be served on the judgment-debtor to show cause why execution should not be levied. No such notice was served on the guardian ad litem appointed by the Court who should have received notice on behalf of the minors.

It is said that a notice was served on Gobardhan and Mr. Mahabir Prasad suggests that this notice though served on a wrong person may suffice to give the Court jurisdiction to proceed with the execution. No doubt the service of notice on a wrong

1. Walian v. Banke Behari, (1903) 30 Cal 1021= 30 I A 182=7 C W N 774=8 Sar 512 (PC).

person does not in all cases invalidate the proceedings in execution. There was the case in 25 Bom 337[2] in which the notice had been served on the wrong person as the legal representative of a deceased mortgagor. An objection was taken in those proceedings that the person on whom notice had been served was not the legal representative. The Court considered that objection and decided against it. The property was sold. Years afterwards when a suit was brought to avoid the sale on account of the defect in the proceedings owing to the wrong person having been brought on the record and the right person not having been brought on the record, their Lordships held that the sale could not be defeated as the Court had jurisdiction to hold it; it had jurisdiction to hold rightly or wrongly that the person who had been brought on the record was the legal representative of the deceased debtor. But this case is different. Here we are not trying after long lapse of time the effect of proceedings which have long ago reached their conclusion in the Court which was seised of them. But we are dealing with a pending case and a sale which has not yet been confirmed. We are also not dealing with a case in which the Court has mistakenly held that Gobardhan was the right person to be served with the notice. On the contrary as soon as its attention was drawn to the matter, the Court had no hesitation in finding that Gobardhan was not the right person. Once the Court has found that the legal conditions do not exist for proceeding with an execution, then there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly constituted in the absence of proper notice under O. 21, R. 22 must fall to the ground. It follows therefore that the sale of the share of the respondents was rightly held by the Subordinate Judge to be unsustainable.

Mr. Mahabir Prasad's last contention was that the sale which purported to be a sale of the entire property, a house, should either stand or be set aside as a whole. There is I think substance in the contention. This is not a case in which the sale has been confirmed, possession taken and enjoyed for years but in respect of part or a share of the property without title. In that state of things there are cases in which the purchaser has retained possession of so much of the property as could in those proceedings have been validly sold to him. It was indeed too late to set aside the entire sale. But here the sale not having been yet confirmed (I speak with reference to the date of the objections before the Subordinate Judge) it is to be considered what was being put up for sale and for what the purchaser was bidding. If there was not a mutual understanding between the Court and the bidders as to what was being put up to sale, it is difficult to say that such a sale can be confirmed. For the respondents Mr. C. P. Sinha has no objection to this direction being given. In the result the appeal is dismissed subject to a direction that the order of the Subordinate Judge be read as an order setting aside the sale in its entirety. The respondents are entitled to their costs actually incurred by them.

Chatterji J. — I agree.

D.S./R.K. *Appeal dismissed.*

2. Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=2 Bom L R 927=7 Sar 739 (P C).

A. I. R. 1940 Patna 64

AGARWALA J.

Surya Narain Acharya — *Plaintiff* — Appellant.

v.

Ram Tarak Misra and another — *Defendants* — Respondents.

Appeal No. 1018 of 1938, Decided on 20th September 1939, from appellate decree of Sub-Judge, Purulia, D/- 7th September 1938.

Transfer of Property Act (1882), S. 92 — S. 92 does not refer to mortgagee whose mortgage is redeemed by mortgagor with mortgagee's money.

Section 92 does not refer to a mortgagee whose mortgage has been redeemed by the mortgagor with money which has been obtained from the mortgagee himself. [P 65 C 1]

S. C. Mazumdar and P. N. Sanyal — *for Appellant.*

R. S. Chatterji — *for Respondents.*

Judgment. — This is an appeal by the plaintiff from a decision of the Subordinate Judge of Purulia modifying a decision of the Munsif of Raghunathpur. On 27th September 1918, defendant 1 and his brothers executed a usufructuary mortgage in favour of defendant 3 to secure a loan of Rs. 450. Subsequently, on 9th April 1930, defendant 1 executed a mortgage with respect to his interest in the property in favour of the plaintiff to secure a loan of Rs. 200. A few days later, that is to say, on 15th April

1930, in consideration of a salami of Rs. 1200, the mortgagors agreed to grant defendant 3, the prior mortgagee, a lease of the mortgaged properties. Out of the salami, Rs. 450 was set off against the prior mortgage and the balance was paid in cash. This transaction was evidenced by a registered lease. The plaintiff sued on his bond of 1930 impleading the mortgagor, the prior mortgagee, and the subsequent mortgagee. The first Court decreed the suit, but that decision has been reversed by the Court below on appeal by defendant 3, the mortgagee. The sole question is whether defendant 3 by redemption of his prior mortgage has lost his rights as a mortgagee. The matter appears to be concluded by S. 101, T. P. Act. The material portions of that Section are :

> Any mortgagee of an immovable property may purchase or otherwise acquire the rights in the property of the mortgagor without thereby causing the mortgage to be merged as between himself and any subsequent mortgagee of the same property.

By the agreement of 15th April 1930, defendant 3, the prior mortgagee, has acquired permanent rights in the property and the Section clearly provides that as between the prior mortgagee and any subsequent mortgagee the prior mortgage shall not be considered to have been merged in the other interest which has been acquired. The learned advocate for the appellants contends that S. 92, T. P. Act, is the Section which is applicable to the facts of this case. According to this argument defendant 3 was a person who had advanced to a mortgagor money with which the mortgage had been redeemed and therefore was a person subrogated to the rights of the mortgagee whose mortgage had been redeemed provided that the mortgagor has, by a registered instrument, agreed that that person shall be subrogated. Now, as there was no agreement by a registered instrument that defendant 3 should be subrogated to the position of a prior mortgagee, it is contended that he could no longer rely upon his position as a mortgagee. The paragraph of S. 92 on which the learned advocate relies clearly does not refer to a mortgagee whose mortgage has been redeemed by the mortgagor with money which has been obtained from the mortgagee himself. There is no other point in this second appeal which is therefore dismissed with costs.

D.B./R.K. *Appeal dismissed.*

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A. I. R. 1940 Patna 66

VARMA AND MANOHAR LALL JJ.

Singheshwar Singh and others — *Defendants* — Appellants.

v.

Medni Prasad Singh and others, Plaintiffs, and others, Defendants — Respondents.

Appeal No. 27 of 1937, Decided on 19th September 1939, from original decree of Sub-Judge, Monghyr, D/- 26th February 1936.

(a) Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), Sec. 7 — Words "evidenced by such document" —Meaning of.

The meaning of the words "evidenced by such document" is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word "loan" which covers an engagement to fulfil a previous obligation; where the loan is evidenced by a series of letters or other documents like bahi khatas or based on as evidenced by a hand-note which for some purposes may be inadmissible in evidence, nevertheless a Court must refer to them for the purpose of S. 7 to find out what the loan was in order to apply the rule of damdupat adopted by the Legislature with the limitations provided by the Act. [P 67 C 2]

(b) Mortgage —Priority—Mortgage in favour of *B* — Subsequent mortgage in favour of *C* of some properties covered by earlier mortgage — Subsequent mortgage in favour of *B* to pay balance due on first mortgage with additional security and lower rate of interest — Suit by *B* within 12 years of due date under third mortgage but beyond that due under first mortgage — *C* held not entitled to priority and suit not barred by limitation.

A mortgagor executed a mortgage in 1912 in favour of *B*. In 1916 he executed another mortgage in favour of *C* by hypothecating some of the properties comprised in the mortgage of 1912. In 1922 he executed mortgage in favour of *B*. The whole of the amount secured by this mortgage was the balance then due to *B* under the earlier bond of 1912. In this document the earlier mortgage of 1912 was specifically referred to and it was stated that the properties of the mortgage of 1922 were subject to the mortgage of 1912. In the mortgage of 1922 additional security was given and there was stipulation to pay lower rate of interest. A suit was brought within 12 years of the due date of payment of the bond of 1922 but more than 12 years of the due date of payment of the bond of 1912 :

Held that by the mortgage of 1922, the mortgagee never gave up his security under the bond of 1912 and the effect of the mortgage of 1922 was merely to substitute the covenant to pay the mortgage amount on the due date stated in this bond in place of the covenant to pay as stated in the bond of 1912. The suit was therefore a suit on the bond of 1922 and the right of the mortgagee so far

as the property stood charged in the bond of 1912, had never been given up; the charge could still be enforced and was always enforceable so long as the full amount secured was not repaid. Hence, the suit on the bond of 1922 was not barred by limitation; the mortgage bond of 1912 was kept alive, and the claim of priority by *C* must fail : *A I R 1918 Mad 1327, Rel. on; Case law discussed.*

[P 68 C 2; P 69 C 1; P 70 C 2]

(c) Transfer of Property Act (1882), S. 67-A —S. 67-A is not retrospective.

The provisions of S. 67-A are not retrospective.

[P 70 C 2]

(d) Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 7 — "Document" in expression "based on document" can be used in two ways — In one case evidencing loan and in another case simply mentioning loan — Sec. 7 does not contemplate that same document may relate to two different amounts.

Section 7 deals with two kinds of loan — a loan advanced and a loan based on a document. Under the second heading it takes into consideration two kinds of documents on which loan may be based— one kind may evidence the loan and the other which may not evidence the loan, but may be utilized to find out the amount mentioned in it. The document in the expression "based on a document" can be used in two different ways, in one case evidencing a loan and in another case simply mentioning a loan. The Section cannot be interpreted to contemplate that the same document may relate to two different amounts. [P 71 C 2]

K. Sahai and R. S. Chatterji —

for Appellants.

B. N. Rai and K. K. Sinha —

for Respondents.

Manohar Lall J.—This is an appeal by defendants 1, 2, 3, 4, 5 and 6 who are the mortgagors and are appellants 1, 2, 4, 5, 6 and 7 in this Court, as well as by defendant 27, who is a subsequent mortgagee, against the decision of the learned Subordinate Judge of Monghyr dated 26th February 1936, decreeing the suit which was instituted by the plaintiffs-respondents to enforce a mortgage bond dated 31st August 1922 in the following circumstances: On 27th April 1906, the father of the principal appellants, who will be hereinafter referred to as the mortgagors, executed a mortgage bond in favour of the plaintiff and his sons to secure a sum of Rs. 800. A sum of Rs. 200 was paid back later on by the mortgagor to reduce his liability but the major part remained unpaid. On 11th October 1912 the mortgagors executed another mortgage bond in favour of the same mortgagees to secure a sum of Rs. 1391 stipulating to pay compound interest at Rs. 1-2-0 per cent. per mensem. The amount due under the earlier bond had come up to Rs. 1241 and a sum of Rs. 150 was taken in cash by the mortgagors. On 29th May 1916 the mortgagors executed another mortgage—a usufructuary mortgage—for a sum of Rs. 900 in favour of defendant 27, an appellant before us. The property covered by this usufructuary bond is included in the properties given in the mortgage of the earlier bond of 1912. The mortgagee of 1916 paid the sum of Rs. 900 to the earlier mortgagee as stipulated in the mortgage of 1916. On 5th August 1920, the mortgagors gave a sudhbharna to the plaintiffs for a sum of Rs. 1500, some property which was also given in security in the earlier bond of 1912. This bond is Ex. 3, and by it the mortgagor stipulated to pay the whole amount of Rs. 1500 in one lump sum in Baisakh 1334; the possession of the mortgaged properties was for a fixed period of seven years.

The amount of Rs. 1500 was arrived at by calculating the dues of the mortgagee of this bond under another bond of Rs. 888 and the balance of Rs. 612 was paid in part payment of the liability under the bond of 1912 which is Ex. 2 in the case. On 31st August 1922 the mortgagors again executed a mortgage bond, the bond in suit, for Rs. 2000 stipulating to pay interest at 13 annas per cent. per mensem to be compounded. The whole of the amount secured by this document was the balance then due under the bond of 1912. In this bond, which is Ex. 2 (a) in the case, it is stated that the amount of Rs. 2000 is the balance of the principal and interest after deduction of the payment towards the bond of 11th October 1912, that the bond is being executed on account of previous dues and the amount will be paid on 30th Baisakh, 1330 fasli. It is also stated in the bond that the mortgaged properties under this document are not subject to any other encumbrance than that under the bond of 1912 and another usufructuary bond of 1905. The properties given in security consist of all the properties which were given under the bond of 1912, but there are additional properties also. The present suit was instituted on 27th April 1935, that is to say within 12 years of the due date of payment of the bond of 1922, but beyond 12 years of the due date of the payment of the bond of 1912 which was renewed as aforesaid by giving additional security in 1922 and with a stipulation to pay a lower rate of interest. It is unnecessary to state the different defences taken in the Court below as the matter in controversy before us has resolved itself into two questions of law : one concerning the application of the provisions of the

Bihar Money-lendars Act, 1939 and the other concerning the priority of defendant 27.

The learned Subordinate Judge held that the bond in suit was a valid document, that the plaintiffs never agreed to release the property given in security to defendant 27, that the bond of 1912 was not fully satisfied by the payment by defendant 27 in 1916 and therefore his claim for subrogation was negatived. He also held that the usufructuary mortgage bond of the year 1920 in favour of the respondents, which covers the properties included in the bond of 1912, was executed with the full knowledge and consent of the mortgagors. He also negatived the contention of the defendant that the stipulation to pay compound interest at 13 annas per cent. was excessive. The plea of limitation was not pressed and was overruled by the learned Subordinate Judge. In appeal it is argued that having regard to S. 7, Bihar Moneylenders Act, this Court should not pass any decree for a sum larger than Rs. 1391, the amount stated in the bond of October 1912, and that from the interest due on this amount, a deduction should be made of the sum of Rs. 1512 which was admitted or proved to have been paid towards the bond of 1912 from time to time in lieu of interest. In other words, the contention is that a decree for mortgage amount should be passed not exceeding Rs. 1391 if there are no other obstacles in the way of the plaintiffs. I do not agree with this contention. The wording of S. 7 is clear. A Court has to find out in each case where the loan is based upon a document what is the exact amount of the loan stated in the document. The word 'loan' has been defined in the Act to include a transaction on a bond bearing interest executed in respect of past liability.

Applying these tests, I am satisfied that the amount of loan advanced in the present case for the purposes of the Bihar Moneylenders Act, is the amount stated in the document of 1922; 'the loan' is based upon that document. That amount, I find is Rs. 2000. The plaintiffs are therefore entitled to a decree for this amount and to a decree for interest for a sum not larger than Rs. 2000 as no payment has been proved to have been made after the execution of this bond. But it was argued by counsel appearing on behalf of the appellants that the wording of S. 7, Bihar Moneylenders Act, justified him in urging that although the amount of Rs. 2000 is mentioned in the document upon which the loan is based, nevertheless the document evidenced the loan of Rs. 1391 originally advanced in 1912 which swelled up to Rs. 2000 in 1922. The argument is based upon the last few words of S. 7 which run as follows: "If the loan is based on a document, the amount of loan mentioned in, or evidenced by such document."

As the matter was of first impression, we had the assistance of the learned Advocate-General who, very kindly, came to assist us at our request. The learned Advocate-General submitted that the words "evidenced by such document" can only apply to a case where the loan is evidenced by bahi khata and the loan is based upon it and that in such cases the Court must find out from the bahi khatas the amount evidenced thereby. On a careful consideration of the argument advanced, I am of opinion that the meaning of this clause (though somewhat obscurely worded) is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document, then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word 'loan' already pointed out, which covers an engagement to fulfil a previous obligation; where the loan is evidenced by a series of letters or other documents like bahi khatas or based on as evidenced by the handnote which for some purposes may be inadmissible in evidence, nevertheless, a Court must refer to them for the purpose of S. 7 to find out what the loan was in order to apply the rule of damdupat adopted by our Legislature with the limitations provided by the Act. When I apply this construction to the present case, I am of opinion that the loan in the present case should be taken to be Rs. 2000. Learned counsel for the appellants tried to argue that the finding of the learned Subordinate Judge disallowing the plea of the payment of two items of Rs. 492-7-0 and Rs. 282 was erroneous. But he could not advance any convincing argument which would justify us in differing from the findings of the learned Subordinate Judge on Issue 6. That finding is based upon good and cogent reasons. I agree with the learned Subordinate Judge that the story of the panchait and the adjustment of accounts in 1342 Fs. cannot be successfully established.

Defendant 27 who, as I have stated above, is the mortgagee of some of the properties covered by the bond of 1912 and who is a mortgagee of the year 1916, contended that by the execution of the bond of 1922, the prior bond of 1912 was fully paid off in the eye of the law, with the result that his client became the prior encumbrancer and that the mortgaged properties should not be allowed to be sold free from the encumbrances of his bond of 1916. He argued in the alternative that if it was held that the bond of 1912 was alive to sustain the mortgage charge prior to that of his charge of 1916, then the suit must be held to be barred by limitation as having been instituted beyond 12 years of the due date stated in the bond of 1912; and repelled the contention that any acknowledgment subsequent to 1916 by the mortgagor, would operate in law to keep alive the bond of 1912 against him, the mortgagee of 1916. In my opinion, these contentions are fully answered by the decision of the Madras High Court reported in 38 I C 240.[1] The facts of that case were that in 1882 a certain Rajah and his son executed a mortgage to one Subbamma of four villages to secure the advance of a sum of Rs. 25,000 and interest thereon (the amount was payable on demand). In 1888, the son, who had become the Rajah on his father's death, mortgaged the same four villages and two others in addition to the same mortgagee to secure the sum of Rs. 39,791 which had then become due on the earlier mortgage of 1882, agreeing to pay interest at a reduced rate and covenanted to pay the principal on 30th December 1893. The plaintiff was the assignee of the mortgage of 1888. In the meantime, in 1887, the same mortgagor had given in mortgage three of the four villages comprised in the first mortgage of 1882 to the ancestor of certain defendants who in due course instituted a suit on their mortgage, obtained a decree and purchased the three villages in Court sale, but the mortgagee Subbamma was not a party to these proceedings. In these circumstances, it was argued that the mortgage of 1888 extinguished the mortgage of 1882 thereby giving priority to the mortgage of 1887 which had become earlier in date. The contention was repelled by Srinivasa Aiyangar J. with whom Ayling J. agreed in these words :

> It is now well settled that a mere change in the form of indebtedness, in the mode or time for payment, a variation of the rate of interest, or the giving of additional security, is not enough to rebut the presumed intention to retain the mortgage security when it is to the interest of the person who is entitled either to extinguish the security or keep it alive, so to keep it alive : a quotation from S. 924 of the well-known book of Jones on Mortgages.

The learned Judges also pointed out that the effect of the second bond of 1888 was merely to substitute a covenant to pay the mortgage amount on 30th December 1893 for the covenant to pay on demand in the bond of 1882 and to lower the rate of interest payable thereafter, without in any way affecting the security for the payment of the mortgage amount. It was also held that an agreement between the mortgagor and the first mortgagee extending the time for payment of the mortgage amount in no way impairs the security even as against the subsequent incumbrancer, for the junior encumbrancer is not a surety for the mortgagor. The learned Judges repelled the argument that even if it be assumed that the mortgage of 1882 was in full force when the third mortgage of 1888 was executed, any right to enforce that mortgage at the time when the action was brought on 2nd October 1913 was barred by the law of limitation or that the mortgagee lost his priority against the appellants because they held that the mortgage money did not become due till 30th December 1893, that payments were made by the mortgagor within 12 years of the second bond of 1888 though beyond 12 years of the due date of the first bond of 1882 and these kept the two bonds alive because

> this is not a case where there are two covenants to secure the payment of a debt, one under the mortgage of 1882, and another under the mortgage of 1888, but only one, viz. that under the latter document which superseded the former, and so long as the latter covenant remained unbroken, the mortgagee cannot demand or recover the mortgage amount. The mortgagee is not suing on the mortgage of 1882 as it stood when it was executed as is assumed in the argument, but on that mortgage as varied by the subsequent agreement, which agreement, I have already held, in no way impaired the security as against the second mortgagee.

In my view, the decision in this case exactly applies to the facts of the present case. By the mortgage of 1922, the mortgagee never gave up his security under the bond of 1912 and the effect of the mortgage of 1922 was merely to substitute the covenant to pay the mortgage amount on the due date stated in this bond in place of the covenant to pay as stated in the bond of 1912; the mortgagee never intended to give up his security under the bond of 1912; he

1. Velauda Reddi v. Narasimha Reddi, (1918) 5 A I R Mad 1327=38 IC 240=32 M L J 263.

refers to it expressly in the later document. The suit is therefore a suit on the bond of 1922 and the right of the mortgagee, so far as the property stood charged in the bond of 1912, has never been given up; that charge can still be enforced and is always enforceable so long as the full amount secured is not repaid, and the suit is brought within 12 years of the due date of the 1922 bond. I do not see what equity there is in favour of defendant 27 who took the mortgage in 1916 with his eyes open, subject to a mortgage of 1912. That mortgage has not been paid off as yet and still subsists; the mortgagee merely made and accepted another arrangement with additional security for the payment of his valid and existing debt, and this in no way was prejudicial to defendant 27.

I now come to consider some cases which were cited on behalf of the appellants. The question in these cases was whether an acknowledgment by a mortgagor after he has transferred the equity of redemption in whole or in part is a valid acknowledgment against the puisne encumbrancer who was in existence before the acknowledgment. The Madras case which I have just been considering is also an authority for the proposition that an acknowledgment of a mortgage debt in the form it took in that case was valid not only as against the person acknowledging it but also as against those deriving title under him even prior to the date of the acknowledgment and subsequent to the debt acknowledged. The learned advocate for the appellants cited the case in A I R 1925 Mad 1108.[2] But that case is against his contention. In that case it was held that where after the sale of a part of the mortgaged property a fresh deed is executed by the mortgagor in renewal of the original mortgage, there is a new promise to pay by the mortgagor and the question is not whether it operates as acknowledgment to save the bar of limitation as against the intermediate alienee because it is a new covenant substituted for the old covenant and not a mere acknowledgment for the old one—the period of limitation even as against the alienee is to be calculated from the date mentioned in the later mortgage and not from that in the original one—the effect of such a new covenant is more analogous to a part payment under Sec. 20, Limitation Act, and not merely to that of an acknowledgment under Section 19.

It is unnecessary to consider in the present case the correctness of the view taken in some cases that the acknowledgment by a mortgagor of the liability to his mortgagee even after he has parted entirely with the equity of redemption extends the period of limitation so as to bind an earlier encumbrancer though subsequent to the date acknowledged. The present case is not a case where the mortgagors transferred their equity of redemption in full and then gave a mere acknowledgment but is a case where the mortgagors have dealt with the equity of redemption only to the extent of giving successive mortgages of 1912, 1916 and 1920 and renewing the earliest bond. Their liability always remained, as pointed out above in August 1922 when they renewed the mortgage of 1912 for the amount then validly due; they gave merely an additional security and covenanted to pay the amount on a different date with the stipulation to pay a lower rate of interest; this was in no way detrimental to the puisne encumbrancer.

I now deal with some of the cases which are strongly relied on by the learned advocate for the appellants. The first case cited by him was the case in 1 C L J 337.[3] That case contains an elaborate exposition of the law by that distinguished Judge, Mookerjee J. Harington J., did not endorse the opinion of his learned colleague because he said at p. 340 that the question of limitation raised a question of some difficulty but he was inclined to think that the admission in the ekrarnamah was sufficient to bar the statutory limitation. Mookerjee J. held that an acknowledgment by the mortgagor in favour of a prior mortgagee does not preclude a puisne mortgagee whose title accrued before the acknowledgment was given from relying on the statute of limitation as a bar. In my opinion as I said already it is unnecessary to consider the correctness of this decision as the present case is not a case of a mere acknowledgment by a mortgagor. I may point out that Srinivas Aiyangar J. at p. 242 sought to draw a distinction at the right hand column of 38 I C 240[1] between the case he was dealing with and the case in 1 C L J 337.[3] In 32 Cal 1077[4] the facts were that *A* mortgaged several

2. Yagnanarayana v. Venkata Krishna Rao, (1925) 12 A I R Mad 1108=86 I C 434.

3. Surjiram Marwari v. Barhamdeo Persad, (1905) 1 C L J 337.

4. Krishna Chandra Saha v. Bairab Chandra Saha, (1905) 32 Cal 1077=9 C W N 868.

properties to the plaintiffs and then sold one of them, property No. 3, to *B* who again mortgaged the property to *C* who brought the property to sale in execution of a decree obtained in a suit to enforce his mortgage, the property was sold and purchased by *D*. The mortgagor afterwards paid part of the principal as well as of the interest under the earlier mortgage and made an acknowledgment of his liability under it. In a suit brought by the plaintiff to enforce the first mortgage, *D* contended that the acknowledgment by *A*, would not prevent the statute of limitation from running against the first mortgagee. But the Court held that the acknowledgment as well as the payments were sufficient to keep alive the debt against the property No. 3. The case in 1 C L J 377[3] was referred to in the argument by the learned advocate for the respondents. This case does not support the appellant in the least. Reliance was next placed upon the decision of the Privy Council in 39 Cal 527=39 I A 68,[5] but the facts of that case are entirely different as pointed out in 38 I C 240[1] at page 243. Attention was next drawn to the case in 58 All 912[6] where it was held that an acknowledgment by a mortgagor cannot bind a mortgagee who derived title prior to the acknowledgment. The learned Judges pointed out the distinction between the plain languages of Ss. 19 and 20, Limitation Act. This case does not assist the appellant because as pointed out in the Madras case cited above, the present case is rather a case within the terms of S. 20 than within the terms of S. 19. The renewal of the bond in 1922 by giving an additional security lowering the rate of interest was a transaction which partook of the nature of part payment and therefore within the terms of S. 20. The next case cited was the case in A I R 1936 All 820.[7] That case dealt with an acknowledgment of liability by some of the heirs of a mortgagor against whom a decree for sale on the basis of a mortgage had been passed and it was held that this did not operate to save limitation as against the other heirs of the mortgagors. This question does not arise for consideration in the present case, and in any case we are bound by the decision of this Court in 12 Pat 93[8] where Rowland J. has reviewed the case law on the subject exhaustively, Agarwala J. giving a concurring judgment.

On a careful consideration of all the cases placed before us, I am of opinion that the suit on the bond of 1922 was not barred by limitation, the mortgage bond of 1912 was kept alive, and that the claim of priority by defendant 27 must fail. It was finally argued that the execution of the bond of 1922 will in any event operate as a novation of contract so that no suit can be instituted on the mortgage bond of 1912 unless, as was done in 44 I A 60,[9] the mortgage bond of 1922 became inoperative in law and then only within twelve years of the due date fixed in the bond of 1912. It is enough to say that the considerations which weighed with their Lordships in 44 I A 60,[9] do not arise in the case before us. In the present case it was to the interest of the mortgagee to keep alive the security under the bond of 1912, which had never been given up; he took an additional security, as pointed out above, by the bond of 1922; on that date the liability under the bond of 1912 was kept alive both by statute and by the intention of the parties as evidenced by the new arrangement. This is not a case of novation of contract within the meaning of Sec. 62, Contract Act.

The learned advocate faintly argued that the amount of Rs. 150 which was paid in cash on the bond of 1912 has not been proved to be advanced for legal necessity. Apart from the fact that the question was never raised either in the pleadings or in the evidence and that the defendants are the father, his sons and grandsons, the amount of Rs. 150 has been proved to have been paid off in 1916 and no part of the claim in the present suit consists of this item. It was also argued that the suit to enforce the mortgage bond of 1922 is not maintainable when the plaintiff has omitted to include in the suit his claims under the usufructuary bond of 1920 which after the period stated therein, namely after 1334, would operate as a simple mortgage bond. It is enough to state that the provisions of S. 67-A, T. P. Act, which are not retrospective do not apply to this mortgage bond.

5. Mohamad Ibrahim Hossain Khan v. Ambika Pershad Singh, (1912) 39 Cal 527=14 I C 496 =39 I A 68=15 CLJ 411=16 CWN 505 (PC).
6. Ram Sarup v. Bhagwati Prasad, (1936) 23 A I R All 636=164 I C 725=1936 A L J 586 =58 All 912.
7. Mohomed Taqi v. Raja Ram, (1936) 23 A I R All 820 = 166 I C 106 = 1936 A L J 1140 = I L R (1937) All 272 (F B).
8. Badri Das v. Pasupati Banarji, (1933) 20 A I R Pat 1=140 I C 145=12 Pat 93=14 P L T 6.
9. Har Chandi Lal v. Sheoraj Singh, (1916) 3 A I R P C 68=39 I C 343=44 I A 60=39 All 178 (P C).

Furthermore the respondents have conceded that any mortgage decree which may be passed in this case should declare that the property which will be sold to repay the amount due, namely Rs. 4000 including the property covered by the bond of 1912, will be sold free from any liability for the amount due under the simple and usufructuary bond of 6th August 1920. To make it clear the property will be sold free from any encumbrances other than that of the bond of 1912 except any earlier encumbrances that may be left outstanding.

Defendant 27 prayed as a last resort that his property in the circumstances of this case should be sold last, namely the property covered by his mortgage bond of 1916, i. e. Ex. A (2) may be sold only in the event of the other properties covered by the bond of 1912 and the bond of 1922 are not sufficient to discharge the liability of Rs. 4000. The respondents have agreed that this should be done but even if they had not conceded this we ourselves in our discretion would have passed a similar order in the circumstances of the case. The result is that there will be a decree in favour of the plaintiffs for a sum of Rs. 4000 only. The office will draw up the usual mortgage decree in the light of my observations above fixing the period of grace for two months from this date. The amount of Rs. 4000 will carry interest at 6 per cent. from the date of decree of the trial Court. In the circumstances each party will bear his own costs in this appeal which is allowed in part. The plaintiff is entitled to proportionate costs in the trial Court for the amount now decreed by this Court.

Varma J.—I agree. In view of the argument advanced by Mr. Kamla Sahay, appearing on behalf of the defendants first party, I should like to add a few words on the interpretation of Sec. 7, Bihar Money-lenders (Regulation of Transactions) Act, 1939. The contention is that although the bond was for Rs. 2000 it mentioned a loan of Rs. 1391 only and, therefore, the principle of damdupat should be applied to the sum of Rs. 1391 and not with regard to the sum of 2000. He urges that the bond of 1922 mentions the sum of Rs. 1391 and therefore the interest should not exceed that amount. If this argument were to be accepted, then the Courts will have to choose between two different sums one, the amount for which the bond has been executed and the other, the amount mentioned in it which has swelled up to the amount for which the bond was executed. But this does not seem to be the object of the Legislature from the wordings of the Section itself. The Section runs as follows:

> Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which together with any amount already realized as interest through the Court or otherwise is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document.

Looking at the Section it seems that it is dealing with two kinds of loan, a loan advanced and a loan based on a document. Under the second heading it takes into consideration two kinds of documents on which loan may be based, one kind may evidence the loan and the other which may not evidence the loan, but may be utilized to find out the amount mentioned in it. "Loan" has been defined in cl. (f) of S. 2. It says :

> 'Loan' means an advance whether of money or in kind on interest made by a money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan; . . . etc.

It is clear. that the definition includes cases of loans based on a document. S. 7 is a bit loosely worded, and we had to take the assistance of the learned Advocate-General who gave us two instances to illustrate the difference between two kinds of transactions one where the bond itself creates the loan, and the other that of a loan of bahi-khata account. From a reading of the Section, I am of opinion, that the document in the expression "based on a document" can be used in such two different ways, in one case evidencing a loan and in another case simply mentioning a loan. The Section cannot be interpreted to contemplate, as argued by Mr. Kamla Sahay, that the same document may relate to two different amounts. The argument of Mr. Kamala Sahay, therefore, fails.

D.S./R.K. *Order accordingly.*

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ROWLAND AND CHATTERJI JJ.

Saiyid Sadik Reza — Appellant.

v.

Bibhuti Bhusan Saha — Respondent.

Appeal No. 474 of 1938, Decided on 5th September 1939.

Principal and Agent — Accounts — Relation between parties being that of principal and agent and accounts between them being mutual, current and running — Account to be settled account need not be signed provided it is submitted to party sought to be made liable on it— Accounts adjusted and specific sum found due from principal to agent—Agent has right to sue for recovery of such sum — Cause of action arises from fact of adjustment.

The essentials of a mutual, open and current account are the reciprocity of dealing and the right to mutual demand. Where the relation between the parties is that of principal and agent, the accounts between whom are mutual, running and current accounts, an account to be a settled account need not be signed provided that it is submitted to the party sought to be made liable on it and he has by words or by his conduct acquiesced in its correctness. Until an account is stated between the parties, the right of either of them is to bring a suit for account and to have accounts taken. But once account has been stated, the party in whose favour there is a credit balance has the right to sue for the balance due to him. As between a principal and agent the obligation of either party is not confined to the rendering of accounts but includes also the payment of any balance which might be found due on taking accounts and where they are taken and adjusted and a specific sum found due from the agent to the principal, the principal then has a right to sue forthwith for recovery of the money. There can be no difference in principle between such case and the case in which on striking account the balance is found payable to the agent rather than to the principal. A cause of action arises from the fact of adjustment of account : *A I R 1920 Pat 161 ; 22 Bom 513 and 23 All 502, Disting.; A I R 1917 Cal 156, Rel. on.* [P 73 C 2; P 74 C 1]

B. N. Mitter and A. K. Mitter — *for Appellant.*

S. M. Mullick, S. C. Mazumdar and Ramanugrah Narain Singh — *for Respondent.*

Rowland J. — The appellant is the manager of a waqf estate. He was defendant in the suit which was for recovery of a sum of Rs. 1860-8-0 and compensation of Rs. 200 which the plaintiff claimed in the following circumstances : The plaintiff's father Rasaraj Saha was gomasta under the estate for a number of years and had given accounts of his collections and expenditure which were adjusted up to the end of the year 1330. He continued to be gomasta until his death which occurred on 3rd Agrahan 1334 B. S. corresponding to 19th November 1927. At that time the accounts for the years 1331-1333 and part of 1334 had not been submitted or adjusted. After his death the plaintiff, his son Bibhuti Bhusan Saha, carried on in his place and was formally appointed in Magh 1334 B. S. The plaintiff submitted his father's accounts of the years 1331-1333 on 27th September 1928. The accounts were received by the defendant's record-keeper and am-Mukhtear Gopal Kristo Das, a copy being returned to the plaintiff with acknowledgments of receipts of each set of papers signed by Gopal Kristo Das. The balance due from the estate to the plaintiff's father at the end of 1333 was according to the plaintiff Rs. 1860-8-0. Thereafter, on 5th October 1929, the plaintiff submitted his account for 1334 receipt of which was again acknowledged in writing by Gopal Kristo and a copy returned to the plaintiff which is Ex. 7. At the close of this account, balance was struck and it was found that for the year 1334 there was a net balance of Rs. 1786-3-3 due from the plaintiff to the estate. The result of deducting this balance from the previous balance of Rs. 1860-8-0 due from the estate to the plaintiff's father was that Rs. 74-4-9 was the balance due to the plaintiff from the estate. The plaintiff retained in his hands the sum of Rs. 1786-3-3 which was the excess of receipts over expenditure during the year 1334 only. The estate through its servant Saiyid Mohsan Reza instituted a criminal prosecution of the plaintiff under S. 408, I. P. C. alleging that he had misappropriated this entire sum of Rupees 1786-3-3.

The plaintiff brought into Court the entire amount on 22nd January 1931, and the case is described as having been compromised which I suppose means that the prosecution was abandoned, the case not being compoundable. Then the plaintiff brings this suit on 25th September 1931, to recover the sum of Rs. 1860-8-0 as due to his father at the close of 1333 and due to himself on the basis of the adjustment made on 27th September 1928, and also compensation by way of damages at Rs. 200 only for having withheld the amount without justification. The defendant pleaded that he was not liable to pay anything to the plaintiff substantially on the following grounds : that there had been no adjustment of account on either of the dates alleged; that the suit was malicious having been instituted in revenge for the prosecution of the plaintiff by the estate; that on a proper examination of the account it would be found that a large sum is due from the plaintiff to the estate, and finally, that the suit was barred by limitation. It should have been brought within three years from the death of Rasaraj Saha which occurred on 19th November 1927. Of the issues raised, contest centred on the questions whether the plaintiff had

a cause of action; whether the suit was barred by limitation and whether there had been any settlement and adjustment of account between the parties on 27th September 1928. The first Court held that there had been no such adjustment; that time must run from the death of Rasaraj and accordingly that the suit must fail both on the merits and as being barred by limitation. On appeal this decision was reversed. The District Judge found that on the plaintiff's copy of the account for 1333 there was a note to the effect that the upshot was excess of expenditure to the extent of Rs. 1860-8-0; that is to say, that on the basis of the account this sum was that it was due from the estate to the plaintiff. The entry was in the writing of a moharrir of the estate named Bhuban Chandra Das. It was unsigned and the plaintiff's case was that it was made in the presence and under the orders of Gopal Kristo Das that am-Mukhtear of the defendant. The District Judge finding that Bhuban Mohan Das was still in the respondent's service came to the conclusion that Bhuban Mohan had an authority to state the accounts on behalf of the defendant-respondent's estate and had duly made the entry which he held to be undoubtedly a statement of accounts between the parties. As regards limitation he held that the plaintiff was entitled to count time from the date of this statement of account and on the defendant's failure to give the plaintiff credit for the amount due, the plaintiff was entitled to sue within a period determinable with reference to Art. 115, Limitation Act.

In second appeal it has been pointed out that neither S. 19, Limitation Act, nor Art. 64 of the Schedule can be invoked in favour of the plaintiff; that S. 19 only applies when the acknowledgment of liability has been made in writing signed by the party either personally or by agent; that for Art. 64 the period begins when the accounts are stated in writing signed by the defendant or his agent; and it is said that the absence of a signature of Bhuban Mohan Das is fatal to the plaintiff's claim to save limitation by reference to the date on which the accounts were presented and accepted. It is said that there was no real statement of account between the parties, and for this, reference was made to 1 P L T 190,[1] and some other cases, 22 Bom 513,[2] 23 All 502.[3] All these cases however are cases of transactions between a creditor and his debtor. There might have been some payments made from time to time by the debtor in reduction of his indebtedness; but the nature of those accounts throughout was that the debtor was indebted and the cause of action was the debt and not an acknowledgment of it. The present case seems to be on quite a different footing as the whole basis of the relation between the parties was that it was a relation of principal and agent the accounts between whom are mutual, running and current accounts. The essentials of a mutual, open and current account are, as held in 7 Bom L R 151,[4] the reciprocity of dealing and the right to mutual demand; where these are the relations between the parties, an account to be a settled account need not, it was there held, be signed provided that it is submitted to the party sought to be made liable on it and he has by words or by his conduct acquiesced in its correctness. Until an account is stated between the parties, the right of either of them is to bring a suit for account and to have accounts taken. But once account has been stated, the party in whose favour there is a credit balance has the right to sue for the balance due to him. It was so held in the Madras High Court also in 21 Mad 366.[5] It was said :

> The allegation of partnership dealings and of settlement of accounts between the partners followed by a promise on the part of one partner to pay a liquidated sum to the other amounts to a contract supported by good consideration and the law does not require it to be in writing.

The case of an adjusted account between partners was considered in the Calcutta High Court in 15 C W N 882.[6] The parties had agreed to dissolve their partnership; they had formulated a basis of settlement; accounts were thereafter examined between them and a final adjustment was made on 20th August 1906. It was held that limitation did not run from the date on which the partnership itself terminated but that the adjustment gave rise to a fresh cause of action from the date on which it was made. A case between principal and agent was

1. Suraj Prasad Pandey v. Boucke, (1920) 7 A I R Pat 161 = 56 I C 379 = 5 Pat L J 371 = 1 P L T 190.
2. Shankar v. Mukta, (1898) 22 Bom 513.
3. Ganga Prasad v. Ram Dayal, (1901) 23 All 502 =1901 A W N 150.
4. Haji Abdul Rahman Shirazi v. Hajee Bibi, (1905) 7 Bom L R 151.
5. Marimuthu Pillai v. Saminatha Pillai, (1898) 21 Mad 366.
6. Jalim Singh v. Choonee Lal, (1911) 15 C W N 882=11 I C 540.

considered in 25 C L J 335.[7] From this decision it would appear that as between a principal and agent the obligation of either party is not confined to the rendering of accounts but includes also the payment of any balance which might be found due on taking accounts and where accounts are taken and adjusted and a specific sum found due from the agent to the principal, the principal then has a right to sue forthwith for recovery of the money. There can be no difference in principle between that case and the case in which on striking account the balance is found payable to the agent rather than to the principal. From these decisions it would seem to follow that a cause of action arose to the plaintiff from the fact of adjustment of account on 27th September 1928. I do not wish to whittle away the principle that ordinarily as between a debtor and creditor an acknowledgment does not create any liability but merely keeps an existing liability alive and the creditor suing for his debt has his original cause of action to sue on; but the point is that the principle does not apply to this case. The points taken in appeal that the plaintiff had no cause of action and that the suit is barred by limitation both in my opinion fail, and for the rest, the matter is concluded by the findings of fact. I would dismiss the appeal with costs.

Chatterji J.—I agree.

D.S./R.K. *Appeal dismissed.*

7. Kesho Prasad Singh v. Sarwan Lal, (1917) 4 A I R Cal 156=40 I C 359=21 C W N 591=25 C L J 335.

A. I. R. 1940 Patna 74

HARRIES C. J. AND FAZL ALI J.

Bhubaneshwar Narayan—Defendant—Appellant.

v.

Rai Satyadeo Narayan and others — *Plaintiffs* — Respondents.

Appeal No. 621 of 1938, Decided on 19th September 1939, from appellate decree of Dist. Judge, Darbhanga, D/- 25th June 1938.

Limitation Act (1908), Art. 116—Suit to recover money on basis of registered simple bond—Art. 116 applies—Suit within six years of day on which debtor has agreed to repay loan is within time.

To a suit to recover money on the basis of a registered simple bond wherein a day is specified on which the debtor would repay the loan, Art. 116 applies and the suit if within six years of the day on which the debtor had contracted to repay the loan would be within time. [P 74 C 2 ; P 75 C 1]

D. N. Varma — *for Appellant.*

T. N. Sahai — *for Respondents.*

Fazl Ali J. — This is an appeal by the defendant in a suit brought by the plaintiffs for the recovery of a sum of Rs. 200 on the basis of a bond dated 18th July 1927. The bond purported to be a sudbharna bond and was executed by the defendants to secure a sum of Rs. 1000 by mortgaging certain properties. Out of this sum Rs. 200 was paid in cash and the balance of Rs. 800 was left with the plaintiffs to pay off a prior mortgage dated 22nd May 1922. The plaintiffs did not pay the sum of Rs. 800 to the prior mortgagee, as the latter claimed that a larger sum was due to him and the defendants did not give possession of the mortgage property to the plaintiffs. The present suit was brought by the plaintiffs on 15th May 1936 and the only ground on which the defendant-appellant contested it was that it was barred by limitation. The plea of limitation having been negatived by the Courts below the defendant has appealed to this Court.

Now, it seems to me to be clear that the bond executed by the defendants in favour of the plaintiffs never took effect as a mortgage bond, because as I have already stated the plaintiffs did not pay the sum of Rs. 800 either to the prior mortgagee or to the defendant and the defendant did not give possession of the mortgaged properties to them. The bond however may still be treated as a simple money bond. It is not denied by the defendant that a sum of Rs. 200 was paid to him by the plaintiffs as a loan and the bond contains an express covenant to "repay the entire loan in cash in one lump sum on the full moon day of Bhado 1341," (corresponding to 23rd September 1934). Now, if the bond is to be treated as a simple bond, I have no doubt that limitation for the present suit must be deemed to run from 23rd September 1934, that is to say the date on which the defendant promised to repay the loan. Art. 66 provides that when a suit is brought on a single bond in which a day is specified for payment, the period of limitation is three years from the date so specified. As the bond on which the suit is brought was registered the period of limitation in this case will be six years and in my opinion the appropriate Article to be applied to the present case is Article 116 which provides that for a suit for compensation for the breach of a contract in writing registered the period of limitation is

six years from the date on which the breach took place. The present suit was brought within three years of the date on which the defendant had contracted to pay the money and therefore it is within time. In my opinion the conclusion arrived at by the Courts below is correct and I would dismiss this appeal with costs.

Harries C. J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 75

HARRIES C. J. AND FAZL ALI J.

Sm. Prabhavati Devi — Decree-holder — Appellant.

v.

Mrs. Lila Singh — Judgment-debtor — Respondent.

Appeal No. 310 of 1938, Decided on 19th September 1939, from original order of Sub-Judge, Bhagalpur, D/- 14th September 1938.

Civil P. C. (1908), S. 47 — During execution of decree deciding rights of parties in intestate estate Court appointing Commissioner to ascertain sums payable to intestate estate—Order is interlocutory and is not appealable.

In the course of execution of a decree deciding rights of parties in the intestate estate of the deceased, Court appointed Commissioner in order to make inquiries and ascertain what sums were due to the intestate estate so that parties might be able to enjoy their respective properties in accordance with the decree:

Held that the order was in the nature of an interlocutory order and had no finality about it. Hence, an appeal did not lie against that order.

[P 76 C 1]

S. M. Mullick and C. P. Sinha — *for Appellant.*

Sir M. N. Mukharji, P. B. Ganguli and N. C. Ganguli — *for Respondent.*

Harries C. J. — This is an appeal from an order of the Subordinate Judge of Bhagalpur dated 14th September 1938. The facts giving rise to the appeal can be shortly stated as follows. The appellant who is in the position of a decree-holder is the daughter of the late Mr. Deep Narain Singh, who died on 29th November 1935. The respondent is the widow of the said Deep Narain Singh. Before his death the deceased executed a deed of trust setting apart extensive property for the propagation of education in Bihar subject to payment of certain annuities. He reserved to himself a monthly payment of Rs. 4250 during his lifetime out of which Rs. 3000 per month was to revert to the trust after his death. As to the balance of Rs. 1250, he reserved for himself a power of disposition, and on 6th March 1931, he executed a will bequeathing Rs. 750 per month to the appellant and the remaining Rs. 500 per month to the widow for their respective lives. He left no will dealing with the remainder of his property which therefore devolved on an intestacy. After Mr. Deep Narain Singh's death disputes arose between the appellant and the respondent. The appellant claimed the intestate estate as sole heir, alleging that the respondent had never been legally married to the deceased. Eventually the daughter brought a suit to establish these allegations. The widow brought another suit, alleging that there was an agreement between the parties to refer their disputes to arbitration and prayed that the dispute should be so referred. These two suits were compromised, and it was agreed between the parties that all disputes existing between them should be referred to Dr. Rajendra Prasad as sole arbitrator.

The points which the arbitrator had to decide were: (1) What were the properties in respect of which Mr. Deep Narain Singh died intestate? (2) How were these properties to be enjoyed by the respective parties?

On 12th August 1937, Dr. Rajendra Prasad made his award in which he decided what properties formed part of the intestate estate. He further held that subject to payment of certain debts, these properties should be enjoyed half and half by the parties for their lives. The question as to who was entitled to the properties after the deaths of the parties was left to be decided in the ordinary course of law. A decree was passed in terms of this award, and eventually the appellant sought to execute the decree. During the course of this execution application questions arose as to what sums were payable to the intestate estate of Mr. Deep Narain Singh, and a Commissioner was appointed to investigate this question amongst others. After the Commissioner had been appointed, he applied to the Court on 19th July 1938, for directions on certain questions, and by the order under appeal the learned Subordinate Judge gave the Commissioner directions upon the various points and directed the Commissioner to complete his investigation in the light of the directions which had been given. Against that order the appellant has preferred the present appeal, and a preliminary objection has been taken on behalf of the

respondent. It has been contended by Sir Manmatha Nath Mukerji who appears for the respondent that this appeal is premature and that the proper time to challenge directions given to the Commissioner is when an appeal is brought against the final order of the learned Subordinate Judge.

In my judgment, this preliminary objection is well-founded. The Commissioner has been appointed to make inquiries and to ascertain what sums are due to the intestate estate in order that the amount of that estate may be ascertained, so that the parties may be able to enjoy their respective properties in accordance with the award made by Dr. Rajendra Prasad. What the ultimate finding of the Commissioner will be it is impossible to say. He must now act upon the instructions given to him and make his report. It appears to me that until that report has been made and the learned Judge has passed his final order, there can be no appeal. The order under appeal is in the nature of an interlocutory order and is in no sense a final order. It was argued by Mr. Sushil Madhab Mullick on behalf of the appellant that this is an order made under Sec. 47, Civil P. C., and therefore appealable; but, in my view, this is in the nature of an interlocutory order and has no finality about it. If this order was appealable, then it appears to me that the appellant might have during the course of these proceedings a series of appeals before the final order was ever passed.

Sir Manmatha Nath Mukerji concedes that all the points taken by the appellant in this appeal will be open to him in an appeal against the final order; and in my view it is only when the final order has been passed that the points which the appellant proposes to argue in this appeal can be properly taken. After the final order has been passed, the whole of these questions can be agitated, and the fact that this appeal has been dismissed on the ground that it is premature will in no way affect the rights of the appellant. For these reasons I hold that there is no appeal against this order and I would accordingly dismiss the appeal with costs.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 76

ROWLAND AND CHATTERJI JJ.

Sheokumar Singh and others —
— *Defendants* — Appellants.

v.

Bechan Singh and others, Plaintiffs and another, Defendant — Respondents.

Second Appeal No. 104 of 1938, Decided on 25th August 1939.

(a) Civil P. C. (1908) O. 2, R. 2 — Cause of action—Meaning explained — Three sale deeds for different considerations executed on same day — Suit to set aside two of them on ground of want of consideration decreed—Subsequent suit to set aside third sale deed on similar ground is not barred by O. 2, R. 2.

"Cause of action" means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his rights to the judgment of the Court. It does not comprise every piece of evidence which is necessary to be proved to entitle the plaintiff to a decree. It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit. To determine whether a suit is barred the true test is whether the same set of facts, if proved, would entitle the plaintiffs to the reliefs not only claimed in the first suit but also in the second. It does not necessarily follow because two claims arise out of one transaction that the cause of action will be identical. There may even be two separate contracts embodied in one instrument and those contracts may create separate causes of action. But ordinarily where a cause of action arises out of the execution of a single document, it may be considered to be but one cause of action though the document deals with more than one property or gives rise to a claim to two kinds of relief such as principal and interest on a mortgage. [P 77 C 2; P 79 C 1; P 80 C 1, 2]

Where there are three sale deeds being executed for different considerations on the same day, each sale represents a distinct and separate contract. A cause of action founded on one contract is different from the cause of action founded on another distinct contract. There can be no doubt that the three sale deeds although executed on the same date, furnish different causes of action. Hence, where a suit to set aside two of the sale deeds on ground of want of consideration is decreed, a subsequent suit to set aside the third sale deed on similar ground is not barred by O. 2, R. 2 : *Case law discussed.* [P 78 C 1]

(b) Civil P. C. (1908), O. 2, R. 2—Different alienations made by Hindu widow do not form one and same cause of action *(Obiter).*

Different alienations made by a Hindu widow cannot be said to form one and the same cause of action. No doubt the reversioner's right of suit in respect of every alienation accrues on the widow's death, but the accrual of his right to sue is not the same thing as the cause of action for the suit. Accrual of cause of action is only one out of the bundle of facts which constitute the cause of action. The question of legal necessity for a particular alienation depends upon its own circumstances: *A I R 1924 All 902, Dissent.* [P 78 C 1]

S. N. Dutta — *for Appellants.*
Harinandan Singh — *for Respondents.*

Chatterji J. — This appeal, which originally came up for hearing before my learned brother was referred to by him to a Division Bench. The relevant facts are briefly these: One Muneshwar Singh had about five bighas of land. On 13th January 1930, he executed three sale deeds in respect of all these lands, one for Rs. 600, another for Rs. 200 and the third for Rs. 300 in favour of defendants 1 to 4. Muneshwar died on 19th January 1930. In 1933 the plaintiffs, claiming to be his next heirs, brought a suit to set aside two of the sale deeds, namely those for Rs. 600 and Rs. 200 and to recover possession of the properties covered by them on the allegation that they were executed without consideration and under the undue influence of defendants 1 to 4. From that suit however one plot No. 623 covered by the sale deed of Rs. 600 was omitted. The suit was decreed. Thereafter in 1935 the plaintiffs brought the present suit to set aside the sale deed for Rs. 300 substantially on the allegation that it was executed without consideration and under undue influence, and with a prayer for confirmation or, in the alternative, recovery of possession over the properties covered by this sale deed as also plot No. 623 which had been omitted from the previous suit. Defendant 5 was impleaded as a subsequent transferee from defendants 1 to 4 under a zarpeshgi deed. The suit was defended on various grounds, one of them being that it was barred under the provisions of O. 2, R. 2, Civil P. C. The Munsif who tried the suit found that the sale deed in question was executed under undue influence and without consideration; but he dismissed the suit, holding that it was barred under under O. 2, R. 2, not only in regard to plot No. 623 but also with regard to the lands covered by the sale deed for Rs. 300. In the plaint it was alleged that the plaintiffs were in possession of the disputed lands but were obliged to bring the suit as the defendants had threatened to interfere with their possession. The Munsif found that this allegation was altogether false and the plaintiffs were never in possession of the lands. On appeal the findings of fact of the Munsif do not appear to have been challenged and the only question which was raised before the Subordinate Judge was whether the suit was barred under O. 2, R. 2. He concurred with the Munsif so far as plot No. 623 was concerned; but with regard to the lands covered by the sale deed for Rs. 300 he came to a different finding and, reversing the Munsif's decision, passed a decree in favour of the plaintiffs. Hence this second appeal by the defendants. The only question for decision in this appeal is whether the plaintiffs' claim with regard to the lands covered by the sale deed for Rs. 300 is barred under O. 2, R. 2. That rule provides that

> every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action;

but if he

> omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

The whole controversy turns on the meaning of the expression "cause of action." As explained in numerous decisions, "cause of action" means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle the plaintiffs to a decree. It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit.

Mr. Dutta for the appellants contends that in the previous suit it was necessary for the plaintiffs to prove the same set of facts as in the present and therefore the cause of action of the two suits must be held to be the same. The test is this. The previous suit was in respect of two sale deeds, namely those for Rs. 600 and Rs. 200. Was it necessary in that suit to allege or prove anything with regard to the sale deed for Rs. 300? The most important allegation of fact was that the sale deeds were without consideration. Was it at all necessary to allege and prove that the consideration for the sale deed now in question was not paid? Certainly not. The plaintiffs might have adduced evidence, but it was not necessary for them to prove, that the consideration of the sale deed for Rs. 300 was in fact not paid. What was necessary to be alleged and proved for the plaintiffs' success in that suit was that the sale deeds for Rs. 600 and Rs. 200 were without consideration. Indeed the question of undue influence was raised there as in the present case; but want of consideration was the most essential factor in invalidating the sale deeds, because consideration, if found to exist, would completely defeat the plea of undue influence. Each sale represents a distinct and separate contract. A cause of ac-

tion founded on one contract is different from the cause of action founded on another distinct contract. There can be no doubt that the three sale deeds although executed on the same date, furnished different causes of action. The plaint in the previous suit has not been brought on the record of this case and having regard to the findings of the Courts below, it cannot be suggested that the plaintiffs in the previous suit made out a case of conspiracy resulting in the execution of three deeds at one and the same time. Here we have a simple case of three sale deeds being executed for different considerations. Facts necessary to establish want of consideration of each separate sale deed must necessarily be different. In my view therefore the cause of action in the present suit is quite different from the cause of action in the previous suit. Consequently O. 2, R. 2, does not apply.

Mr. Dutta has relied chiefly on the decision in 46 All 822.[1] There a Hindu reversioner after the death of the widow brought two suits to recover possession of certain properties improperly alienated by her. Thereafter he brought another suit to set aside certain other alienations by her. In this later suit two points appear to have been raised in the High Court; first, that the suit was barred under O. 2, R. 2; and second, that the alienations were justified by legal necessity. Their Lordships found that the alienations were for legal necessity. That finding was sufficient for the disposal of the appeal and the suit: but their Lordships further held that the suit was barred under O. 2, R. 2. This part of the decision may therefore be regarded as mere obiter dictum. On principle, I do not understand how different alienations made by a Hindu widow can be said to form one and the same cause of action. No doubt the reversioner's right of suit in respect of every alienation accrues on the widow's death, but the accrual of his right to sue is not the same thing as the cause of action for the suit. Accrual of cause of action is only one out of the bundle of facts which constitute the cause of actions. The question of legal necessity for a particular alienation depends upon its own circumstances. With all respect therefore to the learned Judges who decided the case in 46 All 822,[1] I am unable to concur in the view expressed by them.

The next case relied on by Mr. Dutta is A I R 1931 Bom 114,[2] which was decided by a Single Judge. There the question was whether when an adopted son brought two successive suits to set aside alienations effected by his adoptive mother previous to the adoption, the subsequent suit was barred under O. 2, R. 2, and Explanation 4 to S. 11, Civil P. C. His Lordship held that the right to impeach all the alienations of the mother accrued on the date of the adoption and the only facts necessary to be proved were first, the adoption and second, the alienations made by the mother, quite irrespective of whether they were for consideration or for legal necessity. The essential facts being common in both the suits, it was held that the subsequent suit was barred. This case therefore is quite distinguishable and is covered by the principle I have already discussed.

The next case referred to by Mr. Dutta is 14 P L T 663.[3] There the suit was brought to resume a grant terminable on the death of the surviving grantee. There were two villages comprised in the same grant. On the death of the surviving grantee, the grantor or his representative brought a suit to resume one of the villages and got a decree. Thereafter he brought a second suit to resume the other village. Their Lordships held that this second suit was barred under O. 2, R. 2. The reason was that the only facts necessary to be proved in both the suits were that there was a grant, there was the death of the surviving grantee and there was holding over. That being so, the cause of action was held to be the same in both the suits.

Mr. Dutta also relied on certain observations in 40 Bom 351[4] where the following passage was quoted from an English case: "And one great criterion of this identity is that the same evidence will maintain both actions." But in that very case, 40 Bom 351,[4] their Lordships held that two successive suits to set aside two separate sale deeds executed by a Hindu widow were maintainable as the causes of action based on the two deeds were separate. I may refer here to the Full Bench decision of

1. Darbari Lal v. Gobind Saran, (1924) 11 A I R All 902=80 I C 31=46 All 822=22 A L J 753.

2. Anant Subrao v. Mahableshwarbhat Gurunathbhat, (1931) 18 A I R Bom 114=129 I C 737=32 Bom L R 1473.

3. Kamakhya Narain Singh v. Ramraj Singh, (1933) 20 A I R Pat 715 = 147 I C 452 = 14 P L T 663.

4. Sonu Khushal v. Bahinibai, (1916) 3 A I R Bom 310 = 33 I C 950 = 40 Bom 351 = 18 Bom L R 45.

the Allahabad High Court in 16 All 165,[5] where it was pointed out that S. 43, Civil P. C. (now O. 2, R. 2) has nothing to do with the evidence which may be necessary or may be produced to support or defend a cause of action. Mr. Harinandan Singh on behalf of the respondents relied chiefly on the decision of the Privy Council in 12 I A 116,[6] where their Lordships observed as follows :

> That Section (now O. 2, R. 2) does not say that every suit shall include every cause of action or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the causing of action' meaning the cause of action for which the suit was brought.

Applying this principle, it cannot be said that the claim to which the present suit relates arose out of the cause of action for which the previous suit was brought. Several other decisions were cited on both sides, but they are not of much assistance. The true principle deducible from all those cases is whether the same set of facts, if proved, would entitle the plaintiffs to the reliefs not only claimed in the first suit but also in the second. I should observe that the learned Subordinate Judge seems to have rather proceeded on the view that the cause of action in the present suit is different because the previous

> suit was based on defendants' resistance offered to the plaintiffs on the death of Muneshwar Singh whereas there was no such resistance in the case of the lands that formed the subject matter of the present litigation.

This view is entirely erroneous because in an earlier part of his judgment he remarks that neither party argued on points of fact; and the finding of the Munsif was that the plaintiffs were never in possession of the disputed lands. In my opinion the suit was rightly decreed by the learned Subordinate Judge. The decree, however, should be for recovery of possession. With this modification in the decree, I would dismiss the appeal with costs.

Rowland J.—I agree. There is no statutory definition of a cause of action and the question whether in a particular instance the cause of action of two successive suits is identical has to be considered in the light of judicial pronouncements, some of which explain the meaning of the expression "same cause of action" in general terms, while in others it has been held that on a particular set of facts the cause of action was or was not identical. One line of general explanation derives through (1771) 2 W Bl 827[7] and (1884) 14 Q B D 141[8] where it has been said :

> One great criterion of this identity is that the same evidence will maintain both actions.

On the other hand a cause of action is described in (1892) 22 Q B D 128[9] as :

> Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

This pronouncement by Lord Esher, M. R. had the assent of Fry L. J. and Lopes L. J. In 15 I A 156[10] it was stated :

> The cause of action has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

In 16 All 165,[5] a Full Bench decision, Sir John Edge C. J. followed the pronouncement of Lord Esher in (1892) 22 Q B D 128[9] and dissented from the view which had been expressed in another High Court that "one test is whether the same evidence and the same arguments apply in the two cases." It is in the light of these principles that particular cases fall to be decided. Of all these pronouncements that of their Lordships in 15 I A 156[10] is the most authoritative for Indian Courts, and it does not refer to identity of evidence as a test. The Court is no doubt entitled to see whether the evidence required in the two cases is identical; for instance in 38 I A 140.[11] Lord Robson remarked "the evidence is different"; but that was alluded to, it would seem, merely as an aid to determining the identity or otherwise of "the media upon which the plaintiff asks the Court to come to a conclusion in his favour"; the latter, and not identity of evidence being the true criterion, as pointed out in 15 I A 156[10] followed in this Court in A I R 1921 Pat

5. Murti v. Bhola Ram, (1894) 16 All 165=1894 A W N 65 (F B).
6. Raja of Pittapur v. Sri Raja Venkata Mahipatisuraya, (1885) 8 Mad 520=12 I A 116=4 Sar 638 (P C).
7. Hitchen v. Campbell, (1771) 2 W Bl 827 = 3 Wils 304=96 E R 487.
8. Brunsden v. Humphrey, (1884) 14 Q B D 141 =53 L J Q B 476=32 W R 944=51 L T 529 =49 J P 4.
9. Read v. Brown, (1892) 22 Q B D 128 = 58 L J Q B 120=60 L T 250=37 W R 131.
10. Chand Kaur v. Partap Singh, (1889) 16 Cal 98 =15 I A 156=5 Sar 243 (P C).
11. Maung Pe v. Ma Lon Ma Gale, (1911) 38 Cal 629=11 I C 497=15 C W N 766=6 L B R 18 =38 I A 140=14 C L J 15 (P C).

143.[12] In applying these principles to particular cases it may be noticed that it does not necessarily follow because two claims arise out of one transaction that the cause of action will be identical. In 41 I A 142[13] a party who had failed on a technical ground in a suit on two promissory notes was allowed afterwards to sue to recover a part of the consideration for which the promissory notes had been given as it was said that the claims in the two actions though they arose out of the same transaction were in respect of different causes of action.

In 18 I A 158[14] the first suit had been to recover possession on the strength of a sale deed. When that failed, the plaintiff brought a second suit to recover the consideration money. The Calcutta High Court had held that the second suit was not barred as being a suit on the same cause of action; but their Lordships of the Privy Council disposed of the appeal on another ground and did not decide this point. In 12 I A 116[6] the plaintiff had been wrongfully dispossessed by the defendant both of his share in the landed estate and of his share of personal property to both of which he was entitled under a will. He was permitted to maintain successive suits, the one for recovery of the land and the second for the personal effects. Their Lordships pointed out that

> the Section does not say that every suit shall include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action' meaning the cause of action for which the suit is brought.

They relied on an observation in 11 M I A 551[15]

> that the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit.

There may even be two separate contracts embodied in one instrument and those contracts may create separate causes of action as in 21 Bom 267.[16] But ordinarily where a cause of action arises out of the execution of a single document, it may be considered to be but one cause of action though the document deals with more than one property or gives rise to a claim to two kinds of relief such as principal and interest on a mortgage: so held in 49 I A 9.[17] Where by a mortgage several properties had been hypothecated and a suit had been brought successfully challenging the validity of the mortgage in respect of one of the properties, it was held in 1 Luck 1[18] that the mortgage being one and entire, the cause of action in both the suits was identical. A case of this Court is in 14 P L T 663.[3] The claim was to resume khas possession of properties which were the subject-matter of a mokarrari grant and became resumable on the death of the survivor of the grantees. There were two villages concerned. It was held that the plaintiff having in a former action claimed recovery of possession of one of these villages could not in a subsequent suit claim to recover possession of the other. The decision proceeded on the ground that the two villages were the subject-matter of the same grant and that the death of the grantee was the cause of action which entitled the plaintiff to resume both villages. The cause of action it was said consisted in the fact of the grant plus the fact of the death of the latter of the two grantees.

I now come to the decision in 46 All 822[1] which is most strongly relied on by the appellants. This was a case of successive suits by the reversioner of the last male-holder of certain properties to recover possession from the alienees of portions of the property transferred to them by the widow. It was held that the later suit was barred under the provisions of O. 2, R. 2, Civil P. C. on the ground that

> he is the reversioner and rightful heir to Hoti Lal and that the property in suit in the possession of the defendant belongs to Hoti Lal. This is the whole cause of action. It is immaterial for him whether the defendant wants to justify his right to continue in possession on different grounds. The defence or the nature of it is immaterial for the purpose of finding out what is the cause of action of the plaintiff.

The reasoning is based on the observations of their Lordships of the Judicial Committee in 15 I A 156[10] and if the plaintiff rested his claim simply on the facts

12. Hardeo Singh v. Bhawani Sahay, (1921) 8 A I R Pat 143=60 I C 496.
13. Saminathan v. Palaniappa, (1913) 41 I A 142 =26 I C 228=(1914) A C 618=83 L J P C 131 =110 L T 913.
14. Hanuman Kamut v. Hanuman Mandar, (1892) 19 Cal 123=18 I A 158=6 Sar 91 (P C).
15. Moonshee Buzloor Ruheem v. Shumsoonnissa Begam, (1866-67) 11 M I A 551=8 W R 3=2 Suther 59=2 Sar 259 (P C).
16. Yashvant Narain v. Vithal Divakar, (1897) 21 Bom 267.
17. Muhammad Hafiz v. Muhammad Zakariya, (1922) 9 A I R P C 23=65 I C 79=49 I A 9= 44 All 121 (P C).
18. Abhaidat Singh v. Ragho Indar Partab Sahai, (1926) 13 A I R Oudh 77=91 I C 976=1 Luck 1=3 O W N 40.

that the property was Hoti Lal's and that the plaintiff was Hoti Lal's heir, those observations may support the reasoning. It would however be otherwise if the plaintiff had in his plaint referred to alienations made by the widow and had alleged absence of necessity for such alienations among the facts on which the plaintiff based his claim to relief. We do not know the exact terms in which the cause of action was stated in the plaint. Be that as it may, the learned Judges appear to me, if I may say so with respect, to be on less firm ground when they give as a further reason for their view the following argument :

> It is clear that when this suit of 1917 was brought, the plaintiff could have, if he was so disposed, brought a claim with respect to the properties now in dispute. There is no authority, so far as we are aware, to establish that any such suit would have been repugnant to any rule of law. On the other hand, there are numerous authorities to show that a reversioner is entitled to bring a single suit against any number of persons who may be holding different portions of the last male holder's property, though they may be holding under different title deeds, executed at different dates.

With great respect, I cannot accept this as a valid piece of reasoning. It seems to assume that if a suit could be maintained (resisting an objection that it was bad for multifariousness) the consequence will be that it is to be inferred that all the reliefs in the suit are based on one cause of action. To assume this is to forget that the Section does not say that "every suit shall include every cause of action," *vide* 12 I A 116,[6] and to ignore the provisions of the Code which permit a plaintiff to join in one suit reliefs claimed against the same defendant in respect of different causes of action. The fallacy of such reasoning is exposed in 40 Bom 351[4] where it is said :

> No doubt these two separate causes of action might have been joined together in one suit, as raising the common question of title arising out of the death of Bhagirathi and affecting to some extent each of the two different defendants, under the permissive provisions of O. 1, R. 3 of the Schedule of the Civil Procedure Code as in 29 Cal 871[19] and 38 Bom 444.[20] But that is quite another thing from holding that these two separate causes of action ought to have been joined together in one suit against the two different defendants. The two causes of action were clearly separate ... There was, therefore, no legal necessity to join them in one suit.

It is pointed out that a clear distinction should be maintained between the permissive nature of the provisions of O. 1, R. 3 and O. 2, R. 3 and the peremptory nature of the provisions of O. 2, R. 2 of Sch. 1 to the Civil P. C. With this part of the judgment of the learned Judges of the Bombay High Court, I would respectfully express my full agreement. It may, however, be noticed that in distinguishing the two causes of action they have referred to the fact that the evidence to establish both sets of facts was not the same, using the criterion that "the same evidence will maintain both cause of action" from (1771) 2 W B L 827.[7] This criterion is not accepted by Sir John Edge in the Allahabad Full Bench decision, is not referred to by the Privy Council in 15 I A 156[10] and though a Court may be entitled to take it into consideration, it ought not, in my view, to be deemed the decisive test. The Bombay case would no doubt have had the same result had the learned Judges taken the ground that invalidity of the sale deed questioned in the later suit was not the same fact as the invalidity of the sale deed in the former suit and did not automatically follow from it. In the suits between the parties before us the invalidity of the sale deeds by Muneshwar was a necessary part of the cause of action of the plaintiff. It was not enough for him to allege in his plaint that the properties had belonged in his lifetime to Muneshwar and that the plaintiffs were his heirs. Such a suit would have been defeated by the mere production and proof of the sale deeds, for Muneshwar was a full owner with absolute right to transfer. Non-payment of the consideration of Rs. 300 in the present case was a fact that the plaintiff pleaded and was to establish and was not the same fact as non-payment of the consideration money of the other two sale deeds of Rs. 600 and Rs. 200 respectively. On these grounds, I prefer to follow the Bombay decision rather than that in 46 All 822[1] (if as is not quite clear, the latter case is on all fours with the one before us); and the result will be that as stated by my learned brother, the appeal will be dismissed.

D.S./R.K. *Appeal dismissed.*

19. Nundo Kumar Naskar v. Banomali Gayan, (1902) 29 Cal 871.
20. Kashinnath Ramchandra v. Nathoo Keshav, (1914) 1 A I R Bom 130=25 I C 73=38 Bom 444 = 16 Bom L R 454.

A. I. R. 1940 Patna 81

HARRIES C. J. AND MANOHAR LALL J.

Debi Prasad Agarwala — Appellant.

v.

Haji Syed Mehdi Hasan and other — Respondents.

Appeal No. 333 of 1937, decided on 9th May 1939.

(a) Limitation Act (1908), Art. 116 — Lease — Lessee dispossessed due to defective title of lessor — Suit for damages for return of nazarana is governed by Art. 116 — Court should decide in each case whether failure to give or retain possession starts time running.

A suit for damages for return of the nazarana or for any consequent costs and damages is governed by Art. 116 even though the suit may apparently fall within Art. 97 of the Act : *A I R 1916 P C 182; A I R 1936 Pat 462; AIR 1929 Pat 388 and A I R 1927 Pat 248, Rel. on.* [P 84 C 2]

In the circumstances of each case the Court is to decide whether the failure to give or retain possession may justly be regarded as the time from which limitation period should run : *A I R 1922 P C 403 and A I R 1918 P C 151, considered.* [P 86 C 2]

A sajadanashin had leased to *A* the property of khankah which was already let out on permanent lease to *B* by former sajadanashin, and *B* in a suit for specific performance obtained a decree and during pendency of an appeal therefrom executed it and dispossessed *A*. *A* thereupon sued on the indemnity mortgage bond executed in his favour by the sajadanashin along with the lease, for return of nazarana :

Held that the suit was governed by Art. 116 and time began to run not from the date of *B's* decree but from the date when *A* was actually dispossessed. [P 85 C 2; P 86 C 2; P 87 C 1]

(b) Contract Act (1872), Sec. 65 — Sajadanashin entering into agreement to lease property of khankah and accepting nazarana — Agreement is void—Khankah is bound to return the amount of nazarana — Privity of contract between sajadanashin and receiver in management of khankah after him is unnecessary.

Where a sajadanashin entered into agreement to lease the property of the khankah and received nazarana for the same and after him a receiver was appointed who was sued for the return of the nazarana and the nazarana was found to be in the possession of the khankah :

Held that the terms of Sec. 65 applied and the receiver was bound to return the amount received under the void agreement and that no privity of contract between him and the sajadanashin was necessary. [P 87 C 1]

S. M. Mullick and D. N. Verma — *for Appellant.*

M. Hasan Jan, Syed Hasan and J. N. Sahai for A. A. Khan — *for Respondents.*

Manohar Lall J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Shahabad dated 4th January 1937 by which he has dismissed the claim against the respondent, defendant 1, in an action arising out of a transaction of a mokarari lease by which the former sajadanashin of Khankah Sassaram granted a permanent lease to the plaintiff of a portion of the wakf property and put him in possession but of which he was dispossessed on 6th February 1928 with the result that the plaintiff claimed damages and return of the nazarana under the following circumstances. : It appears that before the former sajadanashin executed the mukarrari lease on 8th September 1925 in favour of the plaintiff reserving the rent of Rs. 6 per annum on taking a nazarana of Rupees 2500 the then sajadanashin had already entered into a contract of permanent lease of the same property in favour of one Lachmi Ram. After the plaintiff was put in possession in September 1925 Lachmi Ram instituted a title suit in the Court of the Subordinate Judge of Arrah for enforcing specific performance of his earlier contract of lease in respect of the leasehold properties of which the plaintiff had been put in possession under the document of 1925. The plaintiff and the former sajadanashin were both defendants in the action and they jointly resisted the claim of Lachmi Ram, but the Court, by the judgment and decree dated 15th June 1927, decreed the suit of Lachmi Ram. The appeal by the plaintiff before the District Judge of Arrah was unsuccessful, when he preferred a second appeal to the High Court. During the pendency of the appeal in the High Court, Lachmi Ram took delivery of possession by executing his decree and thereby dispossessed the plaintiff on 6th February 1928. The High Court ultimately dismissed the appeal on 4th July 1930. Simultaneously with the deed of mukarrari of 8th September 1925 in favour of the plaintiff, the former sajadanashin had entered into an indemnity mortgage bond bearing date 18th September 1925 to the effect that if any flaw or defect was found in the mukarrari properties and if the plaintiff was dispossessed he would be competent to recover the nazarana of Rs. 2500 together with costs and damages which the plaintiff may have to pay and incur from the properties hypothecated by the bond which were the exclusive properties of that sajadanashin.

The former sajadanashin was ousted from possession by the appointment of a receiver from the khanka properties under the orders of the District Judge; that receiver is defendant 1 in the action. On the death of the sajadanashin his legal heirs, namely defendants 2 to 8, entered into possession of the properties left by the sajadanashin as his personal properties including the properties entered in the schedule of the indemnity bond of 18th September 1925. Accordingly the plaintiff instituted the present suit on 3rd July 1933 for recovery of the sum of Rs. 3999-7-0 which is made up of the naza-

rana amount Rs. 2500, Rs. 3000-5-0 as the costs of defending the suit of Lachmi Ram, Rs. 851-5-0 as the costs realized by Lachmi Ram in execution of his decree and Rupees 2848-6-0 as costs of repairs of the house (the property leased). Although the claim of the plaintiff came up to this figure of Rs. 9200 including interest he, in the plaint, gave a remission of Rs. 5200-9-0 out of the costs of repairing the house and costs of the suit of Lachmi Ram and interest and limited his claim to Rs. 3999-7-0 as stated already, apparently to bring the suit within the pecuniary jurisdiction of the Munsif so that the appeal may lie to the District Judge and not to the High Court. The cause of action stated in para. 19 of the plaint is dated 6th February 1928 when the plaintiff was dispossessed by Lachmi Ram and therefore "failure of consideration" of the mukarrari settlement occurred and also 4th July 1930 the date of the judgment of the High Court. The plaintiff asked for a decree against defendant 1 as the receiver but if the whole or any portion of this claim was not decreed against defendant 1 he prayed that the whole or the balance may be decreed against defendants 2 to 8 and that the mortgaged properties entered in the indemnity bond of 18th September 1925 may be directed to be sold in the manner provided by O. 34, Civil P. C. The only contesting party to the suit was defendant 1 who contended that the subject-matter of the lease was the personal property of the former sajadanashin and that the suit has been unnecessarily brought and is not maintainable against the khanka which was in the charge of defendant 1 as a receiver. As an alternative it was prayed that the former sajadanashin had no right under the Mahomedan law to execute any lease of a house for a period of more than one year without the sanction of the Kazi and therefore the lease was illegal, invalid and inoperative from the beginning. The payment of the nazarana by the plaintiff and the plaintiff's entering into possession of the leasehold properties was also denied. The plea of limitation was also raised.

The learned Munsif held that the properties given in lease to the plaintiff belonged to the khanka, that the amount of nazarana was actually paid and appropriated in the funds of the khanka and therefore the khanka was liable to refund the amount of Rs. 2500 but was not liable for any loss or damages incurred by the plaintiff which were recoverable from the heirs of the former sajadanashin to the extent of the personal assets left by him. He also held that the grant of the perpetual lease of the wakf property was absolutely void and there was a complete breach of trust committed by the then sajadanashin. With regard to the question of limitation, the learned Munsif held that the suit was within time as having been instituted within six years of the date of dispossession. In the result he decreed the suit for Rs. 2500 with interest at 6 per cent. per annum from the date of the suit against defendant 1 and for the balance against defendants 2 to 8 against whom a preliminary decree in terms of O. 34 was passed with interest at the bond rate and costs. Defendants 2 to 8 did not challenge this decree but defendant 1, the receiver of the khanka, preferred an appeal before the learned District Judge which was disposed of by the learned Subordinate Judge on 4th January 1937. Before the learned Subordinate Judge the receiver gave up the contention that the property was not the property of the khanka. The learned Judge was satisfied from the evidence in the case and, in agreement with the learned trial Court, held that the property leased out was a part of the khanka wakf estate. The learned Subordinate Judge also agreed with the Munsif that the plaintiff had paid the sum of Rs. 2500 as nazarana or the consideration of the lease in question to the former sajadanashin who deposited the amount in the funds of the khanka; the entries in the cash book of this estate showed that the amount had been put in the coffers of the khanka. The finding of the Munsif, that the grant to the plaintiff of a perpetual lease of the wakf property was ab initio void, was affirmed. The learned Subordinate Judge pointed out that the lessor, namely the former sajadanashin as well as the plaintiff, were fully aware of the infirmity of the title that was going to be conveyed under the lease of 1925, that there is not the least whisper in the document of lease showing that the permanent lease in question was going to be granted for any justifying necessity and that at the trial the plaintiff did not adduce any iota of legal proof in support of any necessity for the creation of the incumbrance in question.

Upon these findings the only question which remained was whether the claim could be decreed against the receiver and whether the suit was within time. The learned Subordinate Judge having held that the transaction of the lease was void ab

initio and that the plaintiff had full knowledge of the infirmity of his own title at the time he entered into this transaction, and advanced the nazarana at his own risk, held that the receiver could not be saddled with the liability of refunding the nazarana as "there is no privity of contract between the then sajadanashin and the present receiver of the wakf estate even though the estate was in possession of the plaintiff's money." He therefore came to the conclusion that defendant 1, the receiver, could not be held liable. Upon the question of limitation the learned Subordinate Judge came to the conclusion that the consideration of the lease having failed ab initio the cause of action for the recovery of the nazarana arose from the date of the lease and therefore the plaintiff's suit having been instituted more than six years thereafter was barred by limitation. In the alternative he held that if the plaintiff's lease be assumed to be voidable only on the objection of a third party and possession was taken under it still, relying upon the decision in 8 Pat 432[1] the learned Judge held that limitation would run from 15th June 1927 when the claim of Lachmi Ram was established against the plaintiff and the former sajadanashin, and therefore the suit of the plaintiff was still beyond six years of this date. The result was that the learned Subordinate Judge dismissed the suit as against the receiver but otherwise affirmed the decree in part against defendants 2 to 8. He never considered the question whether a decree for the full amount should be given against defendants 2 to 8. Hence the appeal before us.

The findings of fact arrived at by the Courts below have not been challenged by the appellant and cannot be interfered with by us in second appeal. But Mr. Hasan Jan appearing for the receiver wanted to challenge the correctness of the finding that the nazarana amount, Rs. 2500, was credited in the books of the khanka and spent by it; but we are unable to accede to this argument. In order to come to a conclusion in favour of the respondent, it would have been necessary to examine the accounts of the khanka not only for that date but for the whole year if not for some other years also. Accordingly, it is not open to any of the parties before us to challenge the findings of fact which have been concurrently arrived at by the Courts below. The only question which presents difficulty is whether the suit for the plaintiff is within time. Mr. S. M. Mullick appearing for the appellant strongly contends that the suit is a suit for damages on account of the failure of the then sajadanashin to preserve the plaintiff in quiet enjoyment of the leasehold properties and therefore there was a breach of duty on behalf of the lessor as provided by S. 108 (c), T. P. Act. He points out that the cause of action arose to him not when the lease was granted nor when the Court held in June 1927 in the suit of Lachmi Ram that the lessor had no title to give to the plaintiff but when the High Court affirmed the decision on 4th July 1930 or in any case not earlier than 6th February 1928 when the plaintiff was dispossessed. He therefore contended that limitation started from any of these two dates with the result that the suit was within time being a suit for damages for breach of a contract in writing registered within the meaning of Art. 116, Limitation Act. Mr. Hasan Jan on the other hand contended that the suit must be held to be a suit to which Art. 97, Limitation Act, applied and that the starting point of limitation was the date when the trial Court gave the decision that the plaintiff had no title to remain upon the land by his order dated 15th June 1927. In other words, he contended that if it was a suit for damages the plaintiff was damnified by the decision on 15th June 1927, and therefore the suit was beyond six years; but so far as this suit was for the recovery of the nazarana amount, the plaintiff must come within three years of the date of the lease, or of the date of the decision of the trial Court or of the date of dispossession and that the suit is beyond three years of any of these dates.

A large number of cases were cited before us; but it is unnecessary to discuss these cases because after the decision of their Lordships of the Judicial Committee in 44 Cal 759,[2] it has been consistently held by this Court that a suit for damages for return of the nazarana or for any consequent costs and damages must be governed by Art. 116 even though a suit may apparently fall within Article 97, Limitation Act: *see* A I R 1936 Pat 462.[3] In that case the plaintiff had obtained a lease of a certain

1. Mt. Lakhpat Kuar v. Durga Prasad, (1929) 16 A I R Pat 388=117 I C 654=8 Pat 432.

2. Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur, (1916) 3 A I R P C 182=39 I C 156=44 I A 65=44 Cal 759 (P C).

3. Rajendra Narayan Singh v. Lalmohan, (1936) 23 A I R Pat 462=164 I C 277.

piece of land under a registered document, as in the present case, after paying a certain premium to the lessor but afterwards it having been found that the lessor had no right to make such a grant the lease was held to be void ab initio and when the lessee asked for the return of the money paid to the lessor under Sec. 65, Contract Act, the suit for refund of the money was held to be governed not by Art. 65 or Art. 97 but by Art. 116, Limitation Act. The learned Judges relied upon an earlier Division Bench decision of this Court (referred to later). The same view was taken in 8 Pat 432.[1] That suit was a suit for refund of the purchase money by a vendee paid under a registered document on the ground that the consideration for the sale had failed. It was held that the suit was governed by Art. 116 and that the fact that the suit was in substance for a refund of the purchase-money and not in the nature of damages, although that claim was made in the alternative, was immaterial. Das, J. made this observation at page 435:

> But in the view which I take it is immaterial to consider whether the suit is a suit for refund of the purchase money or a suit for damages for breach of the covenant under S. 55, cl. (2), T. P. Act.

He then drew attention to the case in 44 Cal 759,[2] referred by me above and held that he regarded this decision of the Judicial Committee as establishing that where the suit is in substance a suit based on a registered document and where such a suit could be regarded as a suit for compensation for breach of contract, Art. 116 must apply although such a suit may fall under some other provision of the Limitation Act. At p. 435 the learned Judge also made this observation that the question whether the plaintiff had or had not knowledge of the infirmity of the title of their vendor is irrelevant. The starting point of limitation was also considered in 8 Pat 432,[1] and the learned Judge referred to two oft-cited cases, 38 Mad 887[4] and 45 Bom 955,[5] where three classes of cases under which such questions are discussed were pointed out as being (a) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property; (b) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (c) where though the title is known to be imperfect the contract is in part carried out by giving possession of the properties. Here I wish to read from the judgment of Das, J. at p. 438:

> It was contended before us that the sale was not voidable but void ab initio since it has been found that Mt. Lakhpat had no title whatever to convey. But this point was very completely dealt with in the judgment of the High Court, where it was pointed out that a transaction cannot be regarded as void ab initio where both the parties consider that the vendor has a good title to convey. This being so, as between the parties to this litigation it cannot be regarded that the sale was void ab initio and there is no doubt that possession was taken under the voidable sale.

These remarks apply very closely to the facts of the present case. As between the sajadanashin and the plaintiff the transaction cannot be regarded as void ab initio when both the parties considered that the lessor had a good title to convey and there is no doubt that possession was taken under the lease which could be avoided (after possession had been delivered) only on the objection of a third party. The quotation from remarks of the learned Judge of the Madras High Court is very apposite at this stage:

> In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified.

In 6 Pat 606[6] the lessor having failed to put the lessee in possession of the properties demised, the suit by the lessee to recover the salami which he had paid for the lease was held to be governed by Art. 116, Limitation Act, provided the lease was in writing and registered. In my opinion, these three cases decided by Division Benches of this Court and founded upon the decision of the Privy Council in 44 Cal 759[2] are sufficient to dispose of the contention of the respondent that the present suit so far as the amount of Rs. 2500 is concerned is not a suit to recover damages but a suit to recover the actual amount of salami within the terms of S. 65, Contract Act, and therefore should be governed by Art. 97, Limitation Act, and not by Art. 116. The question which then remains to be determined is what is the starting point of limitation. In 50 I A 69[7] the suit was instituted to recover the consideration paid under an

4. Subbaraya Reddiar v. Rajagopala Reddiar, (1915) 2 A I R Mad 708=23 I C 570=38 Mad 887.
5. Multanmal Jayaram v. Budhumal Kevalchand, (1921) 8 AIR Bom 252=61 I C 70=45 Bom 955=23 Bom L R 325.
6. Nabin Chandra v. Munshi Mandar, (1927) 14 A I R Pat 248 = 101 I C 707 = 6 Pat 606=8 P L T 590.
7. Harnath Kuer v. Inder Bahadur Singh, (1922) 9 A I R P C 403=71 I C 629=50 I A 69=26 O C 223 (P C).

agreement which was void ab initio, the agreement in question being the transfer of a right to expectancy. Their Lordships of the Judicial Committee in dealing with the argument based on S. 65, Contract Act, observed as follows:

> An agreement therefore discovered to be void is one discovered to be not enforceable by law, and, on the language of the Section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. The agreement here was manifestly void from its inception, and it was void because its subject matter was incapable of being bound in the manner stipulated. Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of 2nd January 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation.

In the present case, the plaintiff was actually placed in possession thereby leading to the inference that both the parties thought that they had a right to enter into this transaction of lease which was in law void ab initio. It may be remembered here that the defenee of the receiver was that this property was not the property of the Khanka but was the personal property of the former sajadanashin. The plaintiff also was apparently in doubt as to the true position because he took an indemnity bond from the sajadanashin binding him and his personal properties in case he was disturbed in possession. In 46 Cal 670[8] their Lordships of the Judicial Committee again had to consider the question as to how the starting point of limitation should be decided in such cases. In that case the plaintiff instituted a suit against the zamindar to recover certain sums which he had to pay as purchaser of a patni taluk of a defaulting patnidar at a sale for arrears of rent under the Patni Regulation of 1819, the sale having been subsequently set aside in a suit by the darpatnidar to which the plaintiff was a party. The sale was set aside by the order of the District Judge dated 24th August 1905 which was affirmed by the High Court in appeal on 3rd August 1906. The plaintiff gave up possession on 28th August following. The Courts below treated the suit as governed by Art. 97, Limitation Act as being a suit for money paid on an existing consideration which afterwards failed and held that it was barred by limitation as having been brought more than three years beyond 24th August 1905, being the date of the decree of the District Judge, setting aside the sale when it was found that the consideration failed. It was decided by their Lordships that

> whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

This incidentally would settle that the starting point of limitation would be the date of the decision of the learned Subordinate Judge dated 15th June 1927, if there was nothing else in the case. Their Lordships then made the following weighty observations:

> To escape from this position and its consequence a new starting point was suggested in the course of the argument here; it was contended that the period of limitation began to run when possession was lost. There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of 24th August 1905. If further support of this view be required, it may be found in the express provision of S. 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss.

In my opinion in the circustances of each case the Court is to decide whether the failure to give or retain possession may justly be regarded as the time from which limitation period should run. In the present case the lessee was in possession from the date of the lease. The decree of the Subordinate Judge of June 1927 merely decided that upon Lachmi Ram's depositing the balance of the consideration money which he had not paid to the former sajadanashin a formal deed of lease would be executed and registered by the former sajadanashin and then possession would be delivered by ousting the present plaintiff. It may well have been that Lachmi Ram would have taken some considerable time to perform the obligations imposed upon him by the decree before he would be vested with a title and before he would be entitled to oust the present plaintiff. The plaintiff can therefore have no cause of action for return

8. Juscurn Boid v. Pirthichand Lal, (1918) 5 A I R P C 151=50 I C 444 = 46 I A 52 = 46 Cal 670 (P C).

of the money until he was actually ousted from possession by a formal delivery of possession or by an actual delivery of possession. In my opinion the suit, whether it is regarded as a suit for return of the very amount paid as nazarana or as a suit for compensation, having been instituted within six years of the date when the plaintiff was dispossessed therefore is within time. But it was argued by Mr. Hasan Jan appearing on behalf of the receiver that there is no privity of contract between the then sajadanashin and the present receiver, defendant 1. This argument is of no substance. Upon the finding that the khanka estate was in possession in September 1925, of the sum of Rs. 2500 which the plaintiff had paid to the sajadanashin the terms of S. 65, Contract Act, apply and the person in charge of the khanka estate is bound to refund the amount which has been in possession of the khanka ever since 1925. The plaintiff has discharged the onus which lay upon him when he proved that a sum of Rs. 1000 was entered in the cash book of the khanka on 20th August 1925 and the balance of the sum of Rs. 1500 was credited on 20th September 1925 in its books. The question as to the subsequent application of the money or its misappropriation by the sajadanashin is no concern of the plaintiff. I would therefore allow the appeal of the plaintiff and restore the decision of the learned Munsif with costs throughout.

Harries C. J. — I agree.

D.B./R.K. *Appeal allowed.*

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* A. I. R. 1940 Patna 87

HARRIES C. J. AND ROWLAND J.

Dhari Jena — Petitioner.

v.

Gauranga Charan Sahu —

Opposite Party.

Civil Revn. No. 56 of 1937, Decided on 7th December 1938, from order of Dist. Judge, Cuttack, D/- 5th October 1936.

***(a) Civil P. C. (1908), O. 21, R. 89—Deposit of decretal amount and compensation not accompanied by application to set aside sale—Sale cannot be set aside.**

An application to set aside sale cannot be implied from the mere fact that decretal amount and compensation was deposited. Hence, in absence of an application to set aside sale, the sale cannot be set aside even if decretal amount and compensation had been deposited in the Court : *A I R 1919 Bom 130; 9 I C 33; A I R 1922 Mad 83 and A I R 1923 Pat 159, Rel. on.* [P 87 C 2 ; P 88 C 1]

(b) Civil P. C. (1908), S. 115 — Hard case —Interference in revision.

The fact that a case is a very hard one does not permit the High Court to interfere where it has no power so to do. [P 88 C 1]

H. Sen — *for Petitioner.*

S. N. Sen Gupta—*for Opposite Party.*

Harries C. J.—This is an application for revision of an appellate order passed by the learned District Judge of Cuttack upholding an order of the learned Munsif rejecting an application for setting aside a sale. It appears that the present petitioner's property was sold in execution of a mortgage decree on 15th January 1936. Within thirty days of the date of the sale, the petitioner deposited in Court the entire decretal amount and compensation; but this deposit was not accompanied by any petition requesting the Court to set aside the sale. The chalan showing the deposit was put up before the learned Munsif on 17th February 1936 and it was noted in the order-sheet that no petition for setting aside the sale had been filed. On 20th February 1936, the learned Munsif passed an order that the sale could not be set aside as no petition for setting it aside had been presented to the Court. The sale was therefore confirmed.

On 29th February 1936, the petitioner made an application purporting to be under S. 151 and O. 21, R. 89, Civil P. C., for reviewing the order of the learned Munsif. This application was heard in due course, and it was then suggested that the failure to make an application to set aside the sale was due to a pleader's clerk, but eventually this point was not pressed. The learned Munsif refused to interfere and his order was upheld by the learned District Judge. There can be no doubt that no written or verbal application was made to the Court when the decretal amount and compensation was deposited, and upon the findings of the Court below it is impossible for this Court to hold that such failure was due to any pleader's clerk or to any error or failure on the part of any officer of the Court. The failure to present an application for setting aside the sale was apparently due to the petitioner's ignorance of the provisions of law applicable to the case. It was contended in the Court below and has been contended in this Court that the depositing of the decretal amount together with compensation amounted to an application for setting aside the sale. In any event it is said that such an application must be implied from the very fact that the decretal amount and compensation was deposited.

This contention has been put forward on many occasions previously. In 43 Bom 735,[1] a Bench of the Bombay High Court held that a sale could not be set aside in the absence of an application even though the full decretal amount had been deposited. The Court further held that it had no power under Sec. 115, Civil P. C., to interfere in such a case. In 9 I C 33,[2] a single Judge of the Allahabad High Court came to the same conclusion. The same view was expressed by a single Judge of the Madras High Court in A I R 1922 Mad 83.[3] There is no Patna case precisely in point ; but the case in A I R 1923 Pat 159[4] supports the view which I have expressed. There can be no question that there is a body of authority for the view held by the learned District Judge. The case is undoubtedly a very hard one, but that does not permit the Court to interfere where it has no power so to do. In my view no ground has been made out for interfering with the decision of the lower Appellate Court and accordingly I would dismiss this application and make no order as to costs.

Rowland J.—I agree.

D.S./R.K. *Application dismissed.*

1. Raoji Baburao v. Bansilal Narayan, (1919) 6 A I R Bom 130=53 I C 135 = 43 Bom 735= 21 Bom L R 835.
2. Mathura Prashad v. Ram Lal, (1911) 9 I C 33.
3. Venkatasubba Rao v. Narayana Rao, (1922) 9 A I R Mad 83=66 I C 44.
4. Ramshivendra Narayan v. Awadh Bihary, (1923) 10 A I R Pat 159=68 I C 629=4 P L T 295.

A. I. R. 1940 Patna 88

HARRIES C. J. AND DHAVLE J.

Dhanu Lal — Plaintiff — Appellant.

v.

Kuldip Narayan Singh and others — Defendants — Respondents.

Appeal No. 391 of 1938, Decided on 3rd November 1939, from appellate decree of Addl. Sub-Judge, Patna, D/- 15th January 1938.

(a) Contract Act (1872), S. 73—Tenant promising to pay Government revenue and cess failing to pay it —Landlord in spite of notice of intended sale taking no steps to avoid sale by paying necessary dues — Property sold—Landlord cannot claim as damages loss which he could have avoided by taking necessary steps.

Every person who has a right to damage for breach of contract must take all reasonable steps to mitigate the loss arising from such breach. [P 89 C 2]

Where a tenant who has promised to pay Government revenue and cess has failed to pay it but the landlord who has notice of the intended sale takes no steps to avoid the sale by paying necessary dues and the property is ultimately sold the landlord in a suit by him for damages for breach of contract cannot claim as damages any loss which he could have mitigated by taking necessary steps. [P 89 C 2]

(b) Practice—Amendment—Second appeal — Plaintiff should not be allowed to change whole nature of suit.

The Court should not at the stage of second appeal allow the plaintiff to change the whole nature of the suit, particularly when even at this late stage the materials for deciding this new case are not before the Court. [P 90 C 1]

G. C. Mukherji — *for Appellant.*

Hareshwar Prasad Sinha and Rajeswari Prasad — *for Respondents.*

Harries C. J. — This is a plaintiff's appeal from concurrent decrees of the Courts below dismissing the plaintiff's claim for Rs. 1000 and interest by way of damages or compensation. The plaintiff's claim with regard to certain other small items was decreed, but nothing arises out of that portion of the decree. The plaintiff was the proprietor of certain property, and the defendants were mukarraridars holding from him. It was alleged that the defendants were liable to pay Government revenue and cesses in respect of the property and that they had failed to do so. Consequently the property had been sold for the payment of these Government dues, and the plaintiff had been compelled to repurchase the property from one Ramkishun for a sum of Rs. 1000. The present suit was brought to recover this sum of Rs. 1000 together with certain costs and for certain other small items which were decreed. Both the Courts below came to the conclusion that the plaintiff was not entitled to recover this sum of Rs. 1000 together with interest and costs and dismissed this portion of the claim.

The Courts below have held as a fact that the plaintiff knew of the defendants' failure to pay the Government dues. The amounts due totalled Rs. 9, and both the Courts below have found that the sale could have been avoided if the plaintiff had paid this small sum. The plaintiff, though knowing that this amount was due, allowed the property to be sold and purchased by Ramkishun. He subsequently purchased the same for Rs. 1000, and in the view of the lower Courts the plaintiff could not recover the amount which he spent in recovering the property because he could have mitigated the whole of the loss by himself paying Rs. 9 before the sale took place. It has been contended by Mr. G. C. Mukherji on behalf of the plaintiff that there was no

evidence upon which the Courts could come to the conclusion that the plaintiff knew of the defendants' failure to pay the Government revenue or cess or knew of the impending sale. Both the Courts below have come to the conclusion that notice issued to the plaintiff by the Certificate Officer informing him that his property was going to be sold in a certificate sale was actually served on Walayat Ali (P. W. 3) some time before the sale took place. Walayat Ali was the plaintiff's mukhtar, and in evidence he did not deny the receipt of this notice. All he said was that he could not remember whether he had received the notice or not. He then added that the plaintiff had complained to him that he had not been told that this notice had been served. Mr. Mukherji has contended that service on Walayat Ali was not effective service on the plaintiff because it was not established that Walayat Ali was a person empowered to accept notice on behalf of the plaintiff.

Mr. Mukherji has relied upon Rule 3, Sch. 2, Bihar and Orissa Public Demands Recovery Act; but in my view it is clear from Walayat Ali's evidence that he was a person empowered to receive such a notice on behalf of the plaintiff. Further, there was evidence that a registered parcel had been sent by the Certificate Officer to the plaintiff. At first the plaintiff denied his signature on the receipt for the parcel; but it is clear that the signature is that of the plaintiff. This parcel must have contained some notice relating to this certificate sale, and the moment it is held that the plaintiff received this parcel and gave a receipt for it, it follows that he had notice of this intended sale before it took place. In my view there was ample material upon which the Courts below could come to the conclusion that the plaintiff had notice of the impending sale in time to take steps to avoid it. In fact, he could within thirty days of the sale have obtained the property by paying the amount due and a small percentage as compensation. The plaintiff did nothing of the kind but waited and then paid Ramkishun Rs. 1000 and then brought this suit. The Courts below have held that the plaintiff could, by the exercise of reasonable diligence, have avoided all damage in this case, and that being so, they have refused to give the plaintiff any sum in respect of this portion of his claim. S. 73, Contract Act, lays down that if a party is guilty of a breach of contract, the other party is entitled to compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. In the Explanation to this Section however it is laid down that :

> In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

The contract sued upon here was a promise by the tenant to pay the Government revenue and cess. There was a breach of this contract the moment the tenant failed to pay the Government dues on due date. At that moment the plaintiff's property was in jeopardy, and he was entitled to sue for any damages which would be incurred. Clearly after the breach the plaintiff could have avoided all damage by paying Rs. 9 which was the amount due to the Government. He did nothing and allowed the property to be sold. Every person who has a right to damage for breach of contract must take all reasonable steps to mitigate the loss arising from such breach. In the present case payment of a very small sum could have avoided the damage which occurred in this case, and as the plaintiff did not take any step to mitigate his damages, he cannot claim the large amount which he now does in this case.

Mr. Mukherji attempted to argue that there was no breach of contract in this case until the property had been sold; but, as I have stated, the contract sued upon here was a promise by the tenant to pay the Government dues the moment the Government dues were payable; and as there was failure to pay, there was a breach of contract at that moment. The plaintiff had ample time between the date of the breach and the date of the sale for mitigating all the damage which arose from the breach. Mr. Mukherji has however argued in this case that this is not a case of a claim for damages or compensation for breach of contract. According to him, it is a claim for an amount due under a contract of indemnity. It is to be observed that in the plaint the word "indemnity" is never mentioned, and, indeed, there is nothing to suggest that there was any agreement between the parties by which the tenants agreed to indemnify the plaintiff from any loss due to failure to pay Government dues. The case was undoubtedly pleaded as a case of a claim for

damages for breach of a promise to pay Government dues. The learned Munsif treated the case as such and so did the learned Subordinate Judge. In the grounds of appeal to this Court nothing is said about a contract of indemnity. It is assumed in the grounds of appeal that this was a case of a claim for damages for breach of a promise to pay Government dues and nothing more. It is now argued that in the contract between the parties there is a promise amounting to an indemnity; but the contract is not before us, and it has not been printed. Nevertheless, Mr. Mukherji has urged us to allow him to argue this case upon the basis that there is a contract by the defendants to indemnify the plaintiff against all loss in the event of the property being sold.

I am not inclined to allow the plaintiff to change the whole nature of his suit at this stage. He certainly cannot do so without the leave of the Court, because no point as to indemnity is taken in the memorandum of appeal. Even if we allowed Mr. Mukherji to argue this case as a claim arising out of a contract of indemnity, we have not the contract before us and neither of the Courts below have ever had the opportunity of considering it and construing it. In my view, the Court should not, at this stage, allow the plaintiff to change the whole nature of the suit, particularly when even at this late stage the materials for deciding this new case are not before the Court. The case must be treated as a claim for damages for breach of a promise to pay Government dues, and in my judgment both the Courts below were right in holding that the plaintiff's claim failed by reason of the fact that he could by the exercise of reasonable care and diligence have avoided the effect of the defendants' breach. For these reasons I am satisfied that there is no merit in this appeal and accordingly I would dismiss it with costs.

Dhavle J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 90

HARRIES C. J. AND ROWLAND J.

Maulavi Kamiruddin Khan — *Defendant* — Appellant.

v.

Badrun Nisa Bibi and another, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 31 of 1936, Decided on 1st December 1938, from decision of Addl. Sub-Judge, Cuttack, D/- 6th August 1935.

Limitation Act (1908), S. 10 and Art. 89— Persons by executing deed entrusting their property to another person for good management with powers to sell — Executants reserving themselves, power to sell or mortgage with manager's consent—Deed held did not vest property in manager as trustee—Suit for rendition of accounts held governed by Art. 89 and not by S. 10.

A trust contemplates that the trustee is the legal owner of the trust property. There must be a transfer of the property to the trustee before a trust is created. [P 91 C 2]

Certain persons executed a deed entrusting their property to another for good management, with powers of sale. The executants however reserved to themselves the power to sell or mortgage the property with the consent of the manager :

Held that the deed did not vest the property in the manager as trustee and hence suit for rendition of accounts was not governed by S. 10 but by Art. 89. [P 91 C 2]

M. Subba Rao — *for Appellant.*

B. Mahapatra — *for Respondents.*

Harries C. J.—This is a defendant's second appeal against concurrent decrees of the Courts below decreeing the plaintiffs' claim. The suit out of which the appeal arises was for rendition of accounts and payment to plaintiffs of any sum found due after taking such accounts. Various defences were raised, but it is only necessary to consider one of them in this appeal and that is the defence of limitation. Both the Courts below held that the suit was a suit for rendition of accounts as against a trustee and accordingly they found that the suit was not barred by time. On 12th December 1920, two brothers, namely Zamir and Zahir, executed what is called a deed of trust. By the terms of that deed defendant 1 was entrusted with the management of the property of Zamir and Zahir for a period of ten years ending on 12th December 1930. It appears that defendant 1 managed these properties and in the year 1928 Zamir died. As I have stated, the period of the deed ended on 12th December 1930, and on 13th December 1933 the present suit was filed by the plaintiffs claiming an account from defendant 1.

Defendant 1 contended that the suit was one brought against an agent for accounts and was, therefore, governed by Art. 89, Limitation Act. The plaintiffs, however, argued that this case was governed by Sec. 10, Limitation Act, as the deed in question constituted defendant 1 a trustee of the property. That being so, it was argued that a suit for rendition of accounts could not be barred by time. The question which has to be decided in this case is whether defen-

dant 1 was a trustee or an agent with very wide powers of management. Certain evidence was adduced in the Courts below to show what had in fact occurred during the period of management; but in my view this case must be decided upon the construction of the alleged deed of trust. The deed opens with a recital that the two brothers were unable to manage their property conveniently and were suffering a great loss thereby. For that reason, it is said that they were giving defendant 1 by the document the powers enumerated thereafter for the purpose of good management of the said properties. Thereafter are set out the various rights given to and duties imposed upon defendant 1. He was to transact all the business of the two brothers, appoint servants and agents, bring suits, realize rent and in short deal with the properties as a general manager. He was in fact given certain powers to sell though in some instances such powers could not be exercised without the consent of the two brothers. However, it is significant to note that in para. 13 of the deed the executants of this deed were entitled to mortgage and sell the properties with the consent of defendant 1.

It has been argued that taking this document as a whole it transfers the property to defendant 1 and such is to remain vested in him for a period of ten years. On the other hand, it is argued by the appellant that the document is merely a power of attorney in very wide terms giving defendant 1 absolute power of management but of management only for a period of ten years. If this suit is a suit for rendition of accounts by an agent, then clearly it is barred by time. Art. 89, Limitation Act applies to such suits and according to that article the period is three years from the termination of the agency. The agency undoubtedly terminated on 12th December 1930, and this suit was not instituted until 13th December 1933, that is one day over the period of three years. However, Art. 89 will have no application if defendant 1 was in fact a trustee and not an agent. If he was a trustee, then S. 10, Limitation Act applies and this period of limitation would not bar the suit. S. 10, Limitation Act is in these terms :

> Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Can it be said that this document of 12th December 1920, vested the property of the two brothers in defendant 1 as trustee? In my view the document did not effect such a vesting. A trust contemplates that the trustee is the legal owner of the trust property. The word "trust" is defined in S. 3, Trusts Act, 1882, as follows :

> A 'trust' is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another or of another and the owner.

In short, it is an obligation annexed to the ownership of property and before there can be a trust the trustee must be the owner. The matter is made abundantly clear in S. 6, Trusts Act, 1882, which is in these terms :

> Subject to the provisions of Sec. 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts an intention on his part to create thereby a trust, the purpose of the trust, the beneficiary, and the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee.

In short, there must be a transfer of the property to the trustee before a trust is created. It is quite clear upon an examination of the various terms of the document of 12th December 1920, that no property was transferred to defendant 1. The recital to the document makes it clear that defendant 1 was given powers for the good management of the property which in the past had been badly managed by the two brothers. It is true that he is given powers to deal with the property as if he was the owner; but it is clear that he is given such powers to deal with the property not as owner but as agent for the owners. If the property was transferred by this document, then the owners could never have the power of selling or mortgaging the property; yet, as I have stated, that power was reserved to the two brothers with the consent of defendant 1. In my view, upon a true construction of this document, defendant 1 was not made a trustee but was rather an agent of the two brothers with full powers of managing the property. That being so, the present suit was one for rendition of accounts as between principal and agent and accordingly Art. 89, Limitation Act applied. As the suit was not brought within a period of three years, the lower Court should have held that it was barred by limitation. In my view the suit was wrongly decreed by

both the lower Courts and I would, therefore, allow this appeal, set aside the decrees of the lower Courts and dismiss the plaintiffs' claim in its entirety. The appellant must have his costs in this Court and in the Courts below.

Rowland J. — I agree.

D.S./R.K. *Appeal allowed.*

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* A. I. R. 1940 Patna 92

HARRIES C. J. AND FAZL ALI J.

Kubad Mia — Appellant.

v.

Guhi Mia and others — Respondents.

Letters Patent Appeal No. 5 of 1939, Decided on 7th September 1939, from decision of Agarwala J., D/- 30th November 1938.

(a) Registration Act (1908), S. 49, Proviso, as amended by Act 21 of 1929 — Proviso to S. 49 has no retrospective effect.

Proviso to S. 49 which was added by Act 21 of 1929 has no retrospective effect. Hence the proviso cannot affect a document executed before the Act 21 of 1929 came into force and which being unregistered could not be adduced in evidence according to law in existence before 1929 : *A I R 1933 All 846, Expl. ; A I R 1933 Pat 544, Applied.* [P 94 C 1]

(b) Registration Act (1908), S. 17 (2) (v)— Document held created right in immovable property.

A deed of security executed by *A* in favour of *B* provided that on payment of Rs. 200 out of the purchase price of Rs. 300 the land of *A* was to be delivered to *B* as security and the latter should hold it as security for the sum of Rs. 200 until he paid the balance of Rs. 100. There was a further provision that whilst the land was held by *B* as security he could not build on it though he could bring it under cultivation. It was further provided that on the day *B* pays the remaining sum of Rs. 100 *A* would execute a sale deed :

Held that the deed gave *B* not only possession but security for the money which he had already paid. The document therefore created a right in immovable property. [P 94 C 2]

*** (c) Registration Act (1908), S. 49—Charge created by integral part of transaction—Document must be registered and cannot be tendered in evidence even to prove agreement to execute further document such as sale deed.**

Where a charge is created by a term which is an integral part of the transaction, then the document must be registered and cannot be tendered in evidence even to prove an agreement to execute a further document such as a sale deed. Where, however, the promises are distinct and separable, then a document, though it creates a charge, can be put in evidence to establish a promise to execute a further document such as a sale deed : *A I R 1926 P C 94 and A I R 1929 P C 269, Rel. on ; A I R 1920 P C 33, Disting.; Observations in A I R 1934 Pat 495, held obiter.* [P 95 C 2; P 96 C 1]

(d) Pleading—Amendment — Letters Patent appeal – Suit for specific performance.

A Court should not grant an amendment in a suit for specific performance unless such is asked at an early stage. Hence, a suit for specific performance should not be allowed to be converted into one for compensation or damages at the stage of Letters Patent appeal: *A I R 1928 P C 208, Rel. on.* [P 96 C 2]

S. C. Mazumdar — *for Appellant.*

G. C. Mukharji and N. N. Ray — *for Respondents.*

Harries C. J.—This is a Letters Patent appeal from a decision of Agarwala J. dismissing a second appeal. The suit out of which the proceedings arose was brought by the plaintiff claiming specific performance of a certain agreement entered into between him and the father of defendants 1 and 2. The learned Munsif who heard the suit decreed the plaintiff's claim; but on appeal the learned Additional Deputy Commissioner, Subordinate Judge of Dhanbad, reversed the decision of the Court below and dismissed the claim. He held that the agreement sought to be specifically enforced could not be tendered in evidence and therefore the plaintiff could not prove his claim. The plaintiff appealed to this Court; but Agarwala J. held that the decision of the lower Appellate Court was right and dismissed the appeal. It is against that decision that the present Letters Patent appeal has been preferred. The agreement in question was entered into between the plaintiff and the father of defendants 1 and 2 in the year 1926 and is in these terms :

I, Nilkantha Ghati of Metala Pargana Nagar Keari, execute this deed of security (thika abadha) to this effect: For giving you kabala of my homestead land which appertains to my share in my maurashi mukarrari mauza which is plot No. 813, described in Sch. 3, the total amount is settled at Rs. 300 in the presence of five gentlemen and out of that agreed sum I receive Rs. 200 and give the property as security to you. As long as you do not pay the remaining Rs. 100 which is fixed for sale deed (kabala) so long you will not be able to erect any house on the land but you will remain in possession in bringing it under cultivation, to that I or my heirs will not take objection. On the day you pay the remaining Rs. 100 for sale deed (kabala) I shall be bound to execute registered sale deed (kabala) after fixing the proportionate rent of the said land. To this effect after receiving Rs. 200 I execute this deed of security after giving the said land as security.

The plaintiff paid the sum of Rs. 200 and obtained possession of the land. However, he has not paid the remaining sum of Rs. 100, though he is ready and willing to do so. Defendants 1 and 2 later settled the land with other defendants who ejected the plaintiff therefrom, and accordingly the latter brought this suit seeking specifically to enforce the contract and to compel defen-

dants 1 and 2 to execute a sale deed in his favour on receipt of the balance of the purchase money, namely Rs. 100. As I have stated, the learned single Judge of this Court held that the agreement sought to be specifically enforced could not be put in evidence by reason of the fact that it had not been registered, and therefore the plaintiff could not prove his case. The only question in the appeal therefore is whether this document is one requiring registration, because if it does not require registration then it could be adduced in evidence to establish the plaintiff's case. S. 17 (1), Registration Act, sets out the documents which require registration, and sub-clause (c) requires all non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest in immovable property to be registered. Sub-sec. 2, cl. (v) of this Section however provides that "any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest, of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest" need not be registered. The result of non-registration of a document requiring registration is provided for in Sec. 49 of the Act, which says that no document required by S. 17 of the Act or by any provision of the Transfer of Property Act, 1882, to be registered shall be received as evidence of any transaction affecting such property. There is however a proviso to this Section, which is in these terms :

> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chap. II, Specific Relief Act, 1877, or as evidence of part performance of the contract for the purposes of Sec. 53-A, T. P. Act, 1882, or as evidence of any collateral transaction and not required to be effected by registered instrument.

There can be no question that if this latter proviso applied to this case, the agreement, though unregistered, could be adduced in evidence. It has however been contended on behalf of the respondents that this proviso cannot affect the case by reason of the fact that it only came into force in the year 1930. The proviso was added to Sec. 49, Registration Act, by S. 10, Transfer of Property (Amendment) Supplementary Act, 1929; and S. 15 of that Act, expressly provides that nothing in the Act shall be deemed to affect (b) the validity, invalidity, effect or consequences of anything already done or suffered before the Act came into force; and Sec. 1 (2) provides that the Act should come into force on the first day of April 1930. The respondents argue that one of the effects or consequences of non-registration of the agreement in question was that it could not be adduced in evidence, and as such was undoubtedly the case until this amending Act was passed. If the amending Act applied to transactions which took place before the passing of the Act, then the consequences of non-registration would no longer apply. However, as the Act is not to affect the validity, invalidity, effect or consequences of anything already done, it is argued that any document executed before the Act, which could not be adduced in evidence by reason of non-registration, is not affected by the amending Act. On behalf of the appellant however, it is contended that the High Court at Allahabad has taken a different view. It is urged that this proviso relates only to procedure, and there is no reason why the proviso should not be considered to be retrospective. In 56 All 142[1] a Bench of the Allahabad High Court held that a document executed before the amending Act 21 of 1929, could be adduced in evidence after the passing of that Act though it had not been registered as required by the Registration Act at the time when it was executed. The learned Judges stated that the matter was one relating to procedure, and therefore the amending Act could be regarded as retrospective. It was not brought to the notice of the learned Judges however that Sec. 15 of the amending Act 21 of 1929 makes this provision applicable only to transactions entered into after the passing of the Act and in the absence of any reference to Sec. 15 of the amending Act 21 of 1929, this case cannot be considered as an authority in support of the appellant's contention. Rowland J. in 14 P L T 628[2] held that the amendment of the Transfer of Property Act by the amending Act 21 of 1929 cannot assist a plaintiff whose suit was commenced before that Act came into force, as such proceedings were expressly saved by S. 15 of the

1. Sohan Lal v. Atal Nath, (1933) 20 A I R All 846=148IC 229=56 All 142=1933 ALJ 1584.
2. Dharichhan Singh v. Mahabir Singh, (1933) 20 A I R Pat 544=147 I C 1057=14 P L T 628.

amending Act. In my view, the reasons given by Rowland J. in that case apply equally to this case. S. 15 of the amending Act 21 of 1929 expressly says that any remedy or proceeding or anything done in the course of any proceeding pending in any Court when the Act came into force, was not to be affected by the Act. The same Section also says that the validity, invalidity, effect or consequences of anything already done or suffered before the Act came into force was not to be affected by the Act. As I have stated, one of the consequences of failure to register this document was that it could not be adduced in evidence. That was a consequence which the Act expressly states should not be affected. In my view therefore the proviso to S. 49 did not have retrospective effect and therefore cannot affect this agreement which was executed four years before the amending Act 21 of 1929 came into force. That being so, it must be held that the agreement in question could only be admitted in evidence if it fell within S. 17 (2) (v), Registration Act.

This latter provision renders registration unnecessary if the document does not create any right, title or interest of the value of Rs. 100 or upwards to or in immovable property, but merely creates a right to obtain another document which would, when executed, create such a right. It has been contended by the appellant that the agreement in question does not create any right in immovable property, but merely creates a right to obtain a sale deed, that is another document which would, when executed, create a right in immovable property. It is therefore necessary to consider the document in order to see whether it does create an interest in immovable property or merely creates a right to obtain a sale deed. In my view this agreement clearly created a right in immovable property. The document is itself stated to be a deed of security, and it is provided that on payment of Rs. 200 out of the purchase price of Rs. 300 the land is to be delivered to the plaintiff as security and that the latter should hold it as security for the sum of Rs. 200 until he paid the balance of Rs. 100. There is a further provision that whilst the land is held by the plaintiff as security he cannot build on it though he can bring it under cultivation. It is true that there follows a provision that on the day the plaintiff pays the remaining sum of Rs. 100 the father of defendants 1 and 2 would execute a sale deed; but this latter provision is only one of many terms in the agreement.

There can be no question that possession of the property passed to the plaintiff under the agreement, and he was given a right to hold it and to cultivate it as security for the sum of Rs. 200 which he had already paid. Such an agreement undoubtedly gave the plaintiff a right in this immovable property; it gave him not only possession but security for the money which he had already paid. Agarwala J. was of opinion that the document created a right in immovable property, and with that view I agree. It has however been strongly urged by Mr. Mazumdar on behalf of the appellant that the promise to execute a sale deed on receipt of the balance of the purchase price is the only promise sued upon in this case, and that being so the document could be adduced in evidence of this isolated promise. Reliance was placed upon a case of this Court, 13 Pat 620,[3] in which it was held that where in an unregistered document there are two distinct provisions, one creating a charge or mortgage and requiring registration and the other being an agreement for sale not requiring registration there is nothing to prevent the plaintiff in a suit for specific performance wherein the charge or mortgage is not sought to be enforced from relying on that part of the document which purports to be a mere agreement to sell. This Court purported to follow the case in 43 Mad 660.[4] It is to be observed however that this Court in construing the document then under consideration held that it was a document which gave the plaintiff merely a right to call for a sale deed and that it was not an agreement which created any interest in immovable property. That being so, any observations of the Court as to whether terms in a document can be severed were purely obiter. It is to be noted however that Wort J. who delivered the leading judgment observed at p. 628 that the decision of their Lordships of the Privy Council in 53 I A 214[5] was an authority for the contention that where a document created a specific charge as well as a right to demand

3. Abdul Latif v. Debi Mahton, (1934) 21 A I R Pat 495=155 I C 47=13 Pat 620=15 P L T 443.
4. Vyravan Chetti v. Subramanian Chetti, (1920) 7 A I R P C 33=56 I C 642=47 I A 188=43 Mad 660 (P C).
5. Dayal Singh v. Indar Singh, (1926) 13 A I R P C 94=98 I C 508=53 I A 214 (P C).

a sale deed such a document required registration under S. 49, Registration Act. In my view the case in 13 Pat 620[3] to which I have referred is not an authority in favour of the appellant's contention in this case, because the point which is now before the Court was not before the Court in the earlier case.

The appellant has strongly relied upon the case in 43 Mad 660[4] which is a decision of their Lordships of the Privy Council; but in my view that case is clearly distinguishable from the present one. In the Madras case the facts were as follows : The appellants were the first mortgagees of certain immovable property, and the respondents held a second mortgage of the same property. They agreed that both parties should, as regards rights, stand in the same position without claiming prior or subsequent rights and divide and appropriate in equal halves as per terms mentioned whatever amount might be realized on the date of realization. The appellants realized part of the estate and the respondents sued them in order to obtain their share of the proceeds to which they claimed to be entitled by virtue of the agreement. The agreement was unregistered and an objection was raised by the appellants that the agreement required registration and not being registered could not be used in evidence. Their Lordships held that on the construction of the agreement that if the whole effect of the agreement was to provide merely that the realized money was to be divided in equal shares there was nothing to require it to be registered, and if, on the other hand, there were two distinct provisions, the one relating to rights of property and the other with regard to the division of the money realized, then as the proceedings in the suit related merely to the question of the realized money, the agreement need not be registered for the purpose of being given in evidence in this suit, though it might require registration in a suit relating to the regulation of the rights against the estate itself.

It has been contended that in the present case the agreement to execute a sale deed is a distinct and separate agreement and that the agreement of 1926 can be put in to prove this portion though it might not be admissible in evidence as proving a right or interest in immovable property by reason of want of registration. It is to be observed that in 43 Mad 660[4] there were two distinct and separate agreements one relating to rights in immovable property and the other relating to rights in the proceeds realized. The only question which arose in the case was whether or not the respondents were entitled to a half share of the proceeds collected by the appellants. It was possible to separate and sever the two terms and to regard them as independent of each other. In the present case, it is quite impossible to sever the terms. In my view the provision that the defendant would execute a sale deed on payment of the balance of Rs. 100 is an integral part of the whole agreement and it cannot be severed and treated as something distinct and apart from the other terms which undoubtedly create an interest in immovable property. In my view, the present case cannot be distinguished from the later decision of the Privy Council in 53 I A 214.[5] In this latter case there was an agreement for the sale of immovable property which acknowledged the receipt of Rs. 1000 part of the purchase price paid by the buyer as earnest money. The seller refused to complete and the buyer sued for specific performance. The agreement was not registered. Their Lordships held that under S. 55, sub-s. 6 (b), T. P. Act 1882, the buyer was entitled to a charge upon the property in respect of the earnest money, and that consequently the agreement created an interest in it, with the result that it was required to be registered under S. 17 (1) (b), Registration Act 1908, and was not exempt by S. 17, sub-s. (2) (v). Therefore the suit could not be maintained having regard to S. 49, Registration Act. It is true that no such charge upon property in respect of earnest money is now created by reason of an amendment of the law after the decision of that case ; but the case is still clearly an authority for the proposition that if an agreement creates a charge by implication of law, then it is an agreement affecting immovable property and cannot be regarded as an agreement merely creating a right to demand a sale deed. It appears to me that the present case is a stronger one than the case which was before their Lordships of the Privy Council. In the latter case the charge was created by implication of law, whereas in the present case the charge is expressly created by the terms of the agreement. As I have already stated, Wort J., in 13 Pat 620,[3] expressly held that 53 I A 214[5] was still an authority for the contention that a specific charge created by an agreement would render it liable to registration though

the agreement also contained a provision relating to the execution of a further document such as a sale deed. These two decisions of their Lordships of the Privy Council appear at first sight to be conflicting, but they are clearly distinguishable. Where a charge is created by a term which is an integral part of the transaction, then the document must be registered and cannot be tendered in evidence even to prove an agreement to execute a further document such as a sale deed. Where, however, the promises are distinct and separable, then a document, though it creates a charge, can be put in evidence to establish a promise to execute a further document such as a sale deed. Such is the view expressed by Sir George Lowndes who delivered the judgment of the Board, in 56 I A 363.[6] He observed :

> In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale deed, and it is contended for respondent 1 that, notwithstanding the non-registration, he can sue upon this agreement putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the Section.

In my view the present case cannot be distinguished from the cases in 53 I A 214[5] and 56 I A 363[6] to which I have referred. That being so, the agreement as it was unregistered, could not be tendered in evidence even to establish the promise by the defendants to execute a sale deed on payment of a future sum of Rs. 100. Agarwala J., was therefore right in holding that this document was not admissible in evidence and that the plaintiff had therefore not established his case. Lastly, it was argued that even if this document is not admissible in evidence to establish the defendant's promise, yet it is admissible in evidence to establish that the plaintiff has paid a sum of Rs. 200 upon a consideration which has failed. We were therefore asked to treat this case as a suit for the return of Rs. 200. In my view, a suit if it lay at all, would be a suit not for the return of Rs. 200 but for damages for breach of contract, and the plaintiff would not be able to prove his contract without putting in the document, and in my view the document could not be adduced in evidence for want of registration for the reasons which I have already given. The plaintiff was given possession of the property and remained in possession for nearly ten years, and such possession is expressly stated in the document to be by way of security for the sum of Rs. 200 which he had paid. It in no way follows that upon dispossession the plaintiff has lost Rs. 200. He may have derived considerable profit from the property during his possession, and, on the other hand, the possession might not have been worth reasonable interest on the money. His claim would have to be a claim for damages or compensation and not for the return of money upon a consideration which had failed. Consideration had not wholly failed, because he had been in possession for a long period of time.

In any event, the Court could not at this late stage convert the suit into one for compensation or damages. It is true that the plaintiff, after asking for specific performance and possession, asked for such other and further relief, but in no Court did he ask for damages in the alternative, and it appears to me that to ask for such in a Letters Patent appeal is asking for alternative relief at too late a stage. Further, there is authority of their Lordships of the Privy Council, which makes it clear that a Court should not grant an amendment in a suit for specific performance unless such is asked at an early stage. In 52 Bom 597[7] a plaintiff claimed, pursuant to S. 19, Specific Relief Act, specific performance of a contract, and compensation in addition or in substitution, and subsequently gave notice abandoning his claim for specific performance. It was held that he could not recover damages for breach of contract without amending the plaint, since relief under S. 19, Specific Relief Act could be decreed only where the plaintiff was ready and willing to perform the contract and that it was therefore still subsisting. It was further held that the Court even at the trial, had power to allow the necessary amendment, but that power should be exercised most carefully and jealously, and with due regard to the position of both the plaintiff and the defendant. An amendment should not be allowed when the suit has been pending as one for specific performance for a long period, during which the defendant had been prevented by S. 27 (b), from dealing with the property. As I have stated an amendment is asked at this very last

6. James Skinner v. R. H. Skinner, (1929) 16 A I R P C 269=119 I C 633=56 I A 363=51 All 771 (P C).

7. Ardeshir Mama v. Flora Sasoon, (1928) 15 A I R P C 208=111 I C 413=55 I A 360=52 Bom 597 (P C).

stage, and in my view this Court cannot grant it having regard to the views expressed by their Lordships of the Privy Council in the case to which I have referred. That being so, the Court cannot give the appellant any relief by way of compensation. For the reasons which I have given, I am satisfied that the decision of Agarwala J. was right and I would therefore dismiss this appeal with costs.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 97

MANOHAR LALL J.

Mukti Narayan Gir — Petitioner

v.

Emperor.

Criminal Revn. No. 468 of 1939, Decided on 1st November 1939, from order of Addl. Sess. Judge, Muzaffarpur, D/- 29th July 1939.

(a) Criminal Trial — Complaint — Magistrate doubtful as to truth of allegations in complaint as supported by solemn affirmation of complainant—He should record order to that effect in order sheet.

If a Magistrate has any doubt as to the truth of the allegations in the petition of complaint as supported by the solemn affirmation of the petitioner, he ought to record an order to that effect in the order sheet, so that the superior Courts may be satisfied that the Magistrate had any justification whatsoever in refusing to issue summons to the accused as required by law. [P 98 C 1,2]

(b) Penal Code (1860), S. 211—Mere failure of complainant to prove his case does not make him liable for offence under S. 211.

The failure of a complainant to prove his case is not the same thing as the institution of a maliciously false case so as to make him liable for an offence under S. 211 : *A I R 1924 Pat 379 ; A I R 1925 Pat 329 and 5 C W N 727, Rel. on.* [P 99 C 1]

(c) Criminal Trial — Magistrate to whom complaint is made calling upon accused for report regarding truth of allegation — This is illegal.

It is not only irregular but illegal for a Magistrate to whom a complaint is made to call upon the person accused for a report as to the truth or falsity of the charge preferred against him before calling upon complainant to substantiate his allegations: *A I R 1920 Pat 655, Rel. on ; A I R 1931 Pat 302, Expl.* [P 100 C 1,2]

(d) Criminal P. C. (1898), S. 197—Offences under Ss. 500, 504 and 506, I. P. C., alleged to be committed by Cane Inspector when investigating conduct of complainant in selling cane — Cognizance of complaint cannot be taken by Magistrate.

Where complaint of the offences under Ss. 500, 504 and 506, I. P. C., committed by Cane Inspector while investigating into the conduct of the complainant in selling cane is made against the Cane Inspector, the Magistrate cannot take cognizance of the complaint except with the previous sanction of the local Government : *A I R 1935 Pat 52, Rel. on.* [P 101 C 1]

(e) Bihar Sugar Factories Control Act (1937), Rules under — Person should not be forced to sign statement required to be made under rules.

The law does not contemplate forcing a person to sign a statement which he is required to make under the rules of the Bihar Sugar Factories Control Act. [P 101 C 2]

A. P. Upadhaya and K. P. Varma — *for Petitioner.*

Hasan Jan — *for the Crown.*

Order.—This is an application on behalf of one Mukti Narayan Gir, who has been ordered to be prosecuted under S. 211, I. P. C., as the result of a proceeding under S. 476, Criminal P. C., started by the Subdivisional Officer of Bettiah by his order, dated 6th April, 1939. The petitioner appealed to the learned Sessions Judge of Muzaffarpur under S. 476-B, Criminal P. C., but without success. Hence he moved this Court, and a rule was issued by Mohamad Noor J., on 30th August 1939. It is necessary to state the facts, though somewhat briefly. On 23rd January 1939, an incident admittedly occurred owing to the Cane Inspector having gone to the place of the petitioner in order to investigate into the allegations which were made to him regarding the petitioner's conduct in selling cane to Bagha Sugar Factory in contravention of the order of the Cane Commissioner. The petitioner's version as to what happened on that date was the subject of a complaint which he lodged before the Sub-Divisional Officer of Bettiah on 26th January 1939. The complaint was against six persons by name including one Mr. R. N. Lines, I. C. S., Cane Inspector of Bettiah Sub-Division. The other accused were persons connected with Harinagar Mills and a driver of one Bansi Lal Chaudhury. The allegations against them which were set out in the petition of complaint are to be found at pp. 13 and 14 of the paper-book. The substance of the allegations was that Mr. Lines on coming up to the house of the petitioner asked the complainant why he was supplying sugarcane to the Bagha Factory, upon which the complainant told him that after receiving a letter from the Cane Commissioner of Patna he had stopped supplying sugarcane to the Bagha Mills. Mr. Lines was not satisfied with the explanation, and upon this it was alleged that Mr. Lines in

an angry mood said that the complainant was surely supplying sugarcane to the Bagha Factory and asked the complainant to sign a paper which was written in English. The complainant refusing to sign the paper, it was alleged that

> he was surrounded by all the accused and accused 1 to 6 in hot words began to threaten the complainant that in case he would refuse to sign the paper he would be arrested and sent to jail.

It was also alleged that accused 1 and 5, that is to say Bansi Lal Chaudhury and Mr. Lines, insulted the complainant with abusive language by addressing him as *badmash* and *beiman*. These allegations formed the subject of the complaint, the offence alleged was under Ss. 500, 504 and 506, I. P. C. Upon receipt of this complaint the Magistrate, as he was required by law, examined the petitioner on oath and in his examination on oath the petitioner gave the version to the extent that it was within his own knowledge and experience. He says that on 23rd January at about 10-30 A. M. the accused persons came to him in two motor cars and stopped at his house; whereupon Mr. Lines questioned him regarding the supply of sugarcane. The complainant denied that he was supplying sugarcane since the receipt of contrary orders from the Cane Commissioner, but Mr. Lines persisted in saying that the complainant was surely supplying sugarcane to the Bagha factory. Mr. Lines also asked the complainant to sign on a paper which he refused. The remaining persons, it was then stated in the solemn affirmation as recorded all surrounded the complainant. It will be noticed therefore that Mr. Lines was not alleged to have surrounded the petitioner. The examination goes on; Mr. Lines then said that he would get the complainant imprisoned and Babu Bansi Lal said that he would get him ruined, and Mr. Lines said that the petitioner was a *badmash* and *beiman*. The learned Magistrate on that date passed the following order: "Examined the complainant on solemn affirmation. I shall look into the matter and then pass orders."

I fail to see any indication in this order that the Magistrate had any ground for disbelieving the truth of the complaint. If the Magistrate had any doubt as to the truth of the allegations in the petition of complaint as supported by the solemn affirmation of the petitioner, he ought to have recorded an order to that effect in the order sheet, so that the superior Courts may be satisfied that the Magistrate had any justification whatsoever in refusing to issue summons to the accused as required by law. The Magistrate could also (but only after giving proper and adequate reasons) either summarily enquire into the truth of the complaint himself or call for an enquiry and report as provided by S. 202, Criminal P. C. The next order, which I find in the order sheet, is dated 21st March 1939, that is to say about two months after this date. The order sheet is silent as to what happened to this complaint for this long time. But on looking into the record I find that the Magistrate had taken some pencil notes of the evidence of some witnesses. At p. 11 of the record the pencil note shows that Mr. Lines was examined by the Magistrate on 28th February 1939. Mr. Lines, it is to be remembered, was an accused in the case. After that the record is again silent till 21st March 1939, when a number of witnesses, apparently on behalf of the complainant, were examined. The Magistrate then records the second order on 21st March, which runs as follows :

> Examined several witnesses at the spot in presence of the complainant and most of the persons complained against. One witness of the complainant is absent. He wants time to produce him. Let him produce that witness in Court on 28th March 1939.

Thereafter the petitioner prayed for a summons to his witness, who could not be examined earlier than 1st April, and then the matter was adjourned to 6th April. On 6th April, the Magistrate recorded an order which runs into seven closely typed pages. A perusal of the order shows that the so called enquiry report was nothing short of a judgment in a regular trial. If the Magistrate was prepared to take all that trouble in order to ascertain the truth of the complaint, which was supported by a number of witnesses examined on behalf of the complainant, I think it was his bounden duty to issue summonses to the accused and then to have passed an order of acquittal if he was not satisfied as to the truth of the prosecution case presented at the trial. The Magistrate however took this unusual course because, as he says, one of the accused was a member of the highest service in the land who was sworn to do justice. I need not quote the lengthy observations made by the learned Sub-divisional Officer. These observations were made to show why he preferred to believe the defence case put forward by Mr. Lines. The Magistrate concluded his order by saying that he would not be justified

in issuing any summonses to the accused and dismissed the petition of complaint under S. 203, Criminal P. C., as maliciously false.

In the meantime an important event happened. Mr. Lines, on 7th February 1939 that is long before Mr. Lines himself was examined apparently in the course of the enquiry into the truth of the complaint of the petitioner, lodged a counter-complaint to prosecute the petitioner for offences under S. 27, sub-cl. (5) (a) read with Sec. 18 (3) and R. 44 (c) and (2) and R. 10 (c) and (g), Bihar Sugar Factories Control Act, 1937. In that complaint the charges against the petitioner were that on 23rd January 1939 he was selling sugarcane to Bagha Sugar Factory out of Harinagar Factory's reserved area and that he refused to sign the statement which he made to Mr. Lines. It will be noticed therefore that the allegations which the petitioner made in his complaint were with some variation the very allegations which Mr. Lines alleged in the case against the petitioner. The case started by Mr. Lines proceeded to trial, and on 28th June 1939, a Second Class Magistrate, Mr. Ekka, acquitted the petitioner, holding that the charges were not proved against the accused.

I now come to the order which was drawn up by the learned Sub-divisional Officer under Sec. 476, Criminal P. C. The learned Magistrate did not hold any further enquiry as to whether it was desirable in the interest of public justice to prosecute the petitioner for having lodged a maliciously false case. It is well settled that the failure of a complainant to prove his case is not the same thing as the institution of a maliciously false case so as to make him liable for an offence under S. 211, I. P. C. This was so held in 4 P L T 703.[1] In that case, it may be noticed, Adami J., condemned the procedure adopted by the Sub-Deputy Magistrate who was found to have practically held a trial in considering whether the complaint of the petitioner in that case should be dismissed or not. (This is exactly what was done in the present case.) As pointed out by that learned Judge, the only question before the trying Magistrate was whether prima facie the complainant had made out a true case which would justify the summoning of the accused and that what really happened was a trial of the complainant's case in the absence of the accused, though witnesses for the accused were called.

It is very much to be regretted that notwithstanding the repeated observations of this Court, this Court is once more forced to draw the attention of the Subordinate Courts that they should abstain from adopting an illegal procedure, which has been repeatedly condemned, when examining the truth of a complainant's case at a stage where the only question that arises for consideration is whether a summons should issue to the accused or not. In 6 P L T 365[2] Kulwant Sahay J. took the same view that

> the fact that the complainant fails to prove his case is by itself not sufficient to sanction a prosecution under S. 211 of the Penal Code.

A Division Bench of the Calcutta High Court in 5 C W N 727[3] pointed out as far back as 1901 that S. 211, I. P. C.,

> undoubtedly contemplates a charge, which is indivisible in its nature, and therefore what is to be considered is the nature of the complaint or charge made by the accused; in other words, whether the complaint is substantially true and what is false is a mere fringe to the complaint, or whether the substantial complaint is false and what is true is a mere fringe or in other words a mere accessory circumstance.

Order No. 5 of 6th April 1939 is simply this :

> Orders passed and complaint dismissed under S. 203, as maliciously false as per report separately attached. Draw up a complaint under Section 211 Indian Penal Code.

The complaint actually drawn up by the learned Sub-divisional Officer is in these words :

> One Mahanth Mukti Narain Gir, son of Parson Gir, of Kumhia Khurd, P. S. Ramnagar, filed a complaint in my Court on 26th January 1939 against Mr. R. N. Lines, I. C. S. and others under Ss. 500, 504 and 506, I. P. C.
>
> On enquiry, the complaint, being found to be maliciously false, was dismissed by me under Sec. 203, Criminal P. C. Whereas it is expedient in the interest of justice that an enquiry should be made into the offence under Sec. 211, I. P. C., alleged to have been committed by the aforesaid Mahant Muktinath Gir. I therefore complain that he may be proceeded with in accordance with law.

Against this complaint an appeal was preferred to the learned Sessions Judge which was disposed of by Mr. Salisbury on 29th July 1939. This learned Judge did not consider in the least whether it was desirable in the interest of public justice that the petitioner should be proceeded against for the offence under S. 211, I.P.C.

1. Chhedi Upadhya v. Emperor, (1924) 11 A I R Pat 379 = 72 I C 76 = 24 Cr L J 316 = 4 P L T 703.

2. Bhuan Kahar v. Emperor, (1925) 12 A I R Pat 329=83 I C 701=26 Cr L J 141=6 P L T 365.

3. Giridhari Naik v. Empress, (1901) 5 C W N 727.

A decision in 5 P L J 61[4] was brought to his notice. There it is laid down in clear and unmistakable terms that it was not only irregular but illegal for a Magistrate to whom a complaint is made to call upon the person accused for a report as to the truth or falsity of the charge preferred against him. But the learned Sessions Judge sought to distinguish this authority of a Division Bench of this Court by relying upon two Single Judge decisions of this Court — one by Foster J. and another by Scroope J. The decision by Foster J. is reported in 7 P L T 36.[5] Foster J. considered the cases of the Calcutta High Court which were cited before him, but the case in 5 P L J 61[4] was not brought to his notice; and indeed the learned Judge says :

> The learned vakil for the petitioner has not put before me any authority for the proposition that these departures from the letters of the law are other than an irregularity;

then after dealing with the cases reported in 14 Cal 141[6] and 21 C W N 127[7] the learned Judge observed :

> In the present case on a cursory glance I notice that most of the points on which the dismissal of the complaint is founded are points that might have equally well been made by the Magistrate in the absence of the accused and the accused's pleader.

The learned Judge further observed that the dismissal of the complaint appeared to him to be founded rather on the weakness of the prosecution case than on the strength of the defence. This case therefore was of no assistance to the Crown.

The case decided by Scroope J. is reported in 12 P L T 710.[8] Here again the case in 5 P L J 61[4] was neither cited before nor considered by the learned Judge. What the learned Judge decided in that case was that, although it was highly irregular to hold an enquiry in the presence of the accused and allow him to cross-examine the prosecution witnesses and adduce witnesses for the defence, he thought that in the circumstances of the case before him the irregularity, if any, did not amount to any illegality at all. At p. 713 the learned Judge pointed out that no notice was issued to the accused in that case, but as the accused lived in the village where the local enquiry had to be conducted, the Magistrate did not think it improper to examine the accused who presented himself. It is to be noticed further that the learned Judge draws pointed attention to the fact that the accused did not produce any witnesses on his behalf, but that it was the Magistrate himself who, after examining the accused, examined a number of witnesses who lived close to the house of the complainant. The accused in that case had put forward a plea of alibi before the enquiring officer and therefore the Magistrate who was conducting the enquiry under Sec. 202, Criminal P. C., thought it right to complete his enquiry by examining witnesses who would support the plea of alibi of the accused. It is to be observed further that the witnesses who were examined by the Magistrate were witnesses who were examined by him in the absence of the accused and not only in the absence of the accused but in the absence of the complainant also after he returned to the sadar. I fail to see how this case at all militates against the authoritative decision of the Division Bench of this Court in 5 P L J 61.[4] In the present case the learned Sub-divisional Officer went out of his way to examine Mr. Lines on 28th February 1939 before calling upon the complainant to substantiate his allegations. The record is silent how Mr. Lines came to be examined on that date and why the complainant's witnesses were not examined before 21st March 1939.

But the irregularity of the procedure adopted by the learned Sub-divisional Officer is not made the subject of any application before me, because the present application is not against an order dismissing the complaint, but against an order directing the prosecution of the petitioner. Mr. Hasan Jan, who appears to oppose the rule, argued strenuously that the officer in the position of Mr. Lines could not be protected if such false and frivolous charges are levelled against the officer and therefore he submitted that it was highly expedient in the interest of public justice that the proceedings instituted under Sec. 476, Criminal P. C., should not be quashed. Mr. Jan's fears are wholly unfounded, because the Legislature has itself protected the

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4. Harnarain Halwai v. Kariman Ahir, (1920) 7 A I R Pat 655=57 I C 285=21 Cr L J 621=5 P L J 61=1 P L T 609.
5. Ram Saran Singh v. Mohammad Jan Khan, (1926) 13 AIR Pat 34=89 I C 706=26 Cr L J 1394=7 P L T 36.
6. Baidya Nath Singh v. Muspratt, (1887) 14 Cal 141.
7. Balai Lal v. Pashupathi Chatterji, (1917) 4 A I R Cal 462=35 IC 828=17 Cr L J 396=21 C W N 127=25 C L J 606.
8. Mahabir Baitha v. Emperor, (1931) 18 A I R Pat 302=1931 Cr C 723 = 133 I C 172 = 32 Cr L J 1023=12 P L T 710.

officer, if necessary, by the provisions of S. 197, Criminal P. C. That Section says :

> When any person who is a Judge within the meaning of S. 19, Penal Code, or when any Magistrate or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the local Government.

It follows from this that the learned Subdivisional Officer had no jurisdiction to entertain the complaint so far as it was against Mr. Lines. That matter was considered by Mohamad Noor J. elaborately in 15 P L T 775,[9] and since that decision the Federal Court has now authoritatively laid down that in cases like the present, cognizance could not be taken of any complaint against Mr. Lines. If this aspect of the case had been brought to the notice of the Subdivisional Officer, I think he would not have been at pains to direct the prosecution of the petitioner as in his view the gravamen of the charge levelled by the petitioner was that he had maliciously impugned a certain conduct in the discharge of his duties to a member of the highest service in the land sworn to do justice. I have now to consider for myself whether it is expedient in the interest of public justice that the prosecution of the petitioner should be allowed to go on. This Court is ordinarily reluctant to interfere with the discretion exercised concurrently by the Courts below in a matter of this description; but when I find that there has been a fundamental misconception in understanding the procedure that ought to have been followed by the learned Subdivisional Officer who proceeded upon lines upon which he ought not to have proceeded in this case and when the provisions of Sec. 197, Criminal P. C., have been completely lost sight of, I consider myself free to examine the facts for myself and decide whether the petitioner should be put upon his trial. As I have observed already, the subject-matter of the present complaint is admitted.

The incident, which is disclosed in the petition of complaint of 23rd January 1939, is substantially admitted by Mr. Lines in his counter-complaint of 7th February 1939. The only difference is that Mr. Lines denies that he used the words which are also the subject of the charge in the complaint of the petitioner. But it is not denied that hot words passed between the petitioner and Mr. Lines; Mr. Lines in his anxiety to carry out his duties under the Bihar Sugar Factories Control Act was insisting that the petitioner should sign the statement which he had made to Mr. Lines. I notice from the record that Mr. Lines took the precaution of taking in writing the statements of a number of witnesses (for instance of Sukhma Dutta Misra and Kodai Gir) in support of his allegation that Mukti Narain Gir was refusing to sign the statement when requested. The statement of the witnesses is as follows : "I have witnessed the Mohanthji, Mukti Narain Gir, refusing to sign his statement when requested to by you." Mr. Lines was under the impression that he could force the petitioner to sign the statement and therefore he launched a prosecution against the petitioner for his refusing to sign the statement which he had made to Mr. Lines. The learned Magistrate, who tried the case, found that refusing to sign the statement by the Mahanth did not come under the purview of any of the rules referred to by the prosecution in that case. When this matter was brought to the notice of the learned Sessions Judge, who heard and disposed of the appeal, he says that :

> It appears that the Cane Inspector had told appellant that he would be liable to prosecution if he did not sign the statement which he is alleged to have made. A trying Magistrate subsequently found that there was no obligation upon the appellant to sign his statement. Nonetheless, there is no reason whatever to believe that the Cane Inspector intended to cause appellant to do any act which he was not legally bound to do.

With respect, I do not understand the meaning of the last sentence. This was the very gravamen of the charge against the petitioner that the petitioner when required or forced to do so refused to sign the statement which he had made. Mr. Lines was annoyed at this attitude of the petitioner and threatened that he would be liable to prosecution. In fact, he was doing his utmost to make the petitioner sign the statement. It has now been found that the law does not contemplate forcing a person to sign a statement which he is required to make under the rules of the Bihar Sugar Factories Control Act. In these circumstances the situation can easily be visualised that Mr. Lines was very nearly losing his temper upon the petitioner refusing to sign the statement which he had made to Mr. Lines. If in that situation hot words were used to by Mr. Lines or somebody else in

9. Ram Singh v. S. A. Rizwi, (1935) 22 A I R Pat 52=1935 Cr C 83 = 155 I C 126 = 36 Cr L J 650=14 Pat 299=15 P L T 775.

the crowd which had assembled there, I do not see that this is any justification for the launching of the prosecution against the petitioner in the present case. The incident of that day is admitted; the circumstances which led to the heat in the situation are also admitted. The variation between the parties as to what actually happened is not of such a magnitude that I would be justified in affirming the orders of the Courts below. For these reasons I am of opinion that it is not at all expedient in the interest of public justice that the petitioner, Mukti Narain Gir, should be prosecuted for the offence under S. 211, Penal Code. I therefore quash the proceedings.

D.S./R.K. *Proceedings quashed.*

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* * A. I. R. 1940 Patna 102

SPECIAL BENCH

HARRIES C. J., DHAVLE AND MANOHAR LALL JJ.

Jagarnath Lall — Petitioner.

v.

Land Acquisition Deputy Collector, Patna — Opposite Party.

Civil Revn. No. 685 of 1938, Decided on 14th December 1939, from order of Land Acquisition Deputy Collector, Patna, D/- 2nd August 1938.

(a) Land Acquisition Act (1894), S. 18 (1)—Application within time and not barred by proviso 2 to S. 31—Collector cannot refuse to refer matter on ground that objections to award were not bona fide.

The wording of S. 18 (1) leaves the Collector no alternative but to refer the matter if the application is made within the periods prescribed by the Section and is not barred by proviso 2 to S. 31 of the Act. It follows therefore that the Land Acquisition Deputy Collector has no right whatsoever to refuse to refer the matter on the ground that the objections to the award were not bona fide and were frivolous. [P 103 C 1]

(b) Civil P. C. (1908), S. 115—Land acquisition proceedings until award is made are administrative proceedings.

The land acquisition proceedings up to the time when the award is made are administrative proceedings and not judicial proceedings : *32 Cal 605 (P C), Rel. on.* [P 103 C 2]

(c) Land Acquisition Act (1894), S. 49, proviso 2—Collector must refer question to Court when called upon to do so.

Proviso 2 to S. 49 like S. 18 gives the Collector no alternative but to refer the question to the Court if he is called upon to do so. [P 104 C 1]

*** * (d) Civil P. C. (1908), S. 115—Collector making or refusing to make reference under S. 18, Land Acquisition Act, is not Court subordinate to High Court—High Court has no jurisdiction to revise Collector's order making or refusing to make reference under S. 18 :** *2 Pat L J 204=A I R 1917 Pat 176=39 I C 650, Overruled.*

It does not follow that High Court has revisional jurisdiction merely because an order is one made judicially. Hence, the mere fact that the Land Acquisition Deputy Collector might have been acting judicially gives High Court no right whatsoever to interfere under S. 115, Civil P. C. Such power of interference is only given in cases of orders made by Courts subordinate to the High Court. Further, the fact that the petitioner may have no remedy unless revision lies is also no ground for holding that High Court can interfere in its revisional jurisdiction. This jurisdiction is strictly limited to cases falling within S. 115, Civil P. C. Even assuming that the Collector acts judicially in making or declining to make a reference under S. 18 of the Act, it is extremely doubtful whether he can be regarded as a Court. Even if he is a Court, it is clear that he is not a Court subordinate to the High Court. The Land Acquisition Collector is not subject to the appellate jurisdiction of the High Court, and the High Court has no power whatsoever over him. Hence, High Court has no power under S. 115, Civil P. C., to revise the order of Collector making or refusing to make reference to Court under S. 18, Land Acquisition Act : *A I R 1938 Cal 250; A I R 1924 Mad 442 (F B); A I R 1932 All 568 (F B); A I R 1923 Bom 290; A I R 1930 Lah 242 and A I R 1934 Rang 118, Rel. on; 2 Pat L J 204=A I R 1917 Pat 176=39 I C 650,* **Overruled** *; 12 C W N 241; 16 C W N 327 and A I R 1934 Cal 758, Dissent.* [P 105 C 2; P 106 C 1]

T. N. Sahai — *for Petitioner.*

Advocate-General and Government Pleader — *for Opposite Party.*

Harries C. J. — This is a petition for revision of an order passed by the Land Acquisition Deputy Collector of Patna refusing to refer an objection to an award for determination by the Civil Court. The case first came before Wort J., who, owing to a conflict of authority, referred it to a Division Bench. A Bench, consisting of James and Chatterji JJ., referred the case to the Chief Justice with a recommendation that it should be heard by a larger Bench. Accordingly the case has been argued before this Special Bench. Proceedings for the compulsory acquisition of certain land in the Patna District took place before the Land Acquisition Deputy Collector of Patna, who was authorized to exercise the powers of the Collector, and in due course he made his award under S. 11, Land Acquisition Act (Act 1 of 1894). By his award he awarded to the tenant a sum of Rupees 4917-12-0, to the proprietors a sum of Rupees 99-12-0 and to the tenure-holders Rs. 452. The present petitioner, who held a four annas share in the tenure, objected

to the award and claimed a reference to the Civil Court. The Land Acquisition Deputy Collector was of opinion that the objections of the petitioner were frivolous and were made with a view to harass the tenant. He declined to refer the matter to the Civil Court: hence the present application for revision. S. 18, Land Acquisition Act, 1894, provides that

> any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

The application must state the grounds upon which the objection to the award is taken, and provided the objection is within time, the Collector must refer the matter to the Civil Court. In my view, the wording of S. 18 (1) leaves the Collector no alternative but to refer the matter if the application is made within the periods prescribed by the Section and is not barred by proviso 2 to Sec. 31 of the Act. It follows therefore that the Land Acquisition Deputy Collector of Patna had no right whatsoever to refuse to refer the matter on the ground that the objections were not bona fide and were frivolous. It is to be observed that R. 107 of the Executive Instructions issued by the Board of Revenue for this Province for the guidance of the Collectors, makes it clear that a reference to the Court, on receipt of an application under Sec. 18, is obligatory, unless the application is barred by the provisos to S. 18 or by proviso 2 to Sec. 31. However, in spite of the provisions of the Act and this instruction the Deputy Collector declined to make a reference. It has been urged on behalf of the petitioner that this Court has power to revise the order of the Deputy Collector and to order him to refer the matter to the Civil Court. It is now conceded that if the Court has such a power, such must be under Sec. 115, Civil P. C., as this Court has no longer any power of superintendence, which it previously possessed under S. 107, Government of India Act, 1915. Sec. 115, Civil P. C., provides that,

> the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. . . . . .

From the wording of the Section, it is clear that the High Court possesses revisional powers only in matters decided by a Court which is subordinate to the High Court. Before this Court can interfere in the present case, it must be established that the rejection of the application for reference to the Civil Court was made by the Land Acquisition Deputy Collector as a Court and as a Court subordinate to this Court. There can now be no doubt that land acquisition proceedings up to the time when the award is made are administrative proceedings and not judicial proceedings. This has been clearly laid down by their Lordships of the Privy Council in 32 Cal 605.[1] In that case their Lordships held that the inquiry by the Land Acquisition Collector as to the value of land and the amount of compensation to be paid for its acquisition, resulting in the award, is an administrative, and not a judicial proceeding. If the owner of the land desired a judicial ascertainment of the value of the land, he could require the matter to be referred by the Collector to the Court for determination. As the proceedings before the Collector were not judicial, the latter was not limited to the evidence taken before him, but was entitled to avail himself of information supplied him without the knowledge of the owner of the land, and not disclosed at the inquiry. At page 629, Lord Robertson, who delivered the judgment of the Board, observed:

> When the Sections relating to this matter are read together, it will be found that the proceedings resulting in this "award" are administrative and not judicial; that the "award" in which the inquiry results is merely a decision (binding only on the Collector) as to what sum shall be tendered to the owner of the lands; and that, if a judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court. The Sections directly relevant (besides the 9th already set out) are the 11th, 12th, 13th, 14th, 15th and 18th. These Sections, and the question as a whole, are very satisfactorily discussed in the judgment under appeal, and their Lordships do not think it necessary to repeat the reasoning.

It will be observed that Lord Robertson cites S. 18 of the Act as one of the Sections which makes it clear that the proceedings before the Collector, at least up to the making of the award, are administrative and not judicial. It follows, therefore, that the Land Acquisition Deputy Collector in this case was certainly not a Court up until the time he made his award; and Lord Robertson's observations seem to suggest that he was not acting as a Court in these proceedings under S. 18 of the Act. It has however been

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1. Ezra v. Secretary of State, (1905) 32 Cal 605=9 C W N 454=32 I A 93 (P C).

held by a Bench of this Court in 2 Pat L J 204,[2] that the Land Acquisition Deputy Collector is acting as a Court subordinate to this Court in refusing to refer to the Civil Court a question under proviso 2 to sub-sec. (1) of Sec. 49, Land Acquisition Act. Proviso 2 to Sec. 49 is in these terms:

> Provided also that, if any question shall arise as to whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building within the meaning of this Section, the Collector shall refer the determination of such question to the Court, and shall not take possession of such land until after the question has been determined.

This proviso like S. 18 gives the Collector no alternative but to refer the question to the Court if he is called upon to do so. In 2 Pat L J 204[2] the Deputy Collector refused to make the reference, and a Bench of this Court consisting of Chapman and Roe, JJ., held that this Court could interfere in revision and direct a reference. It has been urged that the Court had no jurisdiction to interfere, but the Bench was of opinion that the reference to the Civil Court was the first step in a judicial proceeding and that the act of making a reference or refusing to make a reference was a judicial act which gave the Court jurisdiction to interfere. Reliance was placed on two earlier cases of the Calcutta High Court to which I shall refer later. This case is certainly an authority for the proposition that the Court has jurisdiction in the present case to interfere and to refer the petitioner's objections for a determination by the Court. No reasons however are given in the judgment as to why the Court came to the conclusion that the Land Acquisition Deputy Collector was a Court subordinate to this Court. All that Chapman J., held was that in making a reference or in refusing to make a reference the Land Acquisition Deputy Collector was acting judicially and he assumed that if such was the case this Court could interfere in revision. The learned Judge did not consider whether the Land Acquisition Deputy Collector, even if he was a Court, was a Court subordinate to this Court. The judgment assumes what this Court is now called upon to decide. It has been urged on behalf of the opposite party that this case was wrongly decided. The point had been before the Calcutta High Court on at least two previous occasions. In 12 C W N 241[3] a Bench held that in rejecting an application under S. 18, cl. (1), Land Acquisition Act asking for a reference to the Civil Court, the Collector acted judicially, and his order was subject to revision by the High Court. From the judgment it is not clear whether the Bench held that the Court had power under its revisional jurisdiction or under its power of superintendence. At p. 245 the learned Judges observed:

> The next question which arises is whether this Court has jurisdiction under Sec. 622 (now 115) Civil P. C., or Ss. 15 of 24 & 25 Victoria, C. 104 to interfere. It is admitted that up to and including the time of making his award the Collector was in no sense a judicial officer and that the proceedings before him were not judicial proceedings, 9 C W N 454,[1] and however irregular his proceedings were, we cannot interfere with his award made under S. 11 of the Act.

But when an application is made to the Collector requiring him to refer the matter to the Civil Court, the Collector may have to determine and, it seems to us, determine judicially, whether the person making the application was represented or not when the award was made, or whether a notice had been served upon the applicant under S. 12 (2) and what period of limitation applies and whether the application is under the circumstances made within time. The Collector's functions under Part 3 of the Act are clearly distinguishable from those under Part 2. Part 3 of the Act relates to proceedings in Court. In our opinion the Collector in rejecting the application was a Court and acting judicially, and his order is subject to revision by this Court. To hold otherwise would be to give finality to an award under S. 11 even in cases in which the Collector acts irregularly and contrary to law and then refuses on insufficient grounds to make a reference under Part 3 of the Act. The party aggrieved may be left without remedy which is implied by a judicial trial before the Judge.

In this case also the learned Judges give no reasons for holding that the Collector, if a Court at all, was a Court subordinate to the High Court. Once they came to the conclusion that the Collector acting under S. 18 was acting judicially, it was assumed that he was a Court subordinate to the High Court. It is clear that all Courts are not subordinate to the High Court. For example, Revenue Courts are subordinate to the Board of Revenue, and this Court has no power whatsoever to revise any orders passed by them, yet they act judicially. In my view it in no way follows that this Court has revisional jurisdiction merely because an order is one made judicially. The case in 12 C W N 241[3] was followed

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2. Saraswati Pathack v. Land Acquisition Deputy Collector of Champaran, (1917) 4 AIR Pat 176 =39 I C 650=2 Pat L J 204.

3. Administrator General of Bengal v. Land Acquisition Collector, 24-Parganas, (1908) 12 CW N 241.

in 16 C W N 327[4] in which it was held that where a Land Acquisition Collector refused to make a reference to the Civil Court under S. 49, Land Acquisition Act, the High Court in revision could set aside his proceedings subsequent to the refusal and directed the Collector to proceed according to law. From the judgment in this case it is not clear whether the learned Judges held that the power to interfere was under the Code of Civil Procedure or not. They propounded the question which they had to decide in these words :

> The first question that arises upon this rule is whether the Land Acquisition Deputy Collector is subject to the extra-ordinary jurisdiction of this Court.

They held, following the earlier case to which I have referred, that the Court had power to interfere. In this case, as well as in the earlier Calcutta case, the learned Judges felt themselves compelled to interfere because if they did not do so, the petitioner would be left with no remedy whatsoever. The same question again arose in 61 Cal 1041[5] in which it was held that the High Court had power to revise an order of the Land Acquisition Collector refusing to refer a case to the Civil Court under S. 18, Land Acquisition Act. In this case the learned Judges had no doubt that the Collector, in refusing to make a reference under S. 18, was acting judicially, but they had some doubt as to whether the Court had power to interfere with such an order under S. 115, Civil P. C. At p. 1043 the learned Judges observed :

> There can be no question that the act of the Collector in refusing to make a reference under S. 18, Land Acquisition Act, is a judicial act. The petition for a reference corresponds to the plaint in a suit. It initiates judicial proceedings in the land Acquisition Court, which, by virtue of S. 54, Land Acquisition Act, is a Court subordinate to the High Court, and the petition for reference is practically a part of those proceedings. Though, therefore technically S. 115, Civil P. C., may not be applicable, it was hardly the intention of the Legislature that there should be no remedy against the wrongful rejection of an application for reference. It may be noted in this connexion that no relief under S. 45, Specific Relief Act, could be obtained outside the jurisdiction of the Chartered High Courts. In these circumstances and in view of the previous rulings of this Court ..... we will not decide against the petitioner on the preliminary point.

From these observations it is clear that the Beneh decided that they must interfere because there was no other remedy. They clearly doubted whether they had power to interfere under the revisional jurisdiction and only interfered because of the earlier decisions, which had held that the Court could revise such orders. In a recent Bench decision of the Calcutta High Court a different view has been taken. In 42 C W N 212[6] a Bench held that assuming that a Land Acquisition Collector when acting under S. 18, Land Acquisition Act, is a Court he is not a Court subordinate to the High Court. Consequently, the High Court has no power to interfere under S. 115, of the Civil Procedure Code with an order made under S. 18, Land Acquisition Act, by a Collector. It will be seen therefore that the view of the Calcutta High Court has not been consistent, and the latest decision of that Court strongly supports the view that the High Court has no jurisdiction to interfere in revision with orders passed under S. 18, Land Acquisition Act. The view expressed in this latest Calcutta case is similar to that taken by a number of other High Courts. In 47 Mad 357[7] a Full Bench held that the High Court had no power under S. 115, Civil P. C., or under S. 107, Government of India Act, to revise the order of a Collector, acting under the provisions of the Land Acquisition Act, refusing to make a reference to the Court under S. 18 in a matter upon which he had passed an award. The Full Bench further held that though the Collector in refusing to refer the matter was acting "judicially," it was doubtful whether he was acting as a "Court" and he was certainly not a Court subordinate to the High Court within S. 115, Civil P. C.

The same view was taken by a Full Bench of the Allahabad High Court in 54 All 1085.[8] The Full Bench held that a Collector, in making or refusing to make a reference under S. 18, Land Acquisition Act, acts in an administrative capacity and not judicially, and even if it were held that the Collector in this matter acted judicially, he was not a Court, and certainly not a Court subordinate to the High Courts

4. Krishna Das v. Land Acquisition Collector of Pabna, (1912) 16 C W N 327=13 I C 470=16 C L J 165.
5. Leath Elies Joseph Solomon v. H. C. Stork, (1934) 21 A I R Cal 758=153 I C 938=61 Cal 1041=60 C L J 184=38 C W N 844.
6. Gopinath Shah v. First Land Acquisition Collector, Calcutta, (1938) 25 A I R Cal 250=177 I C 866=42 C W N 212.
7. Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam, (1924) 11 A I R Mad 442=84 I C 616=47 Mad 357=46 M L J 209 (F B).
8. Bhajani Lal v. Secretary of State, (1932) 19 A I R All 568 = 141 I C 587 = 54 All 1085= 1932 A L J 769 (F B).

of Bombay, Lahore and Rangoon have also held that a Collector, acting under S. 18, Land Acquisition Act, is not a Court subordinate to the High Court: *see* 47 Bom 699,[9] A I R 1930 Lah 242[10] and A I R 1934 Rang 118.[11] In my judgment the view expressed in the Full Bench cases of the Madras and Allahabad High Courts is the correct one. Even assuming the Collector acts judicially in making or declining to make a reference under S. 18 of the Act, it is extremely doubtful whether he can be regarded as a Court. Even if he is a Court, it is, in my view, clear that he is not a Court subordinate to the High Court. The Land Acquisition Collector is not subject to the appellate jurisdiction of the High Court, and the High Court has no power whatsoever over him. S. 55 of the Act empowers the Provincial Government to make rules consistent with the Act for the guidance of officers in all matters connected with its enforcement, and may from time to time alter and add to the rules made. Certain executive instructions have been issued by the Board of Revenue, Bihar and Orissa and these instructions deal with the duty of Land Acquisition Collectors in dealing with references under Ss. 18 and 49: *see* paras. 106, 107 and 110 of the Executive Instructions of the Board of Revenue. It appears to me that the Land Acquisition Deputy Collector in this case, if he was a Court at all, was a Court subordinate not to the High Court but to the Board of Revenue. The latter certainly had powers of superintendence which this Court does not possess.

In my view the mere fact that the Land Acquisition Deputy Collector might have been acting judicially gives this Court no right whatsoever to interfere under S. 115, Civil P. C. Such power of interference is only given in cases of orders made by Courts subordinate to the High Court. Further, the fact that the petitioner may have no remedy unless revision lies is also no ground for holding that this Court can interfere in its revisional jurisdiction. This jurisdiction is strictly limited to cases falling within S. 115, Civil P. C. It is unfortunate that this Court has no power to interfere, but the absence of a remedy is a matter for Legislature and not for the Court. This Court cannot legislate in order to give the petitioner a remedy. In my view therefore the case in 2 Pat L J 204[2] was wrongly decided and must now be regarded as overruled. For the reasons which I have given, I am satisfied that this Court has no jurisdiction to revise the order passed by the Land Acquisition Deputy Collector, and therefore this application must fail. I would accordingly discharge the rule. In the special circumstances of this case, I would make no order as to costs.

Dhavle J. — I agree.

Manohar Lall J. — I agree.

D.S./R.K. *Rule discharged.*

9. Balkrishna Daji v. Collector, Bombay Suburban, (1923) 10 A I R Bom 290=73 I C 354 = 47 Bom 699=25 Bom L R 398.
10. Mushtaq Ali v. Secretary of State, (1930) 17 A I R Lah 242=127 I C 711=31 P L R 158.
11. M. H. Mayet v. Land Acquisition Collector, Myinagyan, (1934) 21 A I R Rang 118 = 150 I C 1049=12 Rang 275.

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AGARWALA J.

Lachman Mahto — Appellant.

v.

Shanker Mahton — Respondent.

Appeal No. 555 of 1938, Decided on 31st July 1939, from appellate decree of Addl. Sub-Judge, Gaya, D/- 30th March 1938.

Limitation Act (1908), Arts. 32 and 144 — Person settled by landlord on gairmazrua-am land acquires no tenancy rights — His cultivation under the settlement amounts to ouster of public — Art. 32 is not applicable and suit after twelve years from ouster would be barred.

A landlord has no right to settle gairmazrua-am lands and if he purports to do, the person with whom he purports to settle them acquires no tenancy right by virtue of the settlement, and his act in bringing the land (formerly a reservoir used by the public) under cultivation amounts to ouster of the public, and the period of limitation for a suit to recover possession is twelve years from the ouster and not 2 years under Art. 32 : *A I R 1933 Lah 705 and A I R 1937 Pat 388, Rel. on.*

[P 107 C 1]

G. P. Shahi — *for Appellant.*

Qazi Nazrul Hasan — *for Respondent.*

Judgment. — This is an appeal by the defendant from a decision of the Additional Subordinate Judge of Gaya, reversing a decision of the Munsif of Jehanabad. The appeal arose out of a suit instituted by five persons in a representative capacity for a declaration that plot No. 124 measuring ·09 of an acre was a reservoir used by the public for washing their cattle and that the defendant had no right to fill it up and cultivate it. The plaintiff prayed for a permanent injunction restraining the defendant from continuing cultivation of the plot. The

defendant pleaded that the land was formerly parti land which was settled with him by the landlord in 1920 orally, and that this settlement was confirmed by a parwana in 1929. As the suit was instituted on 15th April 1936, the defendant pleaded limitation under Article 32 of the Limitation Act. The plot in question is entered in the survey papers as ghairmazrua-am (garha or ditch). It has been found as a fact that the defendant filled up the plot in 1929 and has been cultivating since and that it was from that date the public were ousted from the land in question. It has been held by the Full Bench of the Lahore High Court in A I R 1933 Lah 705[1] that where the act of the defendant amounts to an ouster of the plaintiff, Art. 32, Limitation Act, has no application although the defendant may in fact have perverted the land to some purpose to which it was not originally intended in addition to ousting the plaintiff from it. In 1937 P W N 320[2] it was held in this Court that a landlord has no right to settle gairmazrua-am lands and that if he purports to do, the person with whom he purports to settle them acquires no tenancy right by virtue of the settlement. It must accordingly be held that the defendant-appellant acquired no rights in 1929 and that his act in bringing the land under cultivation amounted to an ouster of the public and that accordingly the period of limitation for a suit to recover possession is 12 years from the ouster. The appeal therefore fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

1. Mastan Singh v. Santa Singh, (1933) 20 A I R Lah 705 = 145 I C 553 = 14 Lah 267 = 34 P L R 618 (F B).
2. Mohammad Waliul Haq v. Ludput Upadhya, (1937) 24 A I R Pat 388 = 169 I C 971 = 16 Pat 389=18 P L T 348=1937 P W N 320.

A. I. R. 1940 Patna 107

FAZL ALI AND CHATTERJI JJ.

Ratanshi Hirji Bhojraj and others — Petitioners.

v.

Tricumji Jiwanda and others — Opposite Party.

Civil Revn. Nos. 379, 467 and 468 of 1938, Decided on 11th May 1939, from order of Sub-Judge, Dhanbad, D/- 25th May 1938.

Civil P. C. (1908), S. 60 and O. 21, R. 53 — Preliminary decree for accounts in suit for dissolution of partnership is attachable in execution of another decree.

When a right to sue merges in a decree, it can no longer be said to be subject to the prohibition against alienation attaching to a mere right to sue. Indeed, a preliminary decree may not be capable of immediate execution but nevertheless it creates some rights which must be regarded as property. Hence, a preliminary decree for accounts in a suit for dissolution of partnership and accounts is attachable in execution of another decree: *A I R 1937 Cal 4, Dissent.; A I R 1929 Mad 641, Expl.; 14 M I A 40 (P C) and A I R 1924 Cal 1047, Disting.* [P 108 C 1 ; P 109 C 1]

R. S. Chatterji — *for Petitioners.*

Sir M. N. Mukherji and N. N. Roy — *for Opposite Party.*

Chatterji J. — These three applications are directed against an order by which three connected claim cases under O. 21, R. 58, Civil P. C., arising out of execution case No. 12 of 1937 in the Court of the Subordinate Judge of Dhanbad were allowed. The decree under execution was obtained by the petitioners against the opposite party No. 1 (a firm named Tricumjee Jivandas) and another individual. The subject of the attachment which gave rise to the claims was a preliminary decree for dissolution of partnership and for accounts obtained by the opposite party No. 1 and three others, namely opposite party Nos. 2 to 4, against certain individuals. This preliminary decree provided among other terms that

> after such accounting is completed a decree for the amount that may be found due for the plaintiffs' 1½ annas share in the profits of the partnership properties and business will be drawn up against defendants 1 to 3 realizable from the assets of Goa Petha in their hands.

The decree further provided that the plaintiffs were to get full costs which were to be assessed after the accounting was over. In execution case No. 12 of 1937 in the Subordinate Judge's Court at Dhanbad when the petitioners attached the interest of the opposite party No. 1 in this preliminary decree, the opposite party Nos. 2 to 4 who were the remaining decree-holders under that decree objected that the preliminary decree was not liable to attachment. This objection has been allowed. The learned Subordinate Judge relying upon the decisions in A I R 1937 Cal 4=40 C W N 1393[1] and A I R 1929 Mad 641[2] has held that the preliminary decree in question is not a decree which is capable of being attached under the provisions of O. 21, R. 53, Civil P. C. The question whether

1. Sailendra Krishna v. Harendra Kumar, (1937) 24 A I R Cal 4=167 I C 430=40 C W N 1393.
2. Dhanraju v. Moti Lal Daga, (1929) 16 A I R Mad 641 = 116 I C 343 = 52 Mad 563 = 57 M L J 264 (F B).

the decree is attachable or not must be determined with reference to the terms of Sec. 60, Civil P. C. That Section lays down that with the exception of certain classes of properties specified therein all other property over which the judgment-debtor has a disposing power is attachable. O. 21, R. 53 merely prescribed the manner in which the attachment of decrees is to be effected. The real question therefore is whether the preliminary decree can be said to be property over which the judgment-debtor has a disposing power. It has not been suggested that it comes under any of the exceptions in S. 60. It has however been contended by Sir M. N. Mukherji appearing for the opposite party that the right conferred by the preliminary decree is nothing more than a mere right to sue which under the provisions of Sec. 6, T. P. Act, is not assignable. A decree conclusively determines the rights of a party with regard to all or any of the matters in controversy in the suit, and it may be preliminary or final, as the very definition of decree in Sec. 2, Civil P. C., shows. When a right to sue merges in a decree, it can no longer be said to be subject to the prohibition against alienation attaching to a mere right to sue. Indeed, a preliminary decree may not be capable of immediate execution but nevertheless it creates some rights which must be regarded as property, and there can be no doubt that such property is attachable under S. 60, Civil P. C.

In A I R 1937 Cal 4[1] it was no doubt held that a preliminary decree for accounts in a suit for dissolution of partnership and accounts is not attachable in execution of another decree. In that case which was heard ex parte no reference appears to have been made to the provisions of Sec. 60 or cl. 4 of O. 21, R. 53, Civil P. C. Cl. 1 of the last mentioned rule refers to a decree either for the payment of money or for sale in enforcement of a mortgage or charge. Cl. 4 refers to decrees of all other kinds; so the preliminary decree in question which falls under cl. 4 can be attached in the manner provided therein. With all respect to the learned Judges who decided the case in 40 C W N 1393,[1] I am unable to concur in their view.

The case in A I R 1929 Mad 641[2] does not really support the view taken by the learned Subordinate Judge. There, the question whether a preliminary decree for accounts in a suit for dissolution of partnership and accounts can be attached in execution of another decree did not really arise, and it appears that it was rather assumed that such a decree could be attached. The main controversy in that case was whether such preliminary decree could be regarded as a decree for the payment of money and whether the sale of such decree was valid in view of the provisions of R. 184 of the Civil Rules of Practice framed by the Madras High Court under the powers conferred by the Code of Civil Procedure.

Sir M. N. Mukherji has referred to 14 M I A 40.[3] There with the consent of the parties, the accounts of a partnership firm were referred under order of the Court to arbitrators, but before any award was made the rights and interests of one of the parties in the award were by order of the Court sold by auction in satisfaction of a decree against him made in another suit by a third party. It was held that the expectant claim under an inchoate award was not property within the meaning of S. 205 of Act 8 of 1859, and was not saleable in execution of a decree. The very decision suggests that if the execution sale had taken place after the award the position would have been quite different. Their Lordships held that "a mere right of suit is not property." The reasons for that decision do not, to my mind, apply to a case like the present where there has been a decree of Court, though preliminary. Sir M. N. Mukherji has also referred to A I R 1924 Cal 1047.[4] The question for decision in that case was whether the right to sue for accounts was assignable and it was held that it was not, under S. 6, cl. (e), T. P. Act. This decision is therefore of no assistance. I should observe here that reference was made on both sides to O. 21, R. 42, Civil P. C., which runs thus :

> Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

With reference to this rule the learned Judges in 40 C W N 1393,[1] decided that the words "any other matter" cannot include a preliminary decree directing the taking of accounts in a partnership suit. Their Lordships further observed :

3. Tuffuzzool Hossein Khan v. Raghoonath Pershad, (1870-72) 14 M I A 40=7 Beng L R 186=2 Suther 434=2 Sar 656 (P C.)
4. Khettra Mohan Das v. Biswanath Bera, (1924) 11 A I R Cal 1047=82 I C 411=51 Cal 972=28 C W N 894=40 C L J 79.

This rule deals expressly with the decrees for mesne profits and rents. In these cases the defendant can only be the judgment-debtor but the plaintiff can never be the judgment-debtor. No decree can possibly be passed in those cases rendering the plaintiff liable to the defendant. That is the essential difference between those decrees and a decree in the partnership suit directing accounts to be taken as in the latter case the question as to who will be the judgment-debtor will depend on the result of the accounts.

The position thus indicated may, perhaps, be correct. But O. 21, R. 42 is not relevant for our present purpose, because all that the rule provides is that there can be an attachment under a preliminary decree but it does not touch the question whether the preliminary decree itself is capable of attachment. In my view, the preliminary decree in question was attachable and the learned Subordinate Judge was wrong in allowing the claims. It was further contended on behalf of the petitioners that the claimants had no locus standi to object to the attachment, the judgment-debtor himself having raised no such objection. In view of my decision on the other point, it is not necessary to deal with this question. In the result I would allow the applications and reject the claim petitions. The petitioners are entitled to costs of both Courts; hearing fee sixteen rupees in each case in the lower Court and one gold mohur in each case in this Court.

Fazl Ali J. — I agree.

D.S./R.K. *Application allowed.*

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* A. I. R. 1940 Patna 109

HARRIES C. J. AND AGARWALA J.

Haramohan Patnaik — *Accused*
Petitioner
v.
Emperor.

Criminal Misc. Case No. 4 of 1939, Decided on 16th October 1939, for leave to appeal to Federal Court.

*** Government of India Act (1935), S. 205 (1) —Order of Foreign and Political Department No. 34 I. B. dated 14th January 1937 made by Governor-General in Council in exercise of powers conferred by Indian (Foreign Jurisdiction) Order in Council 1902, is not order made under Government of India Act, 1935—Certificate cannot be granted from decision involving interpretation of such order.**

There was no power under the Government of India Act, 1935, to make any orders in Council relating to Foreign Jurisdiction until 1st April 1937. As the order of the Foreign and Political Department No. 34 I. B. dated 14th January 1937 made by Governor-General in Council in the exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, was made on 14th January 1937, it cannot possibly be said to have been an order made under the Government of India Act, 1935. Hence, certificate cannot be granted from the decision of High Court on the interpretation of such order. [P 111 C 1]

G. C. Das — *for Petitioner.*

Public Prosecutor for Orissa —
for the Crown.

Harries C. J.—This is a petition for the grant of a certificate under Sec. 205 (1), Government of India Act, 1935. The petitioner was arrested at the railway station at Garh Dhenkanal by the Government railway police under a warrant issued by the District Magistrate of Dhenkanal State, which is a Native State outside British India. After his arrest the petitioner was produced before a Magistrate at Cuttack, and after the Magistrate had satisfied himself that the petitioner was a subject of the Native State he directed that the petitioner should be handed over to the State authorities. The petitioner presented a petition in revision to this Court, but a Bench consisting of Agarwala J. and myself dismissed that petition. We held that the petitioner had been lawfully arrested on railway lands and detained at Cuttack, and in our view the learned Magistrate at Cuttack had no alternative after ascertaining that the petitioner was a subject of Dhenkanal State but to hand him over to the Dhenkanal State authorities. At the conclusion of the hearing, counsel for the petitioner was asked whether he desired the Court to consider whether a certificate should be granted under S. 205 (1), Government of India Act. Counsel then made it clear that he did not wish us to consider the question as he contended that he had an appeal as of right to the Federal Court. Subsequently, an application was made to this Bench to direct the authorities at Cuttack not to hand the petitioner over to the Dhenkanal authorities until the appeal which had been filed in the Federal Court had been disposed of. A recent authority of the Federal Court has compelled the petitioner to ask this Court to grant him a certificate to appeal to the Federal Court, and the matter has now been argued fully before us.

The question that this Court had to decide in the revision petition was a question of the construction of a notification or order of the Foreign and Political Department No. 34 I. B. dated 14th January 1937. This notification purports to have been made in the exercise of the powers conferred by the Indian (Foreign Jurisdiction)

Order in Council, 1902, and of all other powers enabling the Governor-General in that behalf to make the order. The notification deals with the duties of Magistrates and police officers having jurisdiction over railway lands situate in Native States in cases where warrants have been issued by Magistrates of Native States. The material portion of the notification which this Court had to consider is in these terms :

> All criminal processes issued in a manner similar to that prescribed by the Code of Criminal Procedure, 1898, by a Magistrate having jurisdiction in any State in India shall be acted upon and executed in railway lands lying within such State by all Magistrates and police officers having jurisdiction in such railway lands under the same conditions and in the same manner as if such processes had been issued by a Magistrate having jurisdiction in such railway lands. . . . . .
>
> * * * * * *
>
> Provided further that nothing hereinbefore contained shall require a Magistrate or police officer having jurisdiction in such railway lands to execute any process so issued against any person who is not a subject of the State by the Court of which the process has been issued or be construed as authorizing him to execute any such process against any subject or servant of His Majesty.

As I have stated, the petitioner was arrested on railway lands upon a warrant issued by the District Magistrate of the State of Dhenkanal. Having been arrested by the railway police he was taken to Cuttack in British India and placed before a Magistrate. He was asked whether he was a subject of Dhenkanal State, and he admitted that he was. The learned Magistrate then directed that he should be handed over to the Dhenkanal State authorities. The points in the revision petition were whether the conduct of the railway police and the Magistrate was in accordance with the terms of this notification and whether the order or notification was intra-vires the power of the Governor-General in Council. This Court having held that the Police and the Magistrate had acted properly, the petitioner appealed to the Federal Court. Presumably, he intends to argue the same points in the Federal Court as were argued in this Court. I need not go into the details of the argument adduced before this Court as such are fully set out in the judgment delivered by this Court in the revision petition.

The question which now arises is whether the decision of this Court involves a substantial question of law as to the interpretation of the Government of India Act or any order in Council made thereunder. If the decision does involve such a question, the Court must grant a certificate. If the decision does not involve such a question, then, in my view, this Court cannot grant a certificate. It has been urged before us that the Government Notification which this Court was called upon to construe was an order made under the Government of India Act. The notification or order purports to have been made by the Governor-General in Council in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, and of all powers enabling him in that behalf. There is no reference whatsoever to the Government of India Act, 1935, in the order under consideration. On the contrary, it is in terms said to be an order made under powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902. In my view the order which this Court had to consider cannot possibly be regarded as an order made under the Government of India Act, 1935. Sub-s. (1), S. 2, Government of India Act, deals with the exercise of rights, authority and jurisdiction heretofore belonging to His Majesty the King. The proviso to that Section is in these terms :

> Provided that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown.

Sub-s. (2) of S. 3, Government of India Act, defines His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, and that person is now the Governor-General. On 18th March 1937, the Indian (Foreign Jurisdiction) Order, 1937, was made by His Majesty in Council, and Sec. 2 (i) provides :

> As from the commencement of Part III, Government of India Act, 1935, the powers conferred by the Principal Order on the Governor-General in Council shall, so far as they are connected with the exercise of the functions of the Crown in its relations with Indian States, be powers of His Majesty's Representative for the exercise of those functions of the Crown, and he may delegate those powers to such extent and in such manner as he thinks fit.

It is clear that under the Government of India Act, the relations between the Crown and Native States were to be matters to be dealt with by the Governor-General and not by the Governor-General in Council as was the case previously. It is clear from the Indian (Foreign Jurisdiction) Order, 1937, that after the Act came into force all orders under the Foreign Jurisdiction Act

and the Indian (Foreign Jurisdiction) Order in Council, 1902, would have to be made by the Governor-General and not by the Governor-General in Council as previously. However, the order which this Court had to consider was an order made not by the Governor-General as the Crown Representative but an order made by the Governor-General in Council under the Foreign Jurisdiction Act and Indian (Foreign Jurisdiction) Order in Council, 1902. It was an order dated 14th January 1937, and was actually made before the Indian (Foreign Jurisdiction) Order 1937 was passed and before the Government of India Act came into force. Sec. 320, Government of India Act, expressly provides that the Parts of the Act other than Part II should come into force on the date fixed for the commencement of Part III of the Act and Part III of the Act came into force on 1st April 1937. In short, there was no power under the Government of India Act to make any orders in Council relating to Foreign Jurisdiction until 1st April 1937. As the order in question was made by the Governor-General on 14th January 1937, it cannot possibly be said to have been an order made under the Government of India Act, 1935. The case was a difficult one and involved a substantial point of law. That however does not entitle this Court to grant a certificate under S. 205 (1), Government of India Act. It must be a substantial point of law as to the interpretation of the Act or of any Order in Council made under the Act. As the Order in Council which this Court was called upon to construe was not made under the Act, the Court cannot grant the certificate prayed for in this petition. For the reasons given I would reject this petition.

Agarwala J. — I agree.

D.S./R.K. *Petition rejected.*

A. I. R. 1940 Patna 111

DHAVLE J.

Panu Samal and others — Petitioners

v.

Emperor.

Criminal Revn. No. 60 of 1938, Decided on 9th March 1939, against order of Sess. Judge, Cuttack, D/- 16th July 1938.

(a) Criminal P. C. (1898), S. 190 (1) (c) — Petition of protest made to Magistrate by person who lodges first information report is petition of complaint — Magistrate acting on such petition and police diary—S. 190 (1) (c) has no application.

A petition of protest (as it is sometimes called) made to the Magistrate by a person who lodges a first information with the police and who is reported against by them is really a petition of complaint and must be dealt with as such. [P 112 C 1]

Where the Magistrate only acts on information contained in the police diary and the petition of complaint filed by the other side, this latter coming within cl. (a) of the same sub-section and the former within cl. (b), cl. (c) has no application whatsoever : *A I R 1931 All 273, Disting.* [P 112 C 1]

(b) Criminal P. C. (1898), S. 191 — S. 191 does not entitle accused to be tried by Court or Magistrate of his choice.

Section 191 does not give the accused the right to be tried by a Court or Magistrate of their choice, but only makes it impossible for the Magistrate who took cognizance under sub-s. (1), cl. (c) of S. 190 to try the accused except with his consent. [P 112 C 1]

(c) Criminal P. C. (1898), S. 191—'Trial by another Court' — Meaning of.

Trial by another Court means trial by Court of Sessions or by another Magistrate. [P 112 C 1, 2]

G. G. Das — *for Petitioners.*

C. M. Acharya — *for the Crown.*

Order. — This is an application in revision on behalf of three petitioners who have been convicted under S. 379, Penal Code, and sentenced to pay fines of Rs. 60 each with two months' rigorous imprisonment in default. My Lord the Chief Justice admitted the application because he was assured by counsel that the case fell within S. 190 (viz. cl. (c) of sub-s. 1) of the Criminal Procedure Code and that the accused were never informed of their right under S. 191 to have the case tried by another Court. It appears on an examination of the record, which was not before my Lord the Chief Justice, that the police who investigated the matter after recording the first information submitted the final report "mistake of law as it is a civil dispute," and that upon this the then Sub-divisional Magistrate read the case diary and also a petition by the prosecution and called for a charge-sheet under S. 342 against two of the petitioners and under S. 342 read with Sec. 114 against the third. The case however actually came up for trial before another Magistrate who succeeded the First Sub-divisional Magistrate. The learned advocate for the petitioners has cited A I R 1931 All 273,[1] in which a learned Judge of the Allahabad High Court held that where a Magistrate, after examining the police diary, came to the conclusion that the police had

1. Nek Ram v. Emperor, (1931) 18 A I R All 273 =1931 Cr C 337=129 I C 267=32 Cr L J 370.

not properly investigated the case and that a certain person should have been prosecuted, his proper course was to pass an order under S. 190 (1) (c), Criminal P. C., ordering his prosecution, and that in that case, the provisions of S. 191 would apply.

The facts of that case are however entirely different from the facts of the present case, and it has been repeatedly held in the Calcutta and Patna High Courts that a petition of protest (as it is sometimes called) made to the Magistrate by a person who lodges a first information with the police and who is reported against by them is really a petition of complaint and must be dealt with as such. If the petition had been treated as a petition of complaint, the then Sub-divisional Magistrate should have examined the petitioner on oath and could then have directed an investigation under S. 202, Criminal P. C. The latter was, however, rendered unnecessary by the report which the police had already submitted, and the failure of the Sub-divisional Magistrate to examine the complainant is a mere irregularity which cannot affect the venue of the trial. Cl. (c) of sub-s. (1) of S. 190 only deals with cases where the Magistrate takes cognizance of an offence "upon information received from any person other than a police officer or upon his own knowledge or suspicion."

In the present case the Sub-divisional Magistrate only acted on information contained in the police diary and the petition filed by the other side, this latter coming within cl. (a) of the same sub-section and the former (as I am inclined to think) within clause (b). In my opinion therefore cl. (c) has no application whatsoever to the facts of the case. It is also clear that even if it did have any application, S. 191 does not entitle the petitioners to anything beyond what has actually taken place. That Section does not give the accused the right to be tried by a Court or Magistrate of their choice, but only makes it impossible for the Magistrate who took cognizance under sub-s. (1), cl. (c) of S. 190 to try the accused except with his consent. In the present case the petitioners were tried not by that Sub-divisional Magistrate who had taken cognizance on the materials already referred to, but by his successor. The learned advocate points out that the Section speaks of trial by another Court, whereas in the present case the trial was still by the Court of the Sub-divisional Magistrate. I am not impressed by the point, because the Section begins with "when a Magistrate takes cognizance of an offence . . . . ", and what it means by trial by another Court is made clear by the substantive provision that if the accused objects to being tried by such Magistrate, the case shall be committed to the Court of Session or transferred to another Magistrate. The point on which the application in revision was admitted therefore fails.

The learned advocate has also urged that this is a case of a civil dispute and not a case of theft at all. It appears that Bidyadhar, the natural son of Krittibas, was adopted by Lakshmidar Mahapatra, and executed a usufructuary mortgage in favour of Krittibas and that the petitioners, of whom one is a servant, and the other two claim to be bhag tenants, of Harekrishna who has succeeded to the property as a reversioner on the death of Bidyadhar and his widow. Krittibas, the usufructuary mortgagee, is dead and was succeeded by Narsingh who was in possession as usufructuary mortgagee and grew the paddy crops, the subject of the theft. The learned advocate refers to a provision in the mortgage deed that if the mortgagee should be dispossessed, he would be entitled to the principal with interest at the rate of Rs. 2-2-0 per month, besides paddy at the rate of 3 chhelas (=12 maunds) per acre. The contention is that in case of dispossession this was the remedy open to the mortgagee. This remedy was undoubtedly available to the complainant, but that does not by any means involve the consequence that it was not open to the mortgagee to complain of theft. The lower Courts have disbelieved the defence story that the crop was grown by them, and found that it was grown by the complainant. Harekrishna and his men could not therefore have had any bona fide belief that they were entitled to the crops. The conviction of the petitioners must therefore be affirmed. As to the sentence, having regard to the value of the paddy stolen and the apparent means of the petitioners, it seems to me that the ends of justice will be served if the sentence on the petitioners is reduced to a fine of Rs. 30 each with one month's rigorous imprisonment in default. The order of compensation to P. W. 1 Narsingh will stand.

D.S./R.K. *Sentence reduced.*

A. I. R. 1940 Patna 113

ROWLAND J.

Nandkishore Singh and others

v.

Bigan Lohar.

Criminal Ref. No. 32 of 1939, Decided on 3rd October 1939, made by Deputy Commissioner, Palamau, D/- 22nd August 1939.

(a) Criminal P. C. (1898), S. 145—Proceeding under — One party refusing to take special oath — Court can consider refusal with other evidence and draw inference from conduct of party.

Where in a proceeding under S. 145 one party offered to give up his claim if opposite party would take oath on Bhagwat Gita and the latter refused it :

Held that the refusal though not to be treated as anything conclusive was a matter which the Court was entitled to take into consideration along with the other evidence and it was open to the trial Court to draw such inference from this conduct of the party as it thought fit : *22 Bom 680, Rel. on.* [P 113 C 2 ; P 114 C 1]

(b) Criminal P. C. (1898), Ss. 145, 146 — Standard of proof in proceeding under S. 145 stated —Proceeding can be decided on balance of evidence—Order under S. 146 is given only when choosing between conflicting evidence is impossible.

In a proceeding under S. 145, it would not be proper to set up any absolute standard and to say that evidence not up to this standard will not be acted on by the Court for the purpose of an order under that Section. The proceeding under S. 145 can be decided on the balance of evidence and if the Magistrate can see his way to express an opinion that the evidence of one side is superior to the evidence on the other side, then he is entitled to and should, if possible, form a definite opinion on the question of fact as to who is in possession. An order under S. 146 attaching the property is a desperate remedy for cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by the two sides. If the Magistrate thinks that the evidence for the first party, weak though it might be, was preferable to the evidence for the second party, it will be the Magistrate's duty to give a decision in favour of the first party. [P 114 C 1]

K. K. Banerji — *Against Reference.*

Order. — This is a reference by the Deputy Commissioner of Palamau recommending to this Court to set aside an order under S. 145, Criminal P. C., passed by a First Class Magistrate at Daltangunj. The dispute related to 12 bighas of land in village Bohita claimed by the first party Bigan Lohar to be held by him as a raiyat under the second party. The second party claimed it to be in his own possession as bakasht. The first party examined himself and two witnesses and was unable to produce any documentary evidence in support of the settlement of the land with him. He and his witnesses however deposed that he was in cultivating possession of the land. The second party examined witnesses whose evidence the Magistrate found not only not convincing but positively suspicious. In the result although he had observed in his judgment that the evidence adduced by the first party was by itself not sufficient to establish his case against the second party, the Magistrate passed an order in favour of the first party because in his opinion his case had derived support from the weakness of the evidence for the other party. In this connexion he took into consideration the fact that the first party offered to give up his claim if the opposite party's witness would take a special oath on Bhagwat Gita; but the witness refused to do so. There had been a previous dispute between the parties regarding 5 bighas of land which is the subject-matter of these proceedings. In that case Bigan had prosecuted the members of the second party under S. 447 alleging that they attempted by ploughing his field forcibly to dispossess him of 5 bighas. The case resulted in acquittal.

The grounds for the reference are that although the judgment of this case had not been given in evidence at the hearing the acquittal indicated that the second party had successfully ousted the first party at least from these 5 bighas. Secondly, it is said that the Magistrate should not have allowed himself to be influenced by the conduct of the first party in refusing to take a special oath and further that when the first Magistrate had found the evidence for the first party unsatisfactory, he should not have passed an order in his favour merely because of the weakness of the evidence for the second party but should have attached the land under S. 146, Criminal P. C. As regards the judgment of the criminal case under S. 447, the trial Court was under no obligation to take it into consideration when neither party chose to put it in evidence before him. I have however referred to the judgment and it does not contain any finding to the effect that the maliks were in possession of the land. It proves nothing either way and it may well be for that reason that neither party chose to put it in evidence at the hearing. As regards the refusal of the first party to take a special oath, this refusal was of course not to be treated as anything conclusive but it was a matter which the Court was entitled to take into consideration along with the other evidence and it was open to the trial Court to

draw such inference from this conduct of the party as it thought fit. I would accept as correct the statement of the law in 22 Bom 680.[1]

Finally as regards the criticizm that after finding the first party's evidence unsatisfactory the Magistrate should not have acted upon it and passed an order in his favour, the question for determination was a question of fact. The Magistrate did not adduce any reasons for suspecting that the depositions of Bigan and his witnesses were not truthful, but what he said was that the evidence was not sufficient. The comment is not happily expressed. The Magistrate may have been thinking of the standard of proof which a Criminal Court requires before relying on prosecution evidence so as to act on it by convicting an accused person of an offence ; but in a proceeding under S. 145, it would not be proper to set up any absolute standard and to say that evidence not up to this standard will not be acted on by the Court for the purpose of an order under that Section. The proceeding under S. 145 can be decided on the balance of evidence and if the Magistrate can see his way to express an opinion that the evidence of one side is superior to the evidence on the other side, then he is entitled to and should, if possible, form a definite opinion on the question of fact who is in possession. An order under S. 146 attaching the property is a desperate remedy for cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by the two sides. It would be regrettable if it were necessary to pass such an order when the first Court has been able to make up its mind in favour of one party. In my opinion if the Magistrate thought that the evidence for the first party, weak though it might be, was preferable to the evidence for the second party, it was the Magistrate's duty to give a decision in favour of the first party and this is what the Magistrate has done. The reference is discharged.

D.B./R.K. *Reference discharged.*

1. Chintaman Bhat v. Shrinivas Bhat, (1898) 22 Bom 680.

A. I. R. 1940 Patna 114

ROWLAND AND CHATTERJI JJ.

Badrinath Upadhya — Appellant.

v.

Kesho Kumar — Respondent.

Appeal No. 235 of 1938, Decided on 31st August 1939.

(a) Principal and Agent—Liability of agent's heirs to render accounts — Liability to account is personal — Heirs liable to the extent of the assets of deceased agent in their hands only where principal proves loss to have been caused owing to agent's failure to account.

Representatives of a deceased agent are not liable to render account in the sense in which the agent, had he lived, might have been called upon to do so. Liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs. But if the principal can prove that he has suffered loss owing to breach of duty of the agent, his heirs are liable to the extent of the assets of the deceased agent in their hands. It is clear that the principal can only succeed in enforcing liability against the heirs of the agent in respect of the agent's failure to account to the extent that the principal can prove that through this failure loss has been caused: *A I R 1923 Pat 259, Rel. on.* [P 115 C 2]

(b) Principal and Agent—Principal in possession of account books suing agent for accounts — Preliminary decree cannot be passed unless principal establishes prima facie liability of agent by producing account books in Court.

Where all the account books have been submitted by the agent to the principal, it is the principal's duty, in a suit against the agent for accounts, to produce the accounts in Court with a statement of matters objected to and of the balance he claims to be in his favour. Before a preliminary decree can be passed, it is for the principal to disclose such particulars as would establish a prima facie liability of the agent: *A I R 1925 Cal 1069 and A I R 1938 Pat 392, Rel. on.* [P 115 C 2 ; P 116 C 1]

L. K. Jha — *for Appellant.*

S. C. Mazumdar and Ramanugrah Narain Singh — *for Respondent.*

Rowland J. — This is an appeal by the plaintiff in a suit for account. The defendants were firstly Kesho who is respondent before us and secondly Kesho's father Chintaman. It was said that Chintaman was Tashildar in the estate of Srimati Bacha Bai from 1315 F. onwards to 1336. Thereafter Kesho was the Tahsildar until 1339. The suit was brought on 10th April 1935, for accounts for the whole period 1315 to 1339. During the pendency of the suit Chintaman died and his name was struck off. The plaintiff continued the suit against Kesho in his own capacity and as representative of Chintaman. The defendant denied that he was ever the tahsildar or was an agent of the plaintiff. He says that in the last years terminating in 1339 he was a sub-agent acting under his father; that Chintaman's employment continued till 1339. It was further alleged that accounts had been rendered. It was not the duty of Chintaman to receive money on behalf of the plaintiff because the plaintiff made his own collections and Chintaman

merely prepared receipts; that all the books of account which were in the possession of the defendant or his father had been returned to the office of the plaintiff's estate and that there is no longer any liability to account. The Munsif held that Chintaman worked as tahsildar till 1339 and that Kesho was never an agent of the plaintiff but was for a time a sub-agent under Chintaman. He held that Chintaman in fact had acted as tahsildar and had been in charge of collections of money. He held that all the papers in the custody of Chintaman had been submitted to the estate and there was no remaining liability to submit accounts. He said that even if the plaintiff were entitled to demand accounts from Chintaman, he could not enforce this liability against his son, the defendant Kesho, after his death. In the result, he dismissed the suit. The judgment of the Subordinate Judge does not divide the points for decision into any sub-heads. He states as the sole point for consideration "whether the defendant is liable for the rendition of the account to the plaintiff." As a result, we have received less assistance from the judgment of the Subordinate Judge than might have been hoped. The finding of the Munsif that Chintaman was the tahsildar and remained so till 1339 is however affirmed; as also that Kesho was merely a sub-agent under Chintaman. The question whether all books of account had been made over to the plaintiff's estate is not touched in the judgment of the Subordinate Judge; but it must be assumed that on this matter the finding of the Munsif remains undisturbed.

In second appeal it is contended that the Subordinate Judge, is in error in holding that for any sum misappropriated by his father the defendant is not liable and is under no pious obligation to pay up. It is contended that at least a preliminary decree should have been passed for the taking of accounts. Further, it is said that if Kesho being a sub-agent under his father committed any misappropriation, the legal position would be this that he himself would be answerable to his father, the agent of the estate, and his father would be liable to the estate, in respect of any moneys unaccounted for by the sub-agent. Therefore any moneys misappropriated by Kesho are a debt from the father to the estate, and as such, on the father's death are recoverable from his son. In reply it is contended that the remedies of a principal against the heirs of his agent are not identical with his remedies against the agent; and for this reliance is placed on the decision in 5 P L T 355,[1] where it was held that the representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs. But if the principal can prove that he has suffered loss owing to breach of duty of the agent, his heirs are liable to the extent of the assets of the deceased agent in their hands. The burden of proof however in such a case rests on the plaintiffs. It is clear that the plaintiff can only succeed in enforcing liability against the defendant in respect of his father's failure to account to the extent that the plaintiff can prove that through this failure loss has been caused to the plaintiff's estate.

It is next contended for the respondent that before the Court will call on the defendant to account in a case in which the books of account have been made over by the agent, the plaintiff has to show a prima facie case of the existence of some outstanding dues from the defendant to himself. For this reliance is placed on 52 Cal 766.[2] Here, following previous decisions it has been pointed out that the mere fact that books of account have been submitted is not by itself sufficient to absolve an agent from liability to explain the accounts if called on. But it is said the plaintiffs are not entitled to a preliminary decree merely because the defendant has not explained the papers. It is said that on the finding that all the papers have been submitted, it was for the plaintiff next to call upon the defendant to explain the accounts; then, on refusal to do so, an account might have been ordered by the Court. But where all the papers have been submitted, it was held that it was the plaintiff's duty to produce the accounts in Court with a statement of the matters objected to and of what balance the plaintiffs claim to be in their favour. This decision was followed in this Court in A I R 1938 Pat 392[3] which again was a case where the principal being in possession of all the account books sued the agent for accounts. It was held that before a preliminary decree

1. Rameshwar Singh v. Narendra Nath Das, (1923) 10 A I R Pat 259=71 I C 916=5 P L T 355.
2. Bharat Chandra v. Kiran Chandra, (1925) 12 A I R Cal 1069=90 I C 944=52 Cal 766.
3. Shiva Prasad v. Hanuman Bux, (1938) 25 A I R Pat 392=177 I C 133.

could be passed, it was for the plaintiff to disclose such particulars as would establish a prima facie liability of the agent. In the present case as in the one last mentioned, practically no particulars are given either in the plaint or in evidence from which an idea can be formed as to the nature and extent of the liability sought to be imposed on the defendant. The inquiry proposed, that is to say the taking of accounts by a Commissioner, would appear to be something in the nature of a fishing inquiry. Following these two decisions, I am of opinion that the Subordinate Judge was right in refusing to give the plaintiff a preliminary decree. The result will be that the appeal is dismissed with costs.

Chatterji J.—I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 116

AGARWALA J.

Hari Sao — Appellant.

v.

Gulab Chand and another —

Respondents.

Appeal No. 775 of 1938, Decided on 29th August 1939, from appellate decree of Additional Sub-Judge, Patna, D/- 9th July 1938.

Partnership Act (1932), Ss. 4 and 6—Agreement between parties providing that one appointed other for dealing in certain business and had right to dismiss him—Profits or losses to be shared — Relationship between parties is not that of partners.

Partners do not appoint or dismiss each other and hence the provision in an agreement between two parties to the effect that one appointed the other for dealing in certain business and had right to dismiss him for mismanagement is a clear indication that the relationship between the parties is not that of partners even though there is a provision in the agreement that the parties are to share the profits or losses in equal shares.

[P 116 C 1]

C. P. Sinha — *for Appellant.*

T. N. Sahay — *for Respondents.*

Judgment. — This is an appeal by the plaintiff from a decision of the Additional Subordinate Judge of Patna confirming a decision of the Munsif. The appeal arises out of a suit for rendition of accounts on the basis of an agreement between the plaintiff and the defendant, dated 28th August 1933. The defendant is the agent of the National Petrolium Oil Company of Bombay for the sale of their products within a certain area in this province. The agreement between the plaintiff and the defendant related to the sale of the Petrolium Company's products in the area covered by the agency of the defendant. The Courts below have dismissed the suit holding that the agreement between the plaintiff and defendant constituted a partnership and that a suit for accounts by one partner against another is not maintainable unless the plaintiff seeks to dissolve the partnership. The agreement is in these terms:

Babu Gulabchand and Babu Sitabchand, sons of Babu Amir Chand, deceased, by caste Agarwala, by occupation zamindars, money-lenders and traders, residents of town Arrah, mahalla Mahajan Toli No. 1, thana and P. O. Arrah, District Shahabad, hereinafter called the first party, enter into an agreement (as follows): On this the 28th day of August 1933, the first party has taken agency of oil from the National Petrolium Company of Bombay for an area from Patna City to Dinapore, and has appointed Hari Sahu Ram Das Ram, sons of ..... by occupation traders, residents of Bakerganj, Bankipur, Patna, hereinafter called the second party, for dealing in oil. The terms settled between the two parties are detailed below:

Memorandum of agreement between the first party and the second party:

1. The first party appointed the second party to deal in oil of National Petrolium Company of Bombay, for the area from Patna City to Dinapore.

2. The second party agreed to invest alone as much money as will be required in that oil business, and to keep always sufficient goods in stock.

3. All consignments of oil, etc., will be through the Bank and Railway Company. (The second party) will take delivery of the goods on payment of money, stock them in their godown and sell them.

4. The second party also agreed to sell goods on credit, to wholesale dealers and shop keepers, at their own risk. This first party has nothing to do with it.

5. All (profits caused) by the sale of oil, or the commission and expenses received from the company will be shared half and half by both the parties; and all the losses suffered on any account whatsoever will be similarly borne by both the co-sharers according to their shares.

6. The rent of the godown, and proper expenses incurred in maintaining a gumashta and a peon for making collections, will be deducted from the profit, and the balance will be distributed between the two parties.

7. The first party will not supply goods to any other shop-keepers except the second party.

8. The second party shall have to send a return of daily sale and stock balance to Arrah by post every day.

9. If the first party discovers any mismanagement of the business on the part of the second party, the first party will have the power in that case to remove the second party from that business.

10. If the second party have to enter into any transaction or to do anything new, or to make any consultation as regards that business, they will have to come to Arrah and settle the same with the first party.

Section 4, Partnership Act of 1932, describes a "partnership" as the relation be-

tween partners who have agreed to share the profits of a business carried on by all or any of them acting for all. S. 6 of the Act contains rules for determining the existence of a partnership and directs that in determining whether persons are partners or not regard is to be had to the real relation between them as shown by all the relevant facts taken together. It cannot be denied that in the agreement with which I am concerned there are terms which are consistent with the existence of a partnership, for example, the provisions of para. 5 for the sharing of profits and some of the losses in equal shares and the provisions of para. 6 by which the defendant agreed that the costs incurred by the plaintiff in maintaining a staff should be taken into consideration in determining the profits or losses incurred in the business. But the Explanations to S. 6 of the Act indicate clearly that these considerations are not conclusive in determining whether parties are partners or not. It will be noticed that the agreement recites that the defendant "appointed" the plaintiff for dealing in oil and para. 9 confers upon the defendant the power to "dismiss" the plaintiff for mismanagement of the business. Partners do not appoint or dismiss each other and the use of these two expressions in the agreement is, in my opinion, a clear indication that the relationship between the parties was not that of partners. The provisions of para. 7 also indicate that the relationship between the parties was not that of partners. By that paragraph the defendant undertakes not to supply goods to any shop-keeper other than the plaintiff. For these reasons I have no doubt that the relationship between the parties is not that of partners and that the decision of the Courts below is wrong. I would therefore set aside those decisions and remit the case to the Court of first instance to be tried in accordance with law. The plaintiff is entitled to his costs throughout.

D.S./R.K. *Case remitted.*

A. I. R. 1940 Patna 117

HARRIES C. J. AND MOHAMAD NOOR J.

Prahlad Das — Appellant.

v.

Dasarathi Satpathi and others — Respondents.

Second Appeal No. 36 of 1938, Decided on 17th August 1939, from appellate order of Dist. Judge, Cuttack, D/- 31st December 1935.

Hindu Law—Debts — Decree passed against father alone in suit to which sons also were parties — Decree cannot be executed against sons—No question of pious obligation.

Where the creditor impleads the sons of a Hindu debtor as parties to the suit along with their father, the sons being parties to the suits the father cannot be said to have represented them in the suit. If in such a suit, rightly or wrongly, the Court refuses to pass a decree against the sons and passes a decree against the father only, the decree cannot be said to have been obtained against the father both in his individual capacity and also as representing the sons, and such a decree against the father not being a decree against the sons cannot be executed against them, not because they were not under a pious obligation to pay the debt of their father, which is neither illegal nor immoral, but because the procedure of enforcing their liability having been adopted the Court refused to enforce it : *A I R 1935 Pat 275 ; A I R 1929 All 726 and A I R 1938 P C 7, Rel. on ; Appeal from Original Order No. 253 of 1936 (Patna) held no longer good law.* [P 118 C 1 ; P 119 C 1]

H. Mahapatra — *for Appellant.*

G. Dhal — *for Respondents.*

Mohamad Noor J. — The facts of the case out of which this second miscellaneous appeal has arisen are these. The appellant brought a suit to enforce a simple mortgage executed in his favour by defendants 1 to 3 of the suit impleading their respective sons as defendants 4 to 6. The suit was decreed and the mortgaged properties were sold in execution of the decree. The sale proceeds were insufficient to satisfy the decree, and the appellant applied for a decree under O. 34, R. 6, Civil P. C. In this application he specifically asked for a decree against defendants 1 to 3 only, and not against their sons, defendants 4 to 6. A money decree was passed against defendants 1 to 3 and in execution of it the appellant brought to sale the shares of these defendants in the joint family property. The decree however still remained unsatisfied and he wanted to sell the shares of the sons (defendants 4 to 6) also in the joint family property. The executing Court refused to do so and the order has been upheld in appeal by the learned District Judge. The decree-holder has preferred this second miscellaneous appeal.

In my opinion the orders of the Courts below are correct, though they have not given their reasons in detail. Mr. H. Mahapatra, who appears on behalf of the appellant, has very strenuously contended that the decree is executable against the shares of defendants 4 to 6 in the joint family property. His whole argument is based upon the pious obligation of a son to pay out of the joint family property his father's

debts not tainted with illegality or immorality. Nobody disputes this liability, but the question with which we are concerned is not the liability of defendants 4 to 6 but whether it can be enforced against them under the decree as it stands. Because a son is liable to pay his father's debts it does not follow that his share in the property can be taken away without there being a decree in which either he is a judgment-debtor or can be deemed to be a judgment-debtor. Whether a decree against a father can be executed against his sons is not a question of the Hindu law, but of the Civil Procedure Code. Ordinarily, a decree is enforceable only against the judgment-debtor named therein and on his death against his legal representatives to the extent the law makes them liable. But in cases governed by the Hindu law if it is against a karta of a family and was obtained in a suit in which he was sued as such it is binding upon the junior members of the family also as they were represented in the suit by the karta. So, if a father is sued for his personal debt, not tainted with immorality or illegality, he represents in the suit his sons who are joint with him and a decree thus obtained against him must be taken to be a decree against his sons also.

In a case where a creditor of a Hindu debtor wants to enforce the pious obligation of his sons to pay his debts, the debt not being illegal or immoral, if he so likes he can implead the sons also in his suit. If he obtains a decree against them as well, no question can arise. The decree being against the sons in terms can be executed against their share of the joint family property. As the sons are parties to the suit the father cannot be said to have represented them in the suit. But if in such a suit the Court rightly or wrongly refuses to pass a decree against the sons and passes a decree against the father only, the decree cannot be said to have been obtained against the father both in his individual capacity and also as representing the sons and such a decree against the father not being a decree against the sons cannot be executed against them, not because they were not under a pious obligation to pay the debt of their father which, as I have assumed, was neither illegal nor immoral, but because the procedure of enforcing their liability having been adopted the Court refused to enforce it. The Court may be wrong but the decree is there. The creditor may however sue the father only and a decree obtained in such a suit if the debt was not illegal or immoral is effective against the sons also as they, though not parties by name, were represented by their father and must be deemed to have been parties to the suit. If, however, the debt was for immoral or illegal purposes the father cannot represent the sons and the decree obtained in such a suit is not against the sons and the question of the nature of the debt can be gone into in the execution proceedings.

In 16 P L T 393[1] I had to deal with the question as to the circumstances under which a decree obtained against a father can be executed against his sons to enforce their pious obligation of paying his debts. I then, following a decision of Nimatullah J. in 51 All 932,[2] was of the view that in order to enforce the pious obligation of a son to pay his father's debt there must be a decree against him obtained in a suit in which either he was a party or can be deemed to have been a party through his father. My brother Agarwala J. was of the same view. Nimatullah J. had held that a decree obtained against the father when he was joint with his sons was binding on the sons as they would be deemed to have been represented by the father in the suit, whether the sons were represented by the father or not depended upon the subject-matter of the suit and if it was a debt which not being tainted with immorality was binding on the sons the sons must be deemed to have been parties to the suit through the father. In the Patna case[1] the point was how far a decree obtained against a father after the disruption of the family was binding upon the sons and the majority of the Special Bench of the Court held that such a decree could not be executed against the sons. The ratio decidendi of the decision was that in such a case there was no decree against the son as the father having separated could no longer represent him.

The simple question therefore before us is whether the decree which in its terms is against the fathers can be deemed to be one against their respective sons also. I have said before that when the sons themselves are parties to a suit the question of their fathers' representing them cannot possibly arise. The position therefore is that if the

1. Atul Krishna Roy v. Lala Nandanji, (1935) 22 A I R Pat 275=157 I C 53=14 Pat 732 = 16 P L T 393 (F B).

2. Kishan Sarup v. Brijraj Singh, (1929) 16 A IR All 726=121 I C 257=51 All 932=1929 A L J 941.

debt was not tainted with illegality or immorality, the appellant was entitled to obtain a simple money decree against defendants 1 to 3 and also against their respective sons, defendants 4 to 6, but he deliberately did not proceed against the sons though they were parties to the suit and wanted a decree against the fathers only. Such a decree passed in a suit in which the sons themselves were parties cannot be said to be a decree against the fathers and also against the sons represented by the fathers. Mr. Mahapatra, who appears on behalf of the appellant, produced before us a copy of a decision of this Court by Courtney-Terrell C. J. and Chaterji J. in (Appeal from Original Order No. 253 of 1936[3]) decided on 20th November 1937. It was held in this case that though a suit brought against a father and his sons was dismissed against the latter, the decree-holder could execute the decree against the share of the son in the joint family property on the ground of his being under a pious obligation to pay his father's debt not tainted with immorality. Mr. Dhal, appearing on behalf of the respondents has however placed before us a decision of their Lordships of the Judicial Committee in A I R 1938 P C 7[4] in which exactly an opposite view was taken. In that case for the mortgage executed by the father a suit was instituted against his sons and grandsons. The grandsons were dismissed from the suit. Thereafter the decree was sought to be executed against the shares of the grandsons in the family property. Their Lordships held that the suit having been dismissed against the grandsons, the decree could not be executed against their shares in the family property. The remedy of the decree-holder was to appeal from the dismissal of the suit against the grandsons. In the face of the decision of the Privy Council on this point we are bound to hold that the decision of this Court relied on by Mr. Mahapatra cannot now be held to be good law. In my opinion, the decree as it stands, is not executable against defendants 4 to 6 and I would therefore dismiss this appeal with costs.

Harries C. J. — I agree.

G.N./R.K. *Appeal dismissed.*

3. Narain Mahton v. Janki Saran Singh. Appeal from Original Order No. 253 of 1936.
4. Raja Ram v. Raja Baksh Singh, (1938) 25 A I R P C 7 = 172 I C 5 = 13 Luck 61 = 32 S L R 221 (P C).

A. I. R. 1940 Patna 119

DHAVLE AND MANOHAR LALL J.

A. James — Defendant — Appellant.

v.

Ch. Achaibar Singh and others, Defendants and others, Plaintiffs — Respondents.

Appeal No. 40 of 1937, Decided on 8th September 1939, from original decree of Addl. Sub-Judge, Gaya, D/- 22nd December 1936.

(a) Transfer of Property Act (1882), S. 82— Suit for contribution by holder of moiety of mortgaged property against vendee from holder of other moiety — Fact that plaintiff is stranger to contract between vendor and vendee is immaterial.

In a suit by a holder of moiety of mortgaged property for contribution against the vendee from the holder of other moiety, the fact that the plaintiff is stranger to the contract of sale between the vendor and vendee inter se is immaterial : *14 I C 179 and A I R 1930 P C 183, Rel. on.* [P 120 C 2; P 121 C 1]

(b) Contribution—Suit for— Necessary party not before Court—Effect.

In a suit for contribution the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. Hence, a suit for contribution fails in limine if a necessary party is not before the Court and in his absence the liabilities of the parties cannot be satisfactorily ascertained. [P 121 C 1, 2]

Sir Manmatha Nath Mukherji and K. N. Varma — *for Appellant.*

Dr. D. N. Mitter, Sarjoo Prasad, Dhyan Chandra, A. N. Lall and Lal Narayan Sinha — *for Respondents.*

Dhavle J.—This is an appeal by defendant 13 in a suit for recovery of Rs. 5879-5-0 which the plaintiffs said they had to deposit under pressure of execution proceedings and which they claimed ought to have been paid by defendants 1 to 12 and 13. In May 1922, one Janki Lal mortgaged his entire jagirdari right in Mauza Lenjhua and his interest in six other villages to Ramkrit Narain. In May 1924 he entered into an agreement with the representatives of defendants 1 to 12 to sell Lenjhua to them, leaving it to them to pay off the mortgage of 1922. The case of the plaintiffs was that defendants 1 to 12 took the plaintiffs in as co-partners for a moiety in the proposed sale and gave them an express assurance and undertaking that defendants 1 to 12 would play their part properly in obtaining the discharge of the mortgage and would see that the plaintiffs did not have to pay more than a moiety of the mortgage debt.

On 12th September 1924 Janki executed two kabalas for eight annas each of Mauza Lenjhua, one in favour of the plaintiffs and the other in favour of defendants 1 to 12. Out of the consideration money Rupees 12,083-15-0 was left with each set of vendees to pay in discharge of the mortgage of Ramkrit Narain, Janki representing that these two sums of Rs. 12,083-15-0 each represented all that was due upon the mortgage, the rest having already been paid off by him. When the plaintiffs attempted to pay the mortgagee it was discovered that the mortgagee claimed Rs. 1200 more than had been admitted by Janki Lal to his vendees to be due to the mortgagee. In March 1929 defendants 1 to 12 transferred their moiety of Mauza Lenjhua to defendant 13 for Rs. 22,000 which was to be paid by defendant 13 to the mortgagee as the proportionate share of the outstanding mortgage debt. Shortly after this the mortgagee sued to enforce his mortgage, and in March 1930 he obtained a decree for Rs. 54,631-12-6 inclusive of costs.

A question had been raised during the trial of the mortgage suit regarding the order in which the mortgaged properties were to be brought to sale and the Court had decided that unless the decretal amount was paid within five months of the date of the preliminary decree, the two sets of vendees of Janki Lal were to be at liberty within one month after the expiry of the said period of five months to deposit in Court to the credit of the mortgagee Rs. 12,083-15-0 besides interest at 12 per cent. with quarterly rests from 12th September 1924, to the date of deposit. The Court directed that if such deposits were made, the mortgaged properties were to be sold in the same order as that given in the mortgage bond—I may observe in passing that in this document Mauza Lenjhua figures as item 6. The Court further directed that if such deposits were not made by the two sets of vendees or by any set out of them, then the whole Mauza of Lenjhua or the moiety of the defaulting set of vendees as the case may be should be sold first and the remaining mortgaged properties or a sufficient part thereof be sold in the same order as given in the mortgage bond. Acting in accordance with this part of the mortgage decree, the plaintiffs deposited Rupees 24,476-12-6 on the due date, but defendant 13 did nothing of the kind. The result was that the defendants' moiety of Mauza Lenjhua was brought to sale first and sold for Rs. 11,100. The other six mauzas covered by the mortgage were then put up to sale and fetched Rs. 18,671.

I have already said that Mauza Lenjhua was No. 6 in the list of properties, but the plaintiffs had obtained from the High Court an order staying the sale of their moiety in the mauza, with the result that Mauza Bahera, which appeared later in the mortgage bond, was sold before the plaintiffs' moiety. The plaintiffs' deposit and the execution sales thus brought in a little over Rs. 54,000, and the amount for which execution was being levied was Rs. 5879-5-0 in excess of the amount already realized. When the executing Court wanted to proceed against the plaintiffs' moiety in order to realize this balance, they averted the sale by paying the amount. They then brought the present suit and the foundation of the suit appears from such paras. as Nos. 5, 6, 7 and 18 of the plaint to have been that the plaintiffs took their moiety on the clear guarantee given by defendants 1 to 12 that they would not have to run any risk or losses with respect to their purchase and on the express assurance and undertaking given by them that they would pay their quota of the mortgage debt, etc. (to quote from para. 18 of the plaint). Defendants 1 to 12 denied giving any such undertaking, and the issue framed on the point ran : "was there any assurance given by defendants 1 to 3 as pleaded in para. 7 of the plaint?" The learned Subordinate Judge answered this issue against the plaintiffs, and it has not been contended before us on behalf of the plaintiff-respondents that the finding is open to any exception. Janki was not impleaded in the suit and, though the defendants contended that the suit was bad for his non-joinder, the learned Subordinate Judge held that Janki was not a necessary party to this suit, as it appeared that in the execution proceedings he had paid more than he was liable to pay and therefore the ultimate liability was upon defendant 13. The suit was accordingly decreed against defendant 13.

Sir Manmatha Nath Mukherji who appears for this defendant 13, the appellant, contended that the sale deed taken by this defendant from defendants 1 to 12 did not make him liable at all in the circumstances and certainly not liable to the plaintiffs as they were strangers to the contract. But the suit is in essence a contribution suit, and the consideration that the plaintiffs were no parties to the contract between defendants 1 to 12 and defendant 13 is by

no means conclusive of the matter, for in the case in 14 I C 179,[1] which was noticed by their Lordships of the Judicial Committee in 52 All 358[2] there was a contract to which the defendants were no parties and yet it could be said that there had passed to them the benefit of the contract with the plaintiffs, the prior purchasers of a part of the mortgaged properties, who had undertaken to apply the consideration money towards the payment of the mortgage.

The real difficulties of the case, however, came to light when Dr. Mitter began replying for the plaintiffs-respondents and appealed to the doctrine of contribution as bottomed and fixed on the general principles of justice, and not as springing from contract, though contract may qualify it: (1787) W & T Leading Cases in Eq II (9th Edn.) 488.[3] Now this doctrine of contribution was developed in the Courts of equity because these Courts could much more effectually than the common law Courts adjust losses so that they fell in due proportion upon all the persons liable. It thus became a fixed principle that in a suit for contribution the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. In the present case, however, Janki Lal has not been impleaded by the plaintiff-respondents, and the defect is not merely formal. In the first place, it appears that by the terms of the sale deed which the plaintiffs took from Janki Lal, they had something in the nature of an indemnity from Janki Lal in respect of any sums that they may have to pay to the mortgagee in excess of the amount of Rs. 12,083-15-0 with interest which they had agreed to pay. Secondly, the amount decreed in the mortgage suit includes Rs. 2592-12-0 as costs awarded to the mortgagee but obviously not apportioned among the various sets of defendants in that suit and in particular Janki, our plaintiff, our defendants 1 to 12 and also our defendant 13. The total decretal amount, moreover, was Rs. 54,631-2-6, while the amount for which execution has been levied is Rs. 60,127-1-6, and the difference between these two amounts has also yet to be apportioned. It is obvious that in both these items the plaintiffs must bear a share, but what that share may be it is impossible to determine in the absence of Janki. If, as the lower Court has said, Janki has paid more than he was liable to pay, a suit for contribution not based on any contract between the plaintiffs and defendants 1 to 12 and 13, ought to settle once for all what Janki is entitled to. It will be wrong to leave defendant 13 exposed to another suit by Janki Lal. Nor does it appear that the suit as framed raised the question of the liability of defendant 13 to defendants 1 to 12 in the form in which it ought to have been raised and decided. The suit was therefore not properly constituted, and the lower Court was plainly in error in holding defendant 13 liable for the entire amount claimed while his exact liability cannot be determined in the absence of Janki Lal. This was so plain that Dr. Mitter at once asked for leave to implead Janki Lal at this stage and for a remand. In my opinion this prayer ought not to be allowed for the double reason that the plaintiff deliberately left out Janki Lal in spite of the direct indemnity they had from him and that they founded the suit upon an alleged assurance from defendants 1 to 12 which they failed to prove and which appears to be a figment of their imagination. I would therefore allow this appeal, set aside the decree of the lower Court and dismiss the suit. In the circumstances, I would make no order about costs.

Manohar Lall J. — I agree. In my opinion the suit being a suit for contribution fails in limine on the simple ground that Janki Lal, the vendor of the plaintiffs, who is necessary party, is not before the Court and in his absence the liabilities of the parties cannot be satisfactorily ascertained. I do not think this Court would be exercising a wise discretion in allowing the plaintiffs to add Janki Lal as a defendant at this late stage.

D.S./R.K. *Appeal allowed.*

1. Shah Muhammad Abbas v. Muhammad Hamid, (1912) 9 A L J 499=14 I C 179.
2. Ganeshi Lal v. Charan Singh, (1930) 17 A IR P C 183=124 I C 911=52 All 358=57 I A 189 (P C).
3. Dering v. Earl of Winchelsea, (1787) W & T Leading Cases in Eq II (9th Edn.) 488=1 Cox 318=1 R R 41

A. I. R. 1940 Patna 121

VARMA AND MANOHAR LALL JJ.

Babulal Marwari and others —

Appellants.

v.

Tulsi Singh and others — Respondents.

Appeal No. 29 of 1937, Decided on 1st September 1939, from decision of Sub-Judge, Bhagalpur, D/- 30th September 1936.

Contract Act (1872), Ss. 62 and 39—Novation —Parties agreeing to substitute old contract by new one by payment of certain sum and mortgage bond for balance—Party concerned neither paying amount nor delivering mortgage bond —There is no novation and S. 39 applies.

Section 62 does not deal with a case of part performance. It deals with a case of novation, that is, where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it and enacts that the original contract need not be performed. But where the parties agree that the old contract should be substituted by a new contract namely by payment cash down of Rs. 500 and by execution and registration of a mortgage bond for the balance and the amount is not paid and the other party does not accept by words or conduct the position as a mortgagee, there is no novation in the eye of the law. The provisions of S. 39 would apply to such a case and the party can fall back on the original contract: *15 Cal 319, Foll.; A I R 1938 Pat 505, A I R 1916 P C 68, 41 I A 142 (PC), A I R 1938 PC 198 Expl. and Dist.*

[P 124 C 1, 2; P 125 C 1]

Sivnarayan Bose, S. M. Mullick, N. G. Mukherjee and S. K. Sarkar — *for Appellants.*

B. C. De, K. N. Moitra, K. N. Varma and K. P. Sukul — *for Respondents.*

Manohar Lall J.—This is an appeal by the plaintiffs against the decision of the learned Subordinate Judge of Bhagalpur by which he dismissed the suit of the plaintiffs which was instituted to recover a sum of Rs. 12,646 due on a rokka on the ground that there has been a novation of the contract sued upon and that the suit was, therefore, not maintainable. The facts may be briefly stated. On 30th April 1929 the defendants executed a registered handnote in favour of the plaintiffs for a sum of Rs. 9000 promising to pay interest at 12 annas per cent. per mensem. Two payments were made by the defendants, one Rs. 600 on 16th June 1931 and the other Rs. 368 on 9th June 1932. In or about April 1935 the plaintiffs were ready to institute a suit to recover their dues on the rokka when, the case of the defendants, is they implored and entreated the plaintiffs and made them agree to an adjustment of account by arriving at a figure of Rs. 13,300 in full discharge of the remaining liability under the rokka of April 1929. The agreement was that Rs. 500 should be paid in cash on 27th April 1935 by tendering it on that very date and that a mortgage instalment bond for Rs. 12,800 should be executed and registered on that very day, the interest to run at 11 annas per mensem. The bond also provided for default clauses in case the instalments fixed thereby were not paid within time. Certain property was given in security for the payment of the debt as stated in para. 8 of the mortgage bond. There was a covenant of title with these terms added:

Having given assurances on these points the said creditor consented to have this bond executed by us. If anything to the contrary comes to light, we the executants Nos. 1 and 2 shall be severally and jointly liable to criminal prosecution for cheating and fraud and in that case the said creditor shall be competent to cancel the instalments and institute a suit for this entire amount without paying any regard to the instalments.

The plaintiff gives details in the plaint that defendant 1 acted fraudulently and made a number of misrepresentations with a view to induce the plaintiffs to enter into the agreement and take the mortgage bond from which quotations have been given above. In particular they asserted that the mortgagors had no title to give the property in security and that the defendants did not pay Rs. 500 in cash to the plaintiff which was a condition precedent for entering into the new agreement. In other words they repudiated that there was a novation of the original contract of rokka by the execution of the mortgage bond in question and instituted the present suit within two months of the date of the execution of the mortgage bond. The defendants admitted the passing of consideration of the rokka and that the loan was for legal necessity. The amount claimed in the suit was also admitted to be due, if the suit could be maintainable upon the rokka; but the chief contention put forward by the defendants was that the suit was not maintainable inasmuch as the plaintiffs agreed to give up their rights under the rokka in substitution for the rights which accrued to them as mortgagees under the bond already referred to. They pleaded that the amount of Rs. 500 was paid in part in cash and the balance offered to be paid in kind as agreed to by the plaintiffs; but owing to the latter's default in not supplying bullock carts the grains of the value of Rs. 400 remained undelivered. But they pleaded that the

non-payment of Rs. 500 or any portion thereof cannot entitle the plaintiffs to ignore the mortgage bond and sue on the rokka.

(See para. 19 of the written statement.) It was denied that there was any defect in title or that any misrepresentation was made giving right to the plaintiffs to sue upon the rokka. To put it in other language the defendants contended that the plaintiffs could only sue to enforce the mortgage bond, and as admittedly the suit was instituted before the first instalment provided

in the bond was due, they pleaded that the suit was premature. In view of the defence taken, the plaintiffs, on 22nd June 1936, prayed to the Court that the plaint may be amended and an alternative relief may be granted to the plaintiffs in this form:

> If for any reason the Court holds that the plaintiffs are not entitled to a decree on the basis of the rokka, dated 30th April 1929, then a money decree for Rs. 12,646 may be passed on the basis of the mortgage bond, dated 27th April 1935 treating the same as a simple money bond.

The learned Subordinate Judge rejected the prayer of the plaintiffs by order No. 39 because in his opinion the proposed amendment, if allowed, would change the scope of the suit altogether. The learned Subordinate Judge held that the defendants did not make any fraudulent misrepresentation in bringing about the execution of the mortgage bond. He repelled the plea of the defendants that Rs. 500 or any part thereof was paid, but held that the non-payment of Rs. 500 was no bar to defendants succeeding in their contention. Lastly, he held that

> even if it is assumed that the recital in the bond that the properties are the exclusive properties of the executants is false, it would give no right to the plaintiffs to sue on the rokka, as the plaintiffs have taken no steps up till now to cancel the mortgage bond and so long as the bond is not declared to be fraudulent and inoperative by a competent Court, the plaintiffs have no right to fall back on the rokka and bring a suit on the basis thereof.

This reasoning of the learned Subordinate Judge is not understood. The plaintiffs had made the necessary allegations in the plaint that in the circumstances alleged by them the mortgage bond stood inoperative and the defendants had made counter-allegations to prove that the mortgage bond was as effective as ever. In these circumstances the Court was bound to adjudicate upon the matter in controversy and I do not see what the learned Subordinate Judge means by saying that the plaintiffs have no right to ask for the relief unless they brought another suit before another Court to declare the mortgage bond fraudulent and inoperative. Mr. De appearing on behalf of the respondents has strenuously argued that the plaintiffs have no right to maintain the suit on the basis of the rokka in the circumstances in which it must be held that there was a novation of contract. He resisted the appeal of the plaintiffs wherein they pray that the order of the Court refusing amendment of the plaint should be set aside by relying upon the case in 45 I A 214.[1]

1. Ma Shwe Mya v. Maung Mo Hnaung, (1922) 9 A I R P C 249=63 I C 914=48 I A 214=48 Cal 832 (P C).

The first question which arises for consideration is whether in the circumstances there was a novation of contract. The evidence of the plaintiffs was clear that the defendants agreed to pay Rs. 500 in cash, and for the balance offered to execute a registered instalment mortgage bond. They are supported in this by the evidence of Banarsi Chaudhuri and by the recitals in the mortgage bond. The plaintiff at p. 15 states:

> He also told me that I should be at liberty to sue on the rokka if there be any trouble regarding the lands and his representation be found to be false in any respect and if he did not pay Rs. 500 in cash. On these conditions, I eventually agreed to take a mortgage bond from him.

The plaintiff's case that he never received Rs. 500 in cash has been accepted by the learned Subordinate Judge but the plaintiff further stated that he never got the registration receipt of the mortgage bond. The learned Subordinate Judge took the view that there is evidence in this case that the registration receipt was in fact offered to the plaintiff 1. He refers to para. 9 of the plaint where it is stated that the plaintiffs did not take registration receipt nor was any endorsement of satisfaction made on the original rokka. I do not see how the learned Subordinate Judge infers from this recital that the registration receipt was in fact offered to the first plaintiff. He nowhere discusses the evidence of the plaintiff where he says at p. 15, line 30, that the defendant did not give him the registration receipt of the mortgage bond.

It is significant that there was no cross-examination of the plaintiff on this point. The defendant in para. 10 of the written statement did not make out any case that the receipt was offered to the plaintiff as inferred by the learned Subordinate Judge. His case is that the registration receipt was made over by defendant 1 to plaintiff 1 with an endorsement to take back the document from the registration office. The evidence on this point may now be considered. Witness 1 for the defendants is a deed-writer who says that after the registration of the bond Tulsi, namely defendant 1, made over the registration receipt to Babulal, who is plaintiff, P. W. 1, in the case. The second witness for the defendants is Palakdhari Singh. He also says that Tulsi Singh signed the registration receipt and made it over to Babulal at the bistara of Ramadhin. Tulsi Singh, himself a defendant, was the third witness for the defendants. He says at p. 24 that after registration

he made over the registration receipt to Babulal at Ramadhin's bistara. This is all the evidence on this point. It seems to me that the learned Subordinate Judge was not impressed with the evidence of the defendants' witnesses because he gives the finding, already referred to, that the registration receipt was in fact offered to plaintiff 1 and not that the registration receipt was delivered to plaintiff 1. I myself have examined the evidence of the witnesses for the defendants and I am unable to place any reliance upon their evidence, on this point. The deed-writer has made many discrepant statements in the cross-examination. He is also a witness to prove the payment of Rs. 100 to Babulal which has not been accepted by the learned Subordinate Judge. He also supports the defendant in full that the balance of Rs. 400 was to be paid in the shape of grains and that all these terms were settled before the bond was commenced to be written. Palakdhari Singh himself deposed to the payment of Rs. 100 in cash and to the alleged arrangement to deliver Rs. 400 worth of wheat. The last witness is Tulsi himself who says that he paid Rs. 100 in cash and proposed to pay the balance of Rs. 400 in the shape of wheat on his sending a cart. In all these matters the learned Subordinate Judge has disbelieved the story of the defendants. In my opinion therefore there is no evidence of reliable character to show that the registration receipt of the mortgage bond was either delivered to or offered to the plaintiff. The result then is that neither part of the new contract which was to be in substituiton of the original liability was carried out by the defendants. In such circumstances the provisions of S. 39, Contract Act, apply. It provides :

> When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

I have held that defendant 1 refused to perform his promise in its entirety. He neither paid any part of Rs. 500 nor did he deliver the registration receipt to the plaintiff. If he had offered to deliver that receipt or had delivered it to the plaintiff, the plaintiff would, in all probability, have refused to accept it without payment of Rs. 500 as was distinctly agreed upon. Let me assume however that the registration receipt was offered to the plaintiff and he refused to accept it. The result still is that the plaintiff has not signified by words or conduct his acquiescence in the continuance of the substituted contract. The mortgage bond was never taken delivery of by the plaintiff from the registration office. It having been found by the learned Subordinate Judge that Rs. 500 was not paid, it follows that the agreement to substitute Rs. 13,300 in place of the old dues on the *rokka* has never been carried through by the defendants so far as the payment of Rs. 500 is concerned, nor by the plaintiff in accepting the mortgage bond the execution whereof was a unilateral act of the defendant.

It is to be noticed that this is not a case where the mortgage bond was for Rupees 13,300, the amount remaining due on the rokka, but a mortgage bond was to be executed for the balance of Rs. 12,800 after payment of Rs. 500. In other words the mortgage bond assumed, as the recitals show, that Rs. 500 was being paid in cash before or with the execution and registration of the bond. In face of this difficulty the learned advocate for the respondents contended that the remedy of the plaintiff was to sue for recovery of Rs. 500, as he was in law bound to accept his position as a mortgagee under the mortgage bond, as, in his submission, the registration of the mortgage bond transferred title to the mortgagee. I do not agree with this contention. The agreement between the parties was not that the plaintiffs should sue for recovery of Rs. 500 and become a mortgagee for the balance, but the agreement was that Rs. 500 would be paid in cash immediately as a part of the agreement of passing the liability for Rs. 12,800 on the mortgage bond. As the defendant refused to perform his part of the contract in its entirety, the plaintiff was at liberty to resile from his part of the contract in its entirety with the result that the parties were relegated to their own position under the rokka.

The present case is similar to the case reported in 15 Cal 319[2] and I do not see how it can be distinguished from the facts of the present case as was sought to be done by the learned Subordinate Judge. S. 62, Contract Act, does not deal with a case of part performance as the learned Subordinate Judge seems to think. Sec. 62 deals with a case of novation, that is where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it and enacts that the original contract need not be performed. Here the parties had

2. Manohar Koyal v. Thakur Das Naskar, (1888) 15 Cal 319.

agreed that the old contract should be substituted by a new contract, namely by payment cash down of Rs. 500 and by execution and registration of a mortgage bond for the balance. Rs. 500 never having been paid and the plaintiff not accepting by words or conduct the position as a mortgagee, there was no novation in the eye of the law.

The learned advocate for the respondents argued that where a mortgage bond was expressly executed to secure a sum stated in the mortgage bond but it turned out that the amount actually advanced was less, various High Courts have held that the mortgage bond is valid to the extent of the amount advanced and he sought to apply the principle to the facts of the present case. In my opinion, this contention is fallacious. It is obvious that in these circumstances the mortgage bond would be valid for the amount actually advanced because the mortgagor has actually accepted a portion of the money which was contracted to be advanced. He never refused to accept the money offered but he retained it and therefore it is not surprising that the Courts have held that the mortgage bond is valid to the extent the mortgagor has kept a portion of the consideration advanced to him. I put a question to the learned advocate in argument that supposing the money actually advanced was nil, although it was stated in the mortgage bond, which had been registered, that Rs. 2000 had been advanced, can it be seriously contended that there had been a transfer of property in favour of the mortgagee? The answer obviously was, no, because when the Transfer of Property Act speaks of mortgage as a transfer of interest in the property, it is always with the qualification that the right of the mortgagee is simply to enforce the security to get back the advance which he has actually made; in other words to recoup himself for the advance to the extent he has carried out his contract, if accepted by the mortgagor. I have therefore no hesitation in holding, in the circumstances of the present case, that there was no novation of contract within the meaning of S. 62, Contract Act, and that the plaintiff can always sue upon the original rokka as he has actually done in this case.

The learned advocate for the respondents relied upon the case in 17 Pat 318[3] but that case was a case of a sale deed where the consideration was paid in part and the terms of the contract were clear that title was to pass with the registration of the document. He also referred to the case in 44 I A 60,[4] but I do not see how this case helps him. In that case their Lordships held that the

> mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu of the security of 13th November 1876. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt. Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt. Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of the transaction as a release of the mortgage of 13th November 1876.

Their Lordships held therefore in the end that in the circumstances "the mortgage of 1876 was in the events which happened wholly unaffected by the mortgages of 1887." I think this case rather helps the appellant that in the circumstances of this case the mortgage bond of 27th April 1935, in the events which happened did not have the slightest effect upon the rokka of April 1929. 41 I A 142[5] illustrates the case of accord and satisfaction by substituted agreement. In that case the receipt, as construed by their Lordships, was given by the appellants, and accepted by the respondent, and acted on by both parties and therefore it was held that this proved conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the receipt; and this was held to be a clear example of what used to be well-known in Common law pleadings as "accord and satisfaction by a substituted agreement." Their Lordships observed :

> No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction take place, the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights: and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.

3. Radhamohan Thakur v. Bepin Behari, (1938) 25 A I R Pat 505=178 I C 629=17 Pat 318=20 PLT 157.

4. Har Chandi Lal v. Sheoraj Singh, (1916) 3 A I R P C 68=39 I C 343=44 I A 60=39 All 178 (P C).

5. Payana Reena Saminathan v. Pana Lana Palaniappa Chetty, (1913) 41 I A. 142=26 I C 228=(1914) A C 618 =110 L T 913 = 83 L J P C 131 (P C).

Upon the findings which I have arrived at in this case I hold that there has been no accord and satisfaction by substituted agreement, the defendants did not pay Rs. 500 to the plaintiff as agreed upon; and the mere registration of the mortgage bond without the plaintiff accepting it by words or by conduct expressly or impliedly does not operate to relieve the defendants from meeting their obligation under the rokka. Lastly, the learned advocate strongly relied upon the case in 19 P L T 749[6] in support of his contention that no evidence is admissible to prove an agreement in defeasance of the contract, but evidence was admissible only to prove an agreement suspending the coming into force of the contract within the meaning of S. 92, Evidence Act. With respect I think there is a misunderstanding of the decision in the case. In the case before their Lordships the promissory note sued upon was by its express terms payable on demand with the result that the obligation under the note attached immediately; an agreement was sought to be proved as a condition precedent to the execution of the promissory note that no liability was to attach thereto until the executants received certain assets to which the promisee agreed. Their Lordships at p. 755 while dealing with the arguments advanced pointed out the distinction which must always be borne in mind between a collateral agreement which alters the legal effect of the instrument and an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put it in another form :

> It is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note.

The learned advocate relies upon the words "in defeasance of the contract" in the quotation just given. The present case is entirely different. No agreement is being proved to alter the legal effect of the instrument which is admitted to be a mortgage all the time. What is contended and what S. 92, Evidence Act, allows, is to prove a condition precedent preventing the attachment of any obligation to the agreement or from accepting the rights given by the mortgage bond of 1935. Upon a careful consideration of all the arguments advanced, I am of opinion that the plaintiffs' suit ought to have been decreed for recovery of the amount due under the rokka sued upon. The plaintiffs have not charged any interest from the date of the suit. The plaintiffs will however be entitled to interest at the rate of 6 per cent. from the date of the decree of this Court. We have been asked to fix instalments under the provisions of the Bihar Money-lenders Act. I think this is a fit case in which the Court should fix instalments. Accordingly I fix the instalments at Rs. 5000 a year in this way, that the defendants should pay to the plaintiffs Rs. 5000 together with interest at the rate of 6 per cent. per annum from this date on or before 31st August 1940, thereafter another sum of Rs. 5000 together with interest at the same rate on or before 31st August 1941 and the balance with interest will be paid on or before 31st August 1942.

In the circumstances it is unnecessary to consider whether the plaint ought to have been allowed to be amended. But I am of opinion that upon the facts which have been dealt with in the judgment of my learned brother with which I agree it must be held that the plaintiffs had an immediate right on the date of the suit to institute a suit for the entire amount without paying any regard to the instalments. I am satisfied that the property which was given in mortgage was not free from defects of title and that the arsurances given by defendant 1 to the plaintiffs were all erroneous, if not deliberately false. In that view I would have allowed the amendment of the plaint. But as I have stated, it is unnecessary to consider this point at length, because in my view even if there are no defects of title in the mortgaged properties nor any false assurances as detailed in para. 8 of the mortgage bond, in the circumstances of this case there has been no substitution in fact and in law of the agreement entered in lieu of the rights of the plaintiffs on the rokka. I would therefore allow this appeal and grant the plaintffs a decree for the amount as claimed with costs of the trial Court and of this Court.

Varma J. — I have had the advantage of reading the judgment of my learned brother and I agree with the conclusions arrived at therein. But I would like to add a few words, especially with regard to the argument of Mr. Sushil Madhab Mullick that the mortgage bond was never acted upon and contained misrepresentations which made it impossible for the plaintiffs

6. Rowland Ady v. Administrator-General of Burma, (1938) 25 A I R P C 198=175 I C 449 =32 S L R 810=19 P L T 749 (P C).

to accept the mortgage. Mr. B. C. De has argued that once the mortgage bond had been executed by the defendants the only remedy left to the plaintiffs was to sue for a breach of any contract. Now let us see whether the allegations of the plaintiffs contained in the plaint that there were misrepresentations in the mortgage bond are correct. The plaintiffs complained that the following properties were represented by defendant 1 to be his self-acquired properties : half of 76.33 acres, i. e., 38.165 acres of jote lands situated in Mauza Bikrampur Dhanra, Tauzi No. 316 in the zamindari of Mr. Davis, 11.84 acres of jote land situated in Mauza Bikrampur Dhanaura, Tauzi No. 273 in the zamindari of Lachmi Prasad Chowdhri.

Defendant 1 further represented to plaintiff 1 that his surviving nephews of the other branches of the common ancestor Dina Singh had been separate from him in mess, estate and worship and had no interest in the properties proposed to be mortgaged by him and his sons and grandsons. In order to understand the allegations made in para. 10 of the plaint, it is necessary first to look into the genealogy. The common ancestor Dina Singh had five sons Kanhaiya Singh, Gurdeyal Singh, Tulsi Singh, Bhagu Singh and Bhikari Singh; Kanhaiya Singh had three sons, Nathuni, Banwari and Raghoo; Gurdeyal Singh died issueless; Tulsi Singh had three sons, Rampearay, Ramdhari and Sahdeo; Rampearay had three sons, Ramlakhan alias Lakhan, Ramratan alias Ratan and Ramcharan alias Noonoo; Bhagu had two sons, Arjun and Bhim; Bhikari Singh had a son Teku Singh; and Teku Singh had three sons, Karu Singh, Misri Singh and Tadhey Singh. In para. 10 of the plaint the plaintiffs allege the following misrepresentations : (a) that Ramdhari Singh, defendant 3, had been adopted by the said Bhaggu Singh and was no longer defendant 1's son and had no interest in the properties of his own branch; (b) that the mortgaged properties were his self-acquired and exclusive properties; (c) that his nephews were separated members and had no interest in the mortgaged properties; (d) that the defendants would pay Rs. 500 cash to the plaintiffs at the time of the execution of the mortgage bond.

In para. 12 of their written statement, the defendant asserted that the statements made in sub-para. 10 of the plaint were true. In the written statement of Ramdhari Singh also we find that in para. 5 he stated he was living separately from his father and that he had been adopted by his uncle Bhaggu Singh, and he also asserted that defendant 1 was not the manager or the karta of the family of Ramdhari Singh. As against this Mr. Mullick has drawn our attention to the terms of the mortgage bond:

We, the executants, are members of a joint Hindu family governed by the Mitakshara school of law. The karta of the joint family is executant No. 1 (Tulsi Singh) and executants Nos. 2 and 3 and executants Nos. 4, 5 and 6 are the sons and grandsons of executant No. 1. In this joint family the executants Nos. 1 and 2 are the only persons who are majors. Save and except us, the executants, there is no other male person either major or minor in this joint family. This bond is executed by executant No. 1 in his own behalf and as karta of the joint family of us (the other) executant.

As regards the properties mortgaged, it was alleged that

the said mortgaged properties are owned and possessed exclusively by executant No. 1 who has purchased them from his own funds under a sale deed dated 12th May 1916, executed by Babu Bansidhar Marwari, under another sale deed, dated 7th June 1920, executed by Kurman Manjhi, under the third sale deed, dated 20th April 1921, executed by Jokhri Mal. The mortgaged properties are not burdened with any encumbrance or rehan and charge and belong exclusively to executant No. 1 and are free from all defects of title and mortgage.

Further on it is said :

If anything to the contrary comes to light, we the executants Nos. 1 and 2 shall be severally and jointly liable to criminal prosecution for cheating and fraud, and in that case, the said creditor shall be competent to cancel the instalments and institute a suit for this entire amount without paying any regard to the instalments.

Now the properties mortgaged are stated in para. 12 of the bond as follows :

The 8 annas pokhta share being 38.16½ acres out of the 16 annas share which is 76.33 acres of land purchased by (me the executant No. 1) and Kartik Singh in equal shares, which is in the possession and occupation of us, the executants and which lie in Mauaza Bikrampur Dhanaura, Tauzi No. 316, Thana No. 344, pargana thana, and sub-registry Colgong, District Bhagalpur, within the zamindari of Mr. P. C. Davis and others, paying an annual rental of Rs. 250-12-0 besides cess in respect of the entire lands (and then the boundaries are given.)

The 16 annas interest being 7.70 acres of nakdi jote lands situate in Mauza Bikrampur Dhanaura Mahal Maksuspur Khurd, Tauzi No. 273, Thana No. 344, Pargana, Thana and Sub-Registry Office Colgong, District Bhagalpur, paying an annual rental of Rs. 28-10-17½ with cess within the zamindari of Babu Lachhmi Prasad Chaudhry and the suabharnadar Rai Bahadur Sukhraj Rai.

Mr. Mullick contends that this document was executed on 27th April 1935, but on 27th September 1934, in a partition suit in the family, which was partition suit No. 60 of 1932, a compromise petition was filed with a prayer that a decree should be passed in terms of the compromise. Now Karu

Singh and others were the plaintiffs and Tulsi Singh and other were the defendants in that suit. The compromise begins by saying that :

According to the partition the plaintiffs got the properties mentioned in Sch. 1 of this petition by consent of the parties. The remaining joint family properties of the parties which are specified in sch. 2 of this petition fell to the defendants by consent of the parties.

In para. 11 it is mentioned that :

Besides the properties which have fallen to the plaintiff's share according to private partition and which have been specified in sch. 1, the remaining properties whether immovable or moveable have all fallen to the share of the defendants and remained with them.

Now, Sch. 2 properties include item 9 :

The 23 bighas 10 kathas 10 dhurs of nakdi jote lands situate in mauza Bikrampur Dhanaura, pargana and thana Colgong, District Bhagalpur, tauzi No. 273,

and item 12 is :

The 68 bighas of nakdi jote land situate in Mauza Amanat Sarkar within mauza Bikrampur Dhanaura, pargana, and thana Colgong, district Bhagalpur, tauzi No. 316.

In this partition suit Tulsi Singh, Pearay Singh and Ramdhari Singh under the guardianship of his father and guardian ad litem Tulsi Singh, Lakhan Singh, Ratan Singh, and Noonoo Singh were described as minor sons of Pearay Singh under the guardianship of Pearay Singh, their father and guardian ad litem, Arjun Singh and Bhim Singh were described as minor sons of Bhagu Singh under the guardianship of Tulsi Singh, their uncle and guardian ad litem, by caste Rajputs, by occupation zamindars, residents of Mauza Sobhnathpur, pargana and thana Colgong, District Bhagalpur. Mr. Mullick argues that by this decree all the defendants including Ramdhari became entitled to the properties mentioned in Sch. 2 of the compromise petition, and the two properties (items 9 and 12) are the same that have been mortgaged. He urges, therefore, that it is clear from this that Ramdhari, though represented to have been adopted by Bhagu Singh, got an interest in the properties which had been partitioned and in which all the defendants in that suit acquired an interest including Ramdhari. Therefore when the mortgage bond represented that Ramdhari had no interest in the property, it was a case of misrepresentation. Therefore the present plaintiffs were not bound by the terms of the mortgage bond because it contained this important misrepresentation.

There is one other point that has struck me with regard to the terms of the mortgage bond which entitles the plaintiffs to urge that the terms of the mortgage bond were not acted upon. From the terms of the mortgage bond it appears that after accounting Rs. 13,300 was found due from the defendants to the plaintiffs and that the mortgage bond itself is for a sum of Rs. 12,800 payable in instalments of Rupees 800 each year from Jeth 1343 to Jeth 1358. The mortgage bond itself is not for the sum of Rs. 500, which is the difference between Rs. 13,300 and Rs. 12,800. Evidently therefore the sum of Rs. 500 was to be paid at the time of the execution of the bond. This is apparent from the recital contained in para. 3 of the bond :

Hence we, the executants Nos. 1 and 2, implored and entreated Babu Babulal Marwari, the eldest son of Babu Mukti Ram Marwari (who is dead now) and made him agree to accept Rs. 500 in cash which we tender to day out of Rs. 13,300 which has justly become payable now after adjustment of accounts and setting off the payments (already) made under the aforesaid handnote and to get a registered mortgage instalment bond executed by us for the remaining amount of Rupees 12,800. So that his said debt may be paid with facility by us, the executants.

If this sum of Rs. 500 were not taken out of the actual amount due, there could not have been instalments of Rs. 800 to make up the total sum of Rs. 12,800 and the lower Court has held as follows :

as regards the sum of Rs. 500 there is no reliable evidence that any part of it was paid by the defendants.

So it appears that one of the important conditions of the bond was not fulfilled by the defendants. The registration receipt of the bond remained with the defendants. It was an unilateral transaction and therefore it cannot be said that the mortgage bond was in any way acted upon. This state of affairs comes well within the principles laid down in 44 I A 60[4] where the owners of a five-sixths and one-sixth share in a mauza separately mortgaged their shares to the same mortgagee to secure Rs. 5500, and Rs. 4000, respectively. Subsequently, two new mortgages were executed by the persons liable as mortgagors for the amounts due under the respective mortgages, but making the whole property liable for each debt. The mortgagee obtained a decree against the owner of the one-sixth share upon his new mortgage, but the new mortgage by the owner of the five-sixths share was held to be invalid. The decree was executed, but only against a one-sixth share of the mauza. In a suit by the mortgagee upon the original mortgage of the five-sixths

share it was held that the mortgage was not discharged and that the mortgagee was entitled to a decree. In the course of the judgment their Lordships observed :

It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mouza, for the indebtedness both of Jaichand and Phul Singh in lieu (inter alia) of the security of 13th November 1876. Pursuant to this intention, he appears to have handed over the mortgage of 13th November 1876 to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt. Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants having successfully maintained that the transaction embodied in the two deeds, of 1887 was not binding on Mt. Nandan, and consequently did not bind them as heirs of Jaichand, should now claim the benefit of the transaction as a release of the mortgage of 13th November 1876.

In this case after looking at the facts it is clear that although the mortgage bond was executed, it contained serious misrepresentations and one of the important terms upon which the mortgage bond was executed was not fulfilled, and the registration receipt remained with the defendants. In these circumstances I am of opinion that the mortgage bond was never acted upon and the plaintiffs were entitled to sue on the rokka. I therefore agree with the order passed by my learned brother.

D.B./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 129

ROWLAND AND CHATTERJI JJ.

Nripendra Nath Chatterji and others— *Defendants* — Appellants.

v.

Arun Chandra Chatterji, Plaintiff and another — *Defendant* — Respondents.

Appeal No. 194 of 1938, Decided on 19th September 1939, from appellate decree of Sub-Judge, Bhagalpur, D/- 21st January 1938.

(a) Limitation Act (1908), Art. 60—Necessity for demand may be got rid of by waiver—Depositee cannot simultaneously repudiate liability to pay sum deposited and insist that demand previous to suit was essential to its maintainability.

In a suit to recover amount deposited with a banker the necessity for a demand as furnishing a cause of action under Art. 60 may be got rid of by special contract or by waiver. The depositee cannot simultaneously repudiate liability to pay the sum deposited and insist that a demand previous to suit was essential to its maintainability. Hence a repudiation by a bank of a customer's right to be paid any particular sum would be a waiver of any demand in respect of such sum : *(1921) 3 K B 110, Rel. on.* [P 130 C 2]

(b) Limitation Act (1908), Art. 60—Money deposited with banker—Death of banker does not alter nature of liability of his sons to pay sum—Case falls within S. 40, Illus. (a), Contract Act.

Where money has been deposited with a banker, the death of the banker cannot be deemed to alter the nature of the liability of his sons to pay the amount of deposit. The case falls within Illus. (a) to S. 40, Contract Act, and the liability in respect of the money remains entirely unchanged by the death of the banker. [P 131 C 1]

(c) Limitation Act (1908), Art. 60—Cause of action for recovery of deposit and interest is single and governed by Art. 60 — No part of interest can become time-barred when the claim in respect of principal is in time.

The ordinary rule is that the cause of action for the recovery of principal and interest accruing due on it is a single cause of action and where the claim is a single claim for principal and interest, and is within time, no part of the interest can become time-barred. [P 131 C 1]

Therefore, where money is deposited on the understanding that the interest need not be paid out as it accrued but should be added to the principal, Art. 60 applies to the interest as well as to the principal and both would be deemed to be deposits payable on demand : *3 All 328, Disting. ; A I R 1920 Mad 983, Rel. on.* [P 131 C 1]

R. S. Chatterji — *for Appellants.*

Girindra Nath Mukherji —

for Respondents.

Rowland J. — This is an appeal by the contesting defendants and arises out of a suit to recover money deposited by the plaintiff with the father of the defendant. The deposit, it seems, was made with the defendants' father as a banker by entries in a pass-book. It was opened in 1906 and entries in it both of credit and withdrawal were made, the last being dated 3rd November 1907. The plaintiff was a nephew of Babu Kirti Chandra Chatterji with whom the money was deposited and it would seem that the sums are of the nature of gifts by Kirti Chandra to the plaintiff. The entries have been found by both Courts to be genuine and the Courts have held that the claim is for money deposited within the meaning of Art. 60, Limitation Act. Under this Article the period prescribed is three years from the date of the demand. It is said in the plaint that demands were made from 1st January 1936 onwards and the suit was instituted on 6th July 1936. Babu Kirti Chandra Chatterji died in 1914; and the plaintiff claims the amount of the deposit from his sons on the ground that they are in possession of his assets. Interest is claimed at 6 per cent. per annum simple, this amount having been entered

in the pass-book in connexion with the first item of deposit.

One of the objections taken by the defendants was that except with regard to the first item of deposit, there was no agreement to pay interest. Both the Courts have held that the agreement to pay interest was intended to apply to all the items of deposit. This seems a reasonable construction and I find no substance in this particular objection.

The next point taken is that the suit should have been held to be barred by limitation. The nature of the claim was not a deposit but money lent and the Courts should have applied Art. 59 and not Art. 60 of the Schedule. In this connexion, reference is made to the finding of the Courts below that the plaintiff had not proved any demand for the money on 1st January 1936, or at any date prior to the institution of the suit. Nevertheless, it has been held that the suit is maintainable and a decree has been passed. It is said that one criterion to determine whether a sum of money is merely money lent or is a deposit repayable on demand, is to see whether it is money for the recovery of which the plaintiff has a cause of action independently of any demand for repayment. For the English cases on the subject, we were referred to (1921) 3 K B 110[1] where the subject is examined in some detail. In the headnote it is stated to have been decided that :

> Where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent.

The suit was held to be not maintainable on the ground that no cause of action had accrued to the plaintiffs because no demand was made for payment. In a case from India in 17 Lah 557[2] the distinction between a deposit and a loan was examined by Lord Atkin who said :

> Was this then a loan or was it a deposit payable on demand ? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of deposit with a banker it does not necessarily involve the creation of a trust but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositer and repay him He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay.

Therefore it is contended that the plaintiff is entitled to no decree for, if this money was in the hands of the defendants as a deposit referred to in Art. 60, no cause of action had accrued and if it is any other kind of debt or loan the period of limitation for institution of the suit was long barred. The objection, it seems to me, is not fatal. We have been shown two cases, one of this Court and one of the Madras High Court, in which such an objection has not succeeded. In this Court in A I R 1933 Pat 701[3] the Madras decision in A I R 1926 Mad 66[4] was followed. The relevant passage which in this Court was cited from the judgment of the Madras case is by way of obiter dictum and the observation is that :

> The making of the demand is entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged and a suit may be instituted without even a demand being made, in which case no question of limitation arises.

The language used may require some qualification in view of the decisions previously cited, to the effect that there must ordinarily be a demand or something that can be deemed equivalent to a demand or take the place of a demand as part of the cause of action. But the present case seems to fall within the concluding words of Lord Atkin in (1921) 3 K B 110[1] above cited. His Lordship observed :

> Finally it is perhaps unnecessary to say that the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by a bank of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum.

From this point of view, I am of opinion that the defendants cannot simultaneously repudiate liability to pay this sum and insist that a demand previous to suit was essential to its maintainability. As to the nature of the deposit or loan this has been found by both the Courts to be a deposit falling within the terms of Art. 60 which includes money of a customer in the hands of his banker so payable and I do not think we can go behind that finding. It is however contended that although the money was perhaps a deposit in the hands of Kirti

1. Joachimson v. Swiss Bank Corporation, (1921) 3 K B 110=90 L J K B 973=125 L T 338=26 Com Cas 196=65 S J 434=37 T L R 534.
2. Mohammad Akbar Khan v. Attar Singh, (1936) 23 A I R P C 171=162 I C 454=17 Lah 557=63 I A 279 (PC).
3. Baijnath v. Bihari Ram Sham Lal, (1933) 20 AIR Pat 701=147 I C 1094.
4. Narasimham v. Narayana Rao, (1926) 13 A I R Mad 66=92 I C 405.

Babu, after his death the same money in the hands of his sons had changed its character, there being between them and the plaintiff a liability of a different nature from that which had existed between their father and the plaintiff. It has not been shown to us in what manner the death of Babu Kirti Chandra could or should be deemed to alter the nature of the liability to pay this sum of money. The case appears to fall within Illustration (A) to S. 40, Contract Act, and the liability in respect of this money to be entirely unchanged by Kirti Babu's death.

Then it is suggested that though it may be held that in respect of the principal money limitation is saved, Art. 60 being applicable, interest is governed by Art. 63 so that the plaintiff is entitled to recover along with the principal only interest for three years last before the institution of the suit. For this reliance is placed on a decision in 3 All 328.[5] But that was a special case where the depositor had realized out of Court the whole of his principal as well as interest at a certain rate; but with this he was not satisfied. He claimed interest at a higher rate and he brought a suit to recover the difference between the interest which he claimed and the interest which he had been paid. The present case is not by any means on all fours with the facts of that decision. This is more comparable with 43 Mad 629,[6] in which it was held that where money had been deposited on the understanding that interest was not to be paid out as it accrued but to be added to the principal, Art. 60 would apply to the interest as well as to the principal and that both would be deemed to be deposits payable on demand. The ordinary rule is that the cause of action for recovery of principal and of interest accruing due on it is a single cause of action and where the claim is a single claim for principal and interest, I do not think that two periods of limitation will be applicable. In my view then no part of the claim in respect of interest is time-barred.

In the result, I find no substance in the contentions raised in the appeal. There is a cross-objection to which I must now refer. The Munsif had decreed the claim in full including costs; but the lower Appellate Court was of opinion that as the plaintiff had failed to establish a demand antecedent to the institution of the suit, he should not recover from the defendants his costs of the suit. The result was that the Subordinate Judge modified the first Court's decision by giving a decree for the claim but without costs and directed that the parties should bear their own costs of the appeal. This was a matter within the discretion of the lower Appellate Court with which we do not think we ought to interfere. It was for the plaintiff to give the defendants proper notice of his demand before rushing to Court although for the reasons I have stated this did not have to prove fatal his success in the suit. I would therefore not interfere with the discretion of the lower Appellate Court in withholding the plaintiff's costs from them. I would dismiss both the appeal and the cross-appeal with costs.

Chatterji J.—I agree.

G.N./R.K. *Appeal dismissed.*

5. Makundi Kuer v. Balkishen Das, (1881) 3 All 328.
6. Narayan Chetty v. Suppiah Chetty, (1920) 7 A I R Mad 983=58 I C 639=43 Mad 629=38 M L J 437.

A. I. R. 1940 Patna 131

JAMES AND CHATTERJI JJ.

Ramasray Prasad Chaudhury and others — Appellants.

v.

Ramsurat Singh and others — Respondents.

Appeals Nos. 15 to 25 and 678 of 1937, Decided on 5th May 1939, from appellate decree of Dist. Judge, Darbhanga, D/- 24th July 1936.

(a) Bengal Alluvion and Diluvion Regulation (11 of 1825), Cl. 4 — Accreted portion held under proprietors other than proprietor of parent holding — Benefit of cl. 4 cannot be claimed.

The provisions of cl. (4) of the Regulation contemplate that the parent holding and the accretion shall together form one single holding and that the estate of the occupier in the accreted land shall be exactly the same as the estate which he enjoys in the parent holding. This is not possible where the accreted land is held under proprietors other than the proprietors of the parent holding; the parent holding and the accreted land cannot form one single holding and must be regarded as separate holdings. Hence, in such case the benefit of provision of cl. (4) cannot be claimed. [P 132 C 2]

(b) Adverse Possession — Occasional floods not interfering with agricultural operations do not stop running of limitation.

Occasional floods which have never been such as to interfere with the ordinary agricultural operations cannot be treated as estopping the running of limitation: *16 P L T 659, Rel. on.* [P 132 C 2]

(c) Landlord and Tenant—Adverse possession —Possession of limited interest may be adverse for barring suit for determination of that interest.

Possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property : *2 C L J 125, Rel. on.* [P 133 C 1]

(d) Bihar Tenancy Act (8 of 1934), Sec. 25 Persons obtaining settlement of newly appearing waste land for purpose of reclamation made by cosharer in good faith and for benefit of estate as a whole—After occupation for twelve years they cannot be ejected.

Where persons have obtained settlement of newly appearing waste land for the purpose of reclamation made by a cosharer in good faith and for the benefit of the estate as a whole, such persons are raiyats and after occupation for twelve years they acquire an occupancy right by the operation of the provisions of the Bihar Tenancy Act, and under Sec. 25 of the Act, they cannot be ejected except on the conditions prescribed by that Section. [P 133 C 1, 2]

L. K. Jha and R. Chowdhury — *for Appellants.*

B. P. Sinha and Brahmdeo Narain (in all appeals), G. P. Sahi (in No. 16), K. J. Lal (in No. 24), and S. Srivastava (in No. 678) — *for Respondents.*

James J. — These are twelve appeals, eleven from the decision of the District Judge of Darbhanga and one from the decision of the Additional District Judge. They all arise out of suits for ejectment of the cultivators in possession of portions of Plot No. 198, in Bakarpur. This village formally belonged jointly to the Maharaja of Darbhanga and the plaintiff whose property was partitioned at about the time of the preparation of the Record-of-Rights. Plot No. 198 the backwater of a river known as Daria Margang, was left in joint possession of the two zamindars. The backwater gradually silted up and the defendants took possession of the land which formed adjacent to their holdings. In some instances settlement was made on behalf of the Maharaja of Darbhanga of newly formed land within this plot. In 1929 there was a second partition by which the eastern portion of the plot was allotted exclusively to the plaintiff. The Courts below have found for those plots which lie adjacent to the existing holdings of the defendants that the newly formed area has become in each instance an accretion to the holding by virtue of the provisions of cl. (4) of Regn. 11 of 1825 and for the rest that the settlements were made by the Maharaja of Darbhanga in good faith and accepted in good faith by the tenants; acquiesced in by the plaintiff and that the defendants have acquired occupancy right. Mr. L. K. Jha on behalf of the plaintiff-appellant argues that in many instances the provisions of Regn. 11 of 1825 cannot properly be applied to these plots, because the holdings to which the newly formed land accreted were in many instances held under the Darbhanga estate from the time of the earlier partition. This argument applies to the land with which we are concerned in Second Appeal Nos. 15, 22, part of the land of Second Appeal No. 24 and the land in Second Appeal No. 678. On the question of limitation on which the findings of the Courts below are against the plaintiff, Mr. Jha suggests that the defendants could not prescribe for a limited interest and further that their possession should be regarded as having been annually interrupted by the inundation of the land. Where the defendants have been found entitled to hold by virtue of settlement, Mr. Jha argued that the defendants cannot properly claim title by the fact that they have been inducted on the land by a co-sharer of the plaintiff.

On the question of accretion I doubt whether the defendants can claim the benefit of the provisions of cl. (4) of Regn. 11 of 1825, because in each instance the accreted portion lay under proprietors other than the proprietor of the parent holding. The provisions of cl. (4) of the Regulation appear to contemplate that the parent holding and the accretion shall together form one single holding and that the estate of the occupier in the accreted land shall be exactly the same as the estate which he enjoys in the parent holding. This is not possible where the accreted land is held under proprietors other than the proprietors of the parent holding; and it appears to be clear that the parent holding and the accreted land cannot form one single holding and must be regarded as separate holdings. On the question of limitation, the respondents stand on stronger ground. Mr. Jha suggests that annual inundation have interrupted the tenants' possession, but the Courts have found that these occasional floods have never been such as to interfere with the ordinary agricultural operations so that there has been actually no interruption of possession. Mere occasional flooding of this kind cannot be treated as estopping the running of limitation : 16 P L T 659.[1] The raiyats entered into possession of the land as it formed and the findings of the

1. Nand Lal v. Rashdhari Lal, (1932) 16 P L T 659.

Courts below are that they have enjoyed such possession for considerably over a period of twelve years against the plaintiff. The defendants are not, therefore, liable to ejectment. The defendants claim no more than the interest of occupancy raiyats, but possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property : 2 C L J 125.[2]

This disposes of Appeals Nos. 15, 16, 18, 20, 21, 22 and 23. In Appeals Nos. 17, 19, 25 and 678, together with Appeal No. 24, the defendants claim title by settlement from the Maharaja of Darbhanga. Mr. L. K. Jha argues that under S. 99, Estates Partition Act, a settlement by a single co-sharer cannot be treated as binding on another co-sharer to whom the land may be allotted on partition. In 80 I C 827[3] which has been cited by the learned Munsif, it was held by the Judicial Committee of the Privy Council that a single co-sharer has no power to confer a right of occupancy on a raiyat, but as the learned Munsif has pointed out, their Lordships remarked in that case that no evidence had been brought to their attention to show that any of the raiyats in question had held any of the land in suit for twelve continuous years before suit, so as to be able to claim right of occupancy under S. 180, Ben. Ten. Act. In the present case the claim is not that a right of occupancy was conferred by the Darbhanga estate, but that a right of occupancy has accrued by operation of law under Ss. 20 and 21, Bihar Tenancy Act.

The Courts below have relied upon the decision in 19 C W N 407[4] and have found that the Darbhanga estate was managing this property in good faith and that the raiyats in good faith accepted settlement from the estate, and further that the plaintiff acquiesced in the settlement when it was made. It appears to be clear that the settlements were made in the ordinary course of management and that this settlement of newly appearing waste land for the purpose of reclamation was made by the co-sharer in good faith and for the benefit of the estate as a whole and the Courts have reasonably held, as was held in the case upon which they have relied, that the position of the defendants could not be worse than what it would have been if they had accepted rent in good faith from a trespasser in actual occupation of the land. When they obtained settlement in this way, they became raiyats and after occupation for twelve years they acquired an occupancy right by the operation of the provisions of the Bihar Tenancy Act, and under S. 25 of the Act, they cannot be ejected except on the conditions prescribed by that Section. I would dismiss these appeals with costs: there will be one consolidated hearing fee of Rs. 64.

Chatterji J.—I agree.

D.S./R.K. *Appeals dismissed.*

2. Ishan Chandra Mitter v. Raja Ramranjan Chakrabutty, (1905) 2 C L J 125.
3. Midnapore Zamindari Co. Ltd. v. Kumar Naresh Narayan Roy, (1924) 11 A I R P C 144 =80 I C 827=51 I A 293=51 Cal 631 (P C).
4. Dakahyani Dassi v. Mana Raut, (1914) 1 A I R Cal 577=22 I C 666=19 C L J 113=19 C W N 407.

A. I. R. 1940 Patna 133

HARRIES C. J. AND FAZL ALI J.

Bulakram and another —
Defendants — Appellants.

v.

Ganga Bishun Chaudhuri —
Plaintiff — Respondent.

Letters Patent Appeal No. 12 of 1939, Decided on 12th September 1939, from decision of Varma J., D/- 10th February 1939.

Specific Relief Act (1877), Ss. 39 and 42 — Suit for declaration that certain document is void—Court can order document to be delivered up and cancelled though there is no prayer for it.

A plaintiff may bring a suit for a declaration that a document is void without seeking its cancellation, and if he does so, it is open to the Court though there is no prayer for it to order the document to be delivered up and cancelled. [P 134 C 2]

A person brought a suit for a declaration that a certain mortgage, purporting to have been executed by him was a forged document and of no legal effect. He also prayed for an injunction restraining the defendant from ever enforcing his supposed rights under such document :

Held that there was in substance a prayer that the document be declared void. The consequential relief asked for, namely, an injunction was not a very appropriate and satisfactory relief, and it was unnecessary to grant the plaintiff an injunction. The suit could be treated as a suit for a declaration simpliciter under S. 39 and the Court could in its discretion order the document to be delivered up and cancelled : *A I R 1929 Mad 396 and A I R 1932 All 485, Rel. on.* [P 135 C 1]

S. Mehdi Imam, Baldeva Sahay and T. K. Prasad — *for Appellants.*

B. N. Mitter and Ajit Kumar Mitter — *for Respondent.*

Harries C. J.—This is a Letters Patent Appeal from a judgment of Varma J. in a second appeal. The plaintiff-respondent brought a suit in the Court of the Munsif for a declaration that a certain mortgage, purporting to have been executed by him, was a forged document and of no legal effect. He also prayed for an injunction restraining the defendant from ever enforcing their supposed rights under such document. The learned Munsif came to the conclusion that the mortgage was a genuine one and dismissed the suit; but on appeal, the lower Appellate Court held that the document was a forgery and granted the plaintiff the declaration sought for and the injunction. The defendants preferred a second appeal to this Court, but that appeal was dismissed with costs by Varma J., hence this Letters Patent Appeal. It has been strenuously argued on behalf of the defendants-appellants by Mr. Mehdi Imam that the decision of the learned single Judge cannot be sustained. It is argued that the learned single Judge treated this suit as one under S. 42, Specific Relief Act. It is said that it was not a suit falling within that Section and consequently it should have been dismissed. Stress has been laid upon the form of reliefs sought by the plaintiff, and it is necessary to set them out in extenso. The reliefs were:

(1) On determining the above fact it may be held by the Court that the fraudulent mortgage bond dated 10th July 1935 has never been executed by the plaintiff and the aforesaid fraudulent deed forged, fraudulent, illegal and without exchange of equivalence and which is and cannot be binding upon the plaintiff and on his property.

(2) After determining the Relief No. 1, the defendants may be prohibited for ever by issuing an order or injunction to enforce the said fraudulent mortgage bond.

(3) The costs of this suit with interest till the date of realization may be awarded to the plaintiff against the person and property of the defendants.

(4) Any other reliefs, besides the above to which, in the opinion of the Court, the plaintiff be deemed entitled, may be awarded to the plaintiff.

As pointed out by Varma J. the translation of the reliefs is not very happily worded but there is no difficulty in understanding the nature of the reliefs sought. The first relief is clearly for a declaration that a certain mortgage bond was a forged document creating no rights whatever in the property alleged to have been mortgaged. In short, it is a prayer for a declaration that the mortgage was null and void and not binding upon the plaintiff or his property. It has been contended by counsel for the appellants that such a declaration cannot be sought under S. 42, Specific Relief Act. That Section provides that

any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief. . . .

The argument for the appellants is that what the plaintiff was asking for in this suit was not a declaration that he was entitled to a legal character to any right in property but rather a declaration that a certain instrument was null and void. On behalf of the plaintiff-respondent, it is said that what the plaintiff is really asking for is a declaration that he is the owner of the property alleged to have been mortgaged free of all encumbrance. In both the Courts below and before the learned single Judge, the case seems to have been argued as a case under S. 42, Specific Relief Act. It is unnecessary to consider whether or not this declaration can properly be brought within S. 42, Specific Relief Act, because clearly it can be a claim for a declaration falling within S. 39, Specific Relief Act. This latter Section deals with suits for declaration that documents are void or voidable. S. 39 is in these terms:

Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion so adjudge it and order it to be delivered up and cancelled. . . . .

The declaration prayed for in this suit is, as I have said, in effect a declaration that the mortgage bond is forged and fraudulent and void. It is therefore a declaration falling within the ambit of S. 39, Specific Relief Act. It has been argued however that the suit cannot be regarded as a suit seeking a declaration under S. 39 of the Act because consequential relief for an injunction was sought and no consequential relief by way of a cancellation of the document is prayed for. A plaintiff may bring a suit for a declaration that a document is void without seeking its cancellation, and if he does so, it is open to the Court though there is no prayer for it to order the document to be delivered up and cancelled. The wording of the Section suggests that the Court may order cancellation, though there is no specific prayer for it. This has been expressly held in a Division Bench case, A I R 1929 Mad 396[1] and in a Full Bench

1. Kattiya Pillai v. Ramaswamia Pillai, (1929) 16 A I R Mad 396=119 I C 35=56 M L J 394.

case of five Judges, 54 All 812.[2] At p. 820 of this latter case, the learned Judge observed :

The Illustrations to the Section make it obvious that the relief is available even to persons other than parties to an instrument, and in respect of both void and voidable instruments. It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled. Even though no relief for cancellation is asked for, a Court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it merely adjudged void or voidable would not be adequate for his purpose.

In the present case there is in substance a prayer that this document be declared void. The consequential relief asked for, namely an injunction, is not a very appropriate and satisfactory relief, and in my view it is unnecessary to grant the plaintiff an injunction. Even if the plaintiff had only applied for a mere declaration, it would still have been open to the Court to order this document to be delivered up and cancelled. The suit can be treated as a suit for a declaration simpliciter under S. 39 and the Court can in its discretion order the document to be delivered up and cancelled. The findings of the lower Appellate Court are clear, that this document is a forgery and is therefore void. It is still in the hands of the defendants and the plaintiff must have a fear that it may be used against him. In those circumstances, it appears to me that this is a case where the plaintiff should not only have his declaration but the defendants should also be ordered to deliver up the document for cancellation. The document was required by law to be registered, and accordingly notice must be sent to the Registrar of the cancellation of the document.

The result therefore is that this appeal substantially fails. It is true that the learned single Judge upheld both the declaration and the injunction, and I am of opinion that the remedy by way of injunction is inappropriate. However, in the exercise of the discretion of the Court, I am of opinion that an order calling upon the defendants to deliver up this document for cancellation and that it should be cancelled upon delivery, should be substituted for the injunction. The form of declaration will remain and the order as to cancellation substituted for the injunction. With that variation this appeal is dismissed. It was argued by Mr. Mehdi Imam that as the decree was being varied to some extent the appellants should not be made to pay the costs. There is no merit whatsoever in the appeal and as it has been held that the defendants are holding a forged document, I see no reason whatsoever for depriving the respondent who has substantially succeeded of his costs in this Court. The respondent will therefore have the costs of this appeal.

Fazl Ali J.—I agree.

D.S./R.K. *Decree varied.*

2. Kalu Ram v. Babu Lal, (1932) 19 A I R All 485=139 I.C 32=54 All 812=1932 A L J 684 (F B).

A. I. R. 1940 Patna 135

ROWLAND J.

Syed Zafar Ahsan and others —
Petitioners.

v,

Babu Jugeshwar Bux Roy and another
— Opposite Party.

Criminal Revn. No. 466 of 1939, Decided on 3rd November 1939, against order of Magistrate, First Class, Daltonganj, D/- 30th March 1939.

(a) Criminal P. C. (1898), S. 145—One party claiming exclusive possession — Other party claiming joint possession with former — Case falls within S. 145.

A case in which one party claims exclusive possession while another party claims to be in joint possession along with them is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area and therefore the question falls within the purview of S. 145 : *A I R 1932 Pat 366, Rel. on.* [P 136 C 2]

(b) Criminal P. C. (1898), S. 145—Possession delivered by Civil Court is not conclusive proof of possession under S. 145 after lapse of considerable time from date of delivery.

A Criminal Court ought to hold that if on a given date the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which the possession of land is disputed, a stale delivery of possession cannot be conclusive as to present possession under S. 145 : *A I R 1928 Cal 610 (F B), Rel. on.* [P 136 C 2]

(c) Criminal Trial — Revision — Practice—Limitation.

As a general practice the Patna High Court will not entertain, in the absence of most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned : *A I R 1929 Pat 404, Rel. on.* [P 137 C 1]

B. N. Mitter, Ajit Kumar Mitter and G. Muhammad — *for Petitioners.*

Sir S. Sultan Ahmad, B. C. De, K. K. Banerji and S. S. Sinha —
for Opposite Party.

Order. — This is an application in revision by the second party in a proceeding under S. 145 against an order of the Magistrate declaring possession in favour of the first party. The proceeding related to lands of the Deogaon Estate of which Babu Gopal Bux Roy, first party No. 2, is proprietor. Petitioners 2 to 7 are persons in whose favour the proprietor had made a grant of a mukarrari lease of eight annas in the estate at a time when neither of the parties were in possession. The proprietor Gopal Bux Roy sued to recover possession on a declaration that the principal defendant of that suit was an impostor. In order to finance this litigation, the mukarrari lease was granted to the members of the second party. The suit failed in the first Court, but on appeal was decreed by this High Court on 19th August 1936, the final order being that Gopal Bux Roy and the present petitioners 2 to 7 should recover joint possession of the entire Deogaon estate, their shares being one-half and one-half. The lower Court in execution issued on 12th March 1937, a writ of delivery of possession which is said to have been duly executed. The writ was in favour of both parties. The petitioners appointed managers one Mr. Rashid and then a Mr. Qayum who apparently did not succeed in collecting any rents or exercising any sort of effective possession in the estate. They then on 15th May 1938 appointed a new manager, Mr. Syed Zafar Ahsan who is petitioner 1 and who, it is said, began to make collection, the earliest rent receipt purporting to be issued by him being on a date 27th May 1938. The present proceedings started with a report by the Sub-Inspector of Police of P. S. Chatrapur, dated 7th October 1938, as to disputes regarding collection of rents and grazing fees in his elaka and a similar report dated 24th October 1938, from the Sub-Inspector of Police of P. S. Harihargunj. The Magistrate called for written statements from both parties on 9th November 1938. There was some formal amendment to the proceedings on 21st November 1938, and they were transferred for disposal on 27th January 1939 to Mr. P. C. Mazumdar, the Magistrate, who eventually disposed of the proceeding and passed the order now under revision.

The Magistrate has written a long and careful judgment and has dealt with the evidence of possession on both sides. The points taken in revision are that as between parties entitled to joint possession of property, S. 145 is not the appropriate procedure and the Magistrate erred in law in proceeding under that Section. Secondly, it is said that when possession was delivered by the Civil Court, it was the duty of the Magistrate to uphold that possession. Other grounds arise out of the Magistrate's appreciation of the evidence in the case which, it is said, has been vitiated by certain errors.

As to the first point, the argument is not wellfounded; although certain of the earlier decisions may seem to favour it, it has been negatived by a Division Bench of this Court in 13 P L T 609.[1] It was there held to be wrong to graft limitations upon the enactments which the Legislature has not placed there, that a case in which one party claims exclusive possession while another party claims to be in joint possession along with them is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. As to the next point, the argument does not seem to be sustainable in face of the decision of the Full Bench of the Calcutta High Court in 56 Cal 290[2] which has been followed in a series of decisions in this Court. The Magistrate has correctly appreciated the law which is that the Criminal Court ought to hold that if on a given date the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a stale delivery of possession cannot be conclusive as to present possession. In this case it is found by the Magistrate that from 12th March 1937 onwards, it was the first party who exercised all the acts of possession in respect of the disputed property and indeed up till 27th May 1938 no overt act of possession appears to have been attempted to be done on behalf of the second party. It was in the circumstances open to the Magistrate to hold, as he has held, that there had been an ouster of the second party. I should add that in the decree which was passed in 1936 Bapu Gopal Bux Roy was not the petitioners' judgment-debtor but was a co-plaintiff.

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1. Nandkeshwar Prasad v. Sita Saran, (1932) 19 A I R Pat 366=1932 Cr C 899=140 I C 902=34 Cr L J 115=12 Pat 87=13 P L T 609.
2. Agni Kumar Das v. Mantazaddin, (1928) 15 A I R Cal 610=113 I C 181=30 Cr L J 69=56 Cal 290=48 C L J 193=32 C W N 1173 (F B).

As regards the suggested errors in the reasoning by which the Magistrate has dealt with details of the evidence, it is objected that the Magistrate has referred to the fact that Gopal Bux Roy has got his name entered in Collectorate Register as 16-annas proprietor and has relied on this fact in support of the first party's possession. As the second party claimed possession not in the capacity of a proprietor but of a mukarraridar, the entry in Register D had to be in the name of Gopal Bux Roy in any event and is consistent with the case of either party. The entry was not therefore a piece of evidence definitely supporting the case of the first party. Apart from this the criticizms advanced against the Magistrate's reasoning do not seem on examination to be well founded. This is not an appeal on matters of fact, and if it were, it is by no means clear that the Magistrate's finding ought to be disturbed.

It is pointed out on behalf of the opposite party that whereas the order of the Magistrate was passed on 30th March 1939 this Court was not moved until 28th August 1939. It has been held in 8 Pat 468[3] that as a general practice the High Court will not entertain, in the absence of most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned. For these reasons, the application fails and is dismissed. The Rule is discharged.

G.N./R.K. *Application dismissed.*

3. Kelu Patra v. Iswar Parida, (1929) 16 A I R Pat 404=1929 Cr C 201=119 I C 401=30 Cr L J 1053=8 Pat 468=11 P L T 18.

A. I. R. 1940 Patna 137

VARMA AND ROWLAND JJ.

Suraj Prakash Puri and another — *Plaintiffs* — Appellants.

v.

Sant Lal Singh and others—*Defendants* —Respondents.

Appeal No. 491 of 1938, Decided on 22nd August 1939, from decision of Sub-Judge, Chapra, D/- 30th September 1937.

(a) Civil P. C. (1908), O. 41, R. 33 — Interpretation—R. 33 is not to be utilized as mode of evading court-fee—Separate and distinct decrees passed against two sets of defendents — Only one set appealing — Decree cannot be set aside against non-appealing set.

Although the wording of O. 41, R. 33 gives wide power to the Appellate Court, still it should not be exercised in such a way as to interfere with the provision of other enactments, e. g., Court-fees Act. Care must be taken to see that R. 33 is not utilized as a mode of evading court-fee. [P 139 C 1, 2]

Where the decrees passed against two sets of defendants are separate and distinct, but only one set of defendants appeals not from the whole decree but from that part alone which affects it, the decree against the non-appealing defendants cannot be set aside in appeal: *A I R 1934 Pat 524*; *34 All 32*; *A I R 1925 Pat 285*, *Rel. on*; *A I R 1935 Cal 24 and A I R 1926 Cal 1042*, *Expl.* [P 139 C 1]

(b) Civil P. C. (1908), S. 100 — Finding of trial Court based on Record of Rights cannot be disturbed by Appellate Court by ignoring that document.

There is a statutory presumption of correctness attaching to the Record of Rights and when the trial Court had relied upon it as a piece of evidence, the Appellate Court cannot come to a finding of its own after ignoring that important piece of evidence. In such a case the finding of the Appellate Court can be disturbed. [P 140 C 1]

(c) Civil P. C. (1908), O. 41, R. 20 — Power of High Court in second appeal to add as respondent party to suit who was not impleaded as respondent in lower Appellate Court.

Under O. 41, R. 20 High Court has power in second appeal to add as respondents to the appeal persons who were parties to the suit in the original Court, who were not impleaded as respondents in the lower Appellate Court, although the time in which the appeal might have been preferred against them has expired: *A I R 1924 Pat 773*, *Rel. on.* [P 140 C 1]

S. M. Mullick, and Harnarayan Prasad — *for Appellants.*

N. N. Sinha, L. K. Jha, Ganesh Sharama and S. C. Ghose — *for Respondents.*

Varma J.— This is an appeal on behalf of the plaintiffs. They had filed a suit for a declaration that the property in dispute was the property dedicated to God Shiva appertaining to the muth in village Mirzapur Damodar of which mohant Ramavatar Puri, defendant 20, was the mahant and that the mokarrari lease executed by him on 25th May 1926 in favour of the defendants first party was invalid and illegal as the mohant had no right to create that mokarrari as it was created without legal necessity. The defendants first party transferred the lease to the defendants second party. The plaintiff alleged that as mahant Ramavatar Gir had abdicated in his favour on 20th January 1934, he was entitled to file this suit. The reliefs sought in the plaint were that the mokarrari lease should be set aside and that he should be allowed to recover possession of the property valued at Rs. 300 and also for a money decree for a sum of Rs. 800 against the defendants on the ground that the defendants had cut away almost all the trees on the land. The defendants first party did not contest the suit. The suit was mainly contested by the

defendants second party, although written statements were filed on behalf of the minor defendants 22 to 24 and on behalf of defendant 15 to 18 and on behalf of one Lachmi Rai. The defence was that the plaintiff had no right to sue because Mahant Ramavatar Gir was still the mahant of the muth and that he had not abdicated. It was also alleged that they had not cut away the trees and the defendants second party urged that if the trees had been cut away they must have been cut away by the defendants first party before the defendants first party transferred the property to them; that the property which was the subject-matter of the mokarrari lease was the personal property of the mahant and therefore the transfer could not be questioned.

The trial Court held that the property appertained to the muth and as in the absence of any legal necessity no permanent lease should be created and as no legal necessity was proved in this case, therefore it held that the transfer was not valid against the successors. He also held in favour of the plaintiff on the question of abdication by Mahant Ramavatar Gir. Therefore he decreed the suit as against the defendants second party for possession and he decreed the suit against the defendants first party for money because he held that the trees were cut away before the defendants first party transferred the mokarrari property to the defendants second party. Then there was an appeal to the lower Appellate Court on behalf of the defendants second party. When the memorandum of appeal was looked at it appeared that the defendants second party had not paid court-fee on the full valuation of the appeal and when their attention was drawn to it they put in a petition praying that the appeal be valued only at Rs. 300 and not at Rs. 1100 which was the amount of the decree. The memorandum of appeal was also allowed to be amended as prayed for by the defendants second party with the result that only the defendants second party remained as appellants on the record and the defendants first party did not appear anywhere on that memorandum of appeal as a party to the appeal. The lower Appellate Court came to the conclusion that there was no abdication by Mahant Ramavatar Gir and therefore the plaintiff's suit was premature because at least for the lifetime of the mahant the alienation was valid and binding. So far as the nature of the property was concerned, he came to the conclusion that there being no presumption that the properties were trust properties, it must be assumed, in the absence of any evidence to the contrary, that the mahant was dealing with them as his personal properties; and then he holds that even if it were not so, the transfers were valid for the lifetime of the mahant. After having come to these findings, he dismissed the suit altogether and it is this order that has chiefly been attacked by Mr. S. M. Mullick appearing on behalf of the plaintiff.

Mr. Mullick's argument is that O. 41, R. 33 although it is very wide should be read along with the provisions of other enactments like the Court-fees Act or the Limitation Act and for this purpose he has drawn our attention to a number of decisions beginning with 34 All 32[1] where a Bench consisting of three Judges held that the words of O. 41 R. 33 are no doubt very wide; but they remarked as follows :

> The words are no doubt very wide, but we think that care and judicial discretion must be used by Appellate Courts in the exercise of the powers conferred by the rule. In a proper case the Court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule. We think, however, that one principle may be safely stated. The Courts in the exercise of the powers conferred by O. 41, R. 33, should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court-fees Act nor of the law of limitation.

Now this decision has been referred to in some of the decisions of our own High Court, for example, in 4 Pat 37[2] where Dawson-Miller C. J., reiterated the remark that although the provisions of O. 41, R. 33 are very wide, he remarked that

> the object of that order is, speaking generally, to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court, unless it is necessary in the interests of justice to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before us then it seems to me that the Appellate Court has no right whatever to interfere.

Their Lordships also referred to the case in 34 All 32[1] and also to the decision in (1901) 2 Ch D 671.[3] The next Patna case

1. Rangam Lal v. Chandu, (1912) 34 All 32=11 I C 640=8 A L J 1111.
2. Kesho Prasad Singh v. Narain Dayal, (1925) 12 A I R Pat 285=82 I C 984=4 Pat 37.
3. Attorney-General v. Simpson, (1901) 2 Ch D 671=70 L J Ch 828=85 L T 325=17 T L R 768.

is very much like the case in 150 I C 784[4] where Mohamad Noor J., has emphasized the fact that O. 41, R. 33, Civil P. C., is intended to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from that decision of the trial Court, but it ought not to be applied to cases where there has been a distinct and separate decree against those defendants who have not chosen to appeal, it is on the latter part of the observation that I chiefly rely. In the present case, before I go to any other cases, I will just observe that there are two distinct decrees, one against the defendants second party and the other against the defendants first party. The defendants second party, when they filed the appeal were reminded that there was a decree for Rs. 800 more, deliberately avoided to pay court-fee on that amount which was realizable from the defendants first party. The defendants first party did not choose to come before the lower Appellate Court and in these circumstances I am of opinion that no order should have been passed in favour of the defendants first party on this state of the record. The Court could certainly bring the defendants first party on the record under O. 41, R. 20 and after the proper steps were taken by the defendants first party, he should have passed the orders that he has passed now. On this point I want to make my meaning clear. Supposing the whole decree was passed against the defendants second party instead of themselves and the defendants first party, and that the defendants second party did not appeal against that amount of money about which the decree was passed against the defendants first party, could the Court as an Appellate Court pass a decree in their favour with regard to the other item that was left out deliberately by the defendants second party? I am of opinion that it could not and here the force of the observation in the cases which I have cited becomes apparent because they emphasize the fact that although the wording of O. 41, R. 33 gives wide powers to the Court, still it should not be exercised in such a way as to interfere with the provision of other enactments. In this case I may point out the enactment against the provision of which the lower Court's judgment has offended seems to be the Court-fees Act.

The following cases were also cited; 13 Pat 200;[5] 50 Mad 614[6] and 98 I C 383.[7] On this point the opinion of most of the High Courts is that the view which I have expressed is the real interpretation of O. 41, R. 33. But as against this Mr. Nirsu Narain Sinha has drawn our attention to two cases, chiefly 61 Cal 919.[8] It appears that there it was an appeal against the whole decree and the provisions of O. 41, R. 4 were referred to in that connexion. The case that seems to support the view of Mr. Sinha most strongly is 45 C L J 119= A I R 1926 Cal 1042.[9] Looking at the placitum itself, it does appear that it supports the contention raised by Mr. Sinha that an Appellate Court could pass an order affecting the parties to the suit even if they were not parties to the appeal. But from the judgments it is clear that Page J. has struck a note of warning in the following terms :

> Care of course must be taken in each case to see that R. 33 is not utilized as a mode of evading the provisions of other statutory rules or orders.

So far as this point is concerned, it seems that there is a good deal of force in the contention of Mr. Mullick. As to what orders we are going to pass, I will indicate later after I have dealt with the second point. The second point is that the lower Appellate Court may be perfectly justified in dismissing the suit as premature because the mahant was still alive; but Mr. Mullick questions the correctness of the finding of the lower Appellate Court that the property was the personal property of the mahant. For this he has drawn our attention to the findings of the trial Court where the trial Court after referring to the various pieces of evidence has also referred to two entries in survey papers. The trial Court said as follows :

> The disputed mukarrari land bears C. S. Khata No. 1252, Plot No. 16 measuring 3.41 acres corresponding to R. S. Plot No. 243. The R. S. Khatian Ex. 6 (a) shows that the property is a

4. Ram Prasad Singh v. Mohan Mandal, (1934) 21 A I R Pat 524=150 I C 784.

5. Mt. Chanda Bibi v. Mohanram Sahu, (1934) 21 A I R Pat 134=153 I C 412=13 Pat 200= 15 P L T 42.

6. Ramlingam Chettiar v. Subramania Chettiar, (1927) 14 AIR Mad 620=103 I C 394=50 Mad 614=52 M L J 612.

7. Mukund Dharman v. Shantaram Rajo, (1927) 14 AIR Bom 128=98 I C 383=28 Bom L R 627.

8. Kamalkanta Debnath v. Tamijaddin, (1935) 22 AIR Cal 24=154 I C 101=61 Cal 919.

9. Bhutnath Deb v. Sashimukhi Brahmin, (1926) 13 AIR Cal 1042=96 I C 474=45 C L J 119= 30 C W N 885.

'birit' land. A 'birit' land has been defined as a grant or endowment to a person for his maintenance or for religious or charitable objects;

and after referring to another exhibit, he has come to the conclusion that the properties are math properties and not the personal properties of any particular mahant. Mr. Mullick urges that the judgment of the lower Appellate Court being a judgment of reversal, it should have discussed or at least mentioned the evidence upon which the trial Court relied. The lower Appellate Court's judgment is silent with regard to the evidentiary value of these two documents upon which the trial Court has relied. As against this, Mr. Nirsu Narain Sinha urges that as the finding of the lower Appellate Court is a finding of fact and as these two documents contradict each other, it might be that they were not referred to in the course of the arguments and therefore the lower Appellate Court has not referred to them in its judgment. There is a statutory presumption of correctness attaching to the record of rights and when the trial Court had relied upon it as a piece of evidence, the lower Appellate Court should not have come to a finding of its own after ignoring this important piece of evidence altogether. I am therefore of opinion that the finding arrived at by the lower Appellate Court has not been arrived at in a satisfactory manner and in view of the fact that the old mahant was alive at the time the suit was filed, I am of opinion that this question as to whether the property belonged to the math or was the personal property of the mahant did not really arise and should be left open at this stage.

But the matter does not end here. Mr. N. N. Sinha, although he appears for the defendants second party (the minor defendants of the first party have however appeared before this Court), has suggested that the defendants first party should be brought on the record and if necessary proper court-fee may be demanded from them ; and for this purpose he has referred to the case in 5 P L T 509[10] where it was laid down that the High Court has power in second appeal to add as respondents to the appeal persons who were parties to the suit in the original Court, who were not impleaded as respondents in the lower Appellate Court, although the time in which the appeal might have been preferred as against them has expired. It was also laid down that no question of limitation arose under O. 41, R. 20. In the present case I feel that the order passed by the lower Appellate Court dismissing the suit even against the defendants first party on the state of the record as it was at the time before him was not right. He could, if he wanted, have brought the defendants first party on the record under O. 41, R. 20.

I would therefore set aside the order of dismissal of the suit against defendants first party and send back the record of this case to the lower Appellate Court who may add them as parties under O. 41, R. 20 and the defendants first party will be entitled to file a cross-objection provided they pay the proper court-fee within time and then the matter may be disposed of in accordance with law so far as the defendants first party are concerned. If no cross-objection is presented within time, it will be the duty of the lower Appellate Court to affirm that part of the decree of the Munsif by which the defendants first party are directed to pay Rs. 800 to the plaintiff. The appeal, however, as against the defendants second party will stand dismissed because we have held that the suit is premature inasmuch as the mahant was alive at the time the suit was instituted. The defendants second party are entitled to their costs of this second appeal. The defendants first party are entitled to the costs actually incurred by them in this Court.

Rowland J.—I agree.

G.N./R.K. *Order accordingly.*

10. Padarath Mahton v. Hitan Singh, (1924) 11 AIR Pat 773=82 I C 600=5 P L T 509.

A. I. R. 1940 Patna 140

HARRIES C. J. AND FAZL ALI J.

Muhammad Hassan and others — *Defendants* — Appellants.

v.

Baidya Nath Sahay — *Plaintiff* — Respondent.

Second Appeal No. 388 of 1938, Decided on 4th September 1939, from appellate decree of Addl. Sub-Judge, Gaya, D/- 24th March 1938.

(a) Landlord and Tenant — Lease providing forfeiture of lease for non-payment of rent — Right to claim forfeiture arising but landlord acknowledging that lease is subsisting — Landlord has waived his right to claim forfeiture in respect of this particular breach — Right to claim forfeiture is not waived for ever.

It is true that if after the landlord is aware of a cause of forfeiture he, by some act, recognizes the lease, he waives his right to claim forfeiture for that particular breach. For example, if there is a right of forfeiture in the lease for non-payment of rent and after the right to claim forfeiture has arisen, the landlord demands the rent and thus

acknowledges that the lease is subsisting, it can be said that the landlord has waived the forfeiture. That, however, does not mean that he for ever waived his right to claim forfeiture. Waiver would only operate in respect of a particular breach.

[P 141 C 2]

(b) Bihar Tenancy Act (8 of 1934), S. 179 — Holder of permanent tenure in permanently settled area granting permanent mukarrari lease — Parties to such lease can agree that landlord should have right of re-entry on non-payment of rent.

Where the landlord is the holder of a permanent tenure in a permanently settled area and the lease granted is a permanent mukarrari lease, the parties to this particular transaction are at liberty to make their own terms whether such terms are consistent or not with the general provisions of the Bihar Tenancy Act. They are fully entitled to agree that the landlord should have a right to re-enter on non-payment of rent, and therefore, the clause is perfectly valid and can be enforced by a suit at law : *A I R 1934 Pat 153 (F B), Rel. on.*

[P 142 C 1]

B. N. Mitter and M. Rahman — *for Appellants.*

S. M. Mullick and Sarjoo Prasad — *for Respondent.*

Harries C. J. — This is a defendants' second appeal from concurrent decrees of the Courts below in favour of the plaintiff. On 2nd August 1900, one Mt. Makho Kuar executed a se-mukarrari lease in favour of Shaikh Ahmad Hussain of a four anna darmukarrari share in a certain village. The annual rent payable was Rs. 162, and this was to be paid in three instalments, namely Rs. 50 in the month of Pus, Rs. 62 in the month of Chait and Rs. 50 in the month of Jeth. It was further provided in this lease that if the tenant failed to pay three consecutive instalments, the lease was to be deemed to have been determined and the landlord was to have a right to re-enter and take khas possession. The present defendants-appellants are the heirs of the original lessee, Ahmad Hussain, whereas the plaintiff is a purchaser of the interest of Mt. Makho Kuar. He actually purchased by a sale-deed dated 14th March 1934, and from the terms of that sale deed, it is clear that the tenants were in arrears at the time of the transfer. After the transfer to the plaintiff, the defendants failed to pay their rent, and on 8th June 1936, there were more than three consecutive instalments in arrear. On that date, a notice was served upon the defendants, stating that according to the terms of the agreement, the landlord had a right to re-enter and eject the defendants, and a similar notice appears to have been sent eight days later, namely on 16th June 1936. The plaintiff brought the present suit alleging that the defendants had broken the terms of the lease and that he had a right to enter and take possession of the property. He further claimed a sum of money as compensation for the loss sustained by the defendants' failure to pay rent. Both Courts below came to the conclusion that the plaintiff was entitled to possession and compensation and decreed his suit.

In second appeal two points have been taken by Mr. Mitter on behalf of the defendants-appellants. First, it has been argued that the plaintiff in this case had waived his right to claim forfeiture of the lease. It is said that as there were previous arrears which apparently have never been paid, the plaintiff has waived for ever his right to re-enter. In short, the argument amounts to this, that if a landlord is a little indulgent to his tenant, he loses for ever the right to enforce a forfeiture clause in the lease. It is true that if after the landlord is aware of a cause of forfeiture he by some act recognizes the lease, he waives his right to claim forfeiture for that particular breach. For example, if there is a right of forfeiture in the lease for non-payment of rent and after the right to claim forfeiture has arisen, the landlord demands the rent and thus acknowledges that the lease is subsisting, it can be said that the landlord has waived the forfeiture. That, however, does not mean that he for ever waived his right to claim a forfeiture. Waiver would only operate in respect of a particular breach. In the present case, it may be that the plaintiff or his predecessor waived the right to claim forfeiture for the earlier arrears; but there is nothing whatsoever to show that the plaintiff had ever acknowledged the lease to be subsisting after the arrears now complained of occurred. As I have pointed out, the notice served shows that the plaintiff no longer regards the lease as subsisting and has claimed forfeiture of it. There is nothing whatsoever to suggest that the parties ever agreed that future rights under this lease should be waived. In my view, both the Courts below were right in holding that the plaintiff had not waived his right to forfeit the lease for the arrears complained of in this suit. The second and more substantial point taken in this appeal is that the landlord has no right under the Bengal Tenancy Act to claim a forfeiture for non-payment of rent. It was argued in the Court below that this lease was not a lease falling within the Bihar Tenancy Act; but in my view this is a lease

governed by that Act. Its very terms show that it was in the nature of an agricultural lease which would fall within the Act. On behalf of the appellants it has been argued that there can be no ejectment for non-payment of rent under the Bihar Tenancy Act by reason of Ss. 10, 65 and 178 (1) (c). Had there been no other provisions in the Act, the appellants' contention would be well founded; but unfortunately for them there is an express provision dealing with this case, namely S. 179 of the Act. That Section is in these terms:

Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant.

The plaintiff's predecessor was the holder of a permanent tenure in a permanently settled area, and this is not contested, and the lease granted is a permanent mukarrari lease, and, therefore, the transaction of leasing this property falls within Sec. 179. That Section makes it clear that with regard to this particular form of lease granted by a particular form of tenure-holder the provisions of the Act will not prevent the parties agreeing to what terms they think proper. In short, the Section permits the parties in this particular form of transaction to contract out of the provisions of the Act. Mr. Mitter's argument has been that as the other earlier Section to which I have referred, prohibit ejectment for non-payment of rent, Sec. 179 must be read so as not to conflict with the earlier Sections. S. 179 is by its terms an exception to the law as laid down in the earlier Sections, and that being so, any lease made in accordance with its provisions is void. This point was expressly considered by a Full Bench of this Court in 13 Pat 231.[1] This Bench is bound by the Full Bench decision, and that ends the matter. In my judgment the parties to this particular transaction were at liberty to make their own terms whether such terms were consistent or not with the general provisions of the Bihar Tenancy Act. They were fully entitled to agree that the landlord should have a right to re-enter on non-payment of rent, and, therefore, the clause is perfectly valid and can be enforced by a suit at law.

In my judgment the lower Appellate Court was right in holding that this was a contract which was valid under the Bihar Tenancy Act and which could be enforced. There were three consecutive instalments of rent in arrear, and that being so, the plaintiff was entitled to re-enter and take possession of the land. The decrees granted by the Courts below were, in my view, right, and accordingly this appeal fails and is dismissed with costs.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal dismissed.*

1. Moinuddin Mirza v. Surendra Kumar Roy, (1934) 21 AIR Pat 153=147 I C 655 = 13 Pat 231 = 15 P L T 156 (F B).

A. I. R. 1940 Patna 142

ROWLAND AND CHATTERJI JJ.

Mazharul Haq and others — Appellants.

v.

Raghuber Singh and others — Respondents.

Appeal No. 71 of 1939, Decided on 16th August 1939, from appellate order of Dist. Judge, Saran, D/- 30th November 1938.

Civil P. C. (1908), O. 21, R. 22 — Death of judgment-debtor after issue of sale proclamation — Execution cannot be continued without bringing legal representatives on record — Fact that legal representatives entered appearance in execution proceedings does not obviate necessity of notice under O. 21, R. 22 before execution can continue.

Where in execution of a money decree after the issue of the sale proclamation the judgment-debtor dies, the decree-holder is not at liberty to proceed with the execution against a dead man. The execution proceedings cannot be continued against the estate of a dead person without bringing on the record his legal representatives; while substituting the legal representatives the Court should issue notice against them and their objections, whatever they may have to urge, should be heard before the execution proceedings can be further continued against them: *A I R 1936 Mad 205, Rel. on.*

[P 143 C 2; P 144 C 1]

And the fact that the legal representatives enter appearance and file objections will not obviate the necessity of the notice because their appearance is in their personal capacity as owners of property sought to be taken in execution of a decree not passed against them and they could not be held to be judgment-debtors until the decree-holder had obtained a substitution of their names in his execution petition: *A I R 1914 P C 129 and A I R 1932 Pat 199, Rel. on; AIR 1929 Pat 79, Disting.*

[P 144 C 2]

S. K. Mitra and M. Rahman — *for Appellants.*

S. M. Mullick, Jaleshwar Prasad and Thakur A. D. Sinha — *for Respondents.*

Chatterji J.—The respondents obtained a money decree against one Zafarullah. In execution of that decree in execution case No. 54 of 1935, Zafarullah was arrested. When brought to Court he intimated that he would file an application for adjudication as an insolvent and in accordance with the provisions of S. 55 (4), Civil P. C., one

Razaq Mian stood surety for him. In the surety bond Razaq hypothecated certain properties belonging to him. Zafarullah did file an application for insolvency, but it was dismissed by the District Judge. On appeal to the High Court, the order was confirmed. Soon after the disposal of that insolvency case by the District Judge, the decree-holder filed on 5th March 1937 an application for execution of the decree against Razaq, the surety. On 5th April 1937, notice under O. 21, R. 22 was issued on Razaq fixing 26th April 1937 for his appearance. On 26th April 1937, Razaq appeared and filed an objection mainly on the ground that the application for execution was not maintainable against him as the provisions of law had not been complied with. On the same day the Court issued a notice against Razaq calling upon him to produce the judgment-debtor and also to show cause why the execution should not proceed against him. On 22nd May 1937, the date fixed in the notice, Razaq neither produced the judgment-debtor nor shewed cause; but he filed an application for time and it appears that time was allowed and the case was adjourned to 12th June 1927.

On 12th June the Court issued an order of attachment of the properties mentioned in the security bond. In the meantime, the execution proceedings were stayed pending the disposal of the High Court appeal arising out of the insolvency proceeding. As the execution proceeding was stayed, Razaq did not want to proceed with his objection which was dismissed for non-prosecution on 21st September 1937. After the High Court appeal was disposed of, the decree-holder made an application to continue the execution proceeding which was allowed. On 4th May 1938, after the sale proclamation had been issued Razaq died. Thereafter, on 17th May 1938 his legal representatives appeared and filed an objection stating that the execution could not proceed against them. This objection was allowed by the Subordinate Judge on 24th June 1938. He held that there were certain irregularities in the execution proceeding and in face of them he would not continue the execution. Against that order the decree-holder filed an appeal to the District Judge who allowed it. He took the view that the liability of Razaq under the surety bond having been admittedly incurred, the decree-holder was entitled to proceed in execution against his properties. He further held that it was not necessary in the execution proceeding to substitute the heirs of Razaq or to issue any notice against them. Against this decision this miscellaneous second appeal has been preferred by the heirs of Razaq.

Three points are urged in this appeal; first, that the execution which was started on 5th March 1937 against Razaq was not maintainable; because the requisite notices were not served on him; second, that the decree-holder should have, after the death of Razaq, substituted his legal representatives under S. 50, Civil P. C., and issued notices against them under O. 21, R. 22; third, that the decree-holder could not proceed at the same time both against the surety and the judgment-debtor. In connexion with this last point, I ought to have mentioned that when the Subordinate Judge allowed the objection of these appellants, the decree-holder prayed for arrest of the judgment-debtor which was granted.

I will deal with the second point first. Indeed the execution proceeding had already reached the stage of the sale proclamation having been issued when Razaq died; but it by no means follows that the decree-holder was at liberty to proceed with the execution against a dead man. The learned District Judge seems to be of opinion that in the circumstances the execution proceeding can be continued without substituting the heirs of Razaq. I am unable to support this view of the law. Suppose, in an execution proceeding, the judgment-debtor dies after attachment and issue of sale proclamation and the property is sold without substituting his heirs, who in that case will exercise the statutory right conferred by O. 21, R. 89, Civil P. C., and make the necessary application? A dead man is on the record and his legal representatives may have no knowledge of the proceedings. On principle, I do not think the Court can sell the property of a dead man. I am therefore of opinion that the decree-holder before he could proceed with the execution should have substituted the heirs of Razaq. In this connexion reference may be made to the Full Bench decision of the Madras High Court in 59 Mad 461[1] where though the facts were dissimilar, the principle was laid down that execution proceeding could not be continued against the estate of a dead man without bringing on the record his legal representatives. What happened there was that after the sale proclamation the judgment-debtor

1. Kanchamalai Pathar v. Shahaji Rajah Sahib, (1936) 23 A I R Mad 205 = 162 I C 156 = 59 Mad 461=70 M L J 162 (F B).

died and the sale was held without substituting his legal representatives. Subsequently they made an application to set aside the sale. It was held by their Lordships that the sale was void and was liable to be set aside at the instance of the legal representatives. The proper order therefore to be passed in the present case is that the decree-holder should, in order that he may continue the execution proceeding, substitute in the place of deceased Razaq his legal representatives. While substituting them the Court should issue notice under O. 21, R. 22 against them, and their objections, whatever they may have to urge, should be heard before the execution proceeding can be further continued against them.

On behalf of the respondents, Mr. Jaleshwar Prasad contends that inasmuch as the legal representatives already entered appearance in the execution proceeding, there was no necessity of issuing a notice under O. 21, R. 22. He has relied on a decision of this Court in 7 Pat 790,[2] where a notice under O. 21, R. 22 was in fact issued but not served and the legal representatives entered appearance and filed objections. It was held that no fresh notice under O. 21, R. 22 was necessary. That case is quite distinguishable from the facts of the present case. It has been held by the Privy Council in 42 Cal 72[3] and also by this Court in 11 Pat 241[4] that the issue of a notice under O. 21, R. 22 unless the Court dispenses with it, is necessary to give jurisdiction to the Court to execute the decree.

In this view it is not necessary to deal with the other objections because when the legal representatives, the appellants, have been substituted and been served with notices they will be at liberty to urge their objections and they will be dealt with according to law. I would therefore allow the appeal, set aside the order of the District Judge and direct that the Subordinate Judge do proceed with the execution in accordance with law giving opportunity to the decree-holder to substitute in the place of the deceased Razaq his legal representatives, the present appellants. In the circumstances the parties should bear their own costs throughout. I may mention that the attachment that has already been effected of the properties of Razaq should continue so long as the present execution proceeding is to last.

Rowland J. — I agree. The case illustrates the difficulties that arise out of attempts to take short cuts in matters of procedure. The correct procedure for the initiation of proceedings against the surety was first to call on him to produce the judgment-debtor; next on his failure to do so to call on him to shew cause against forfeiture and execution; next on failure to shew cause to the satisfaction of the Court to obtain an order of the Court directing execution to proceed against the person and properties of the surety. The correct procedure after the death of Razaq was to substitute his heirs in the execution proceeding and obtain the leave of the Court to continue the execution against them; thereafter to serve them with notices under O. 21, R. 22 and on their appearance the Court after hearing and determining any objections that they might make, would permit or disallow the continuance of the execution. When the heirs of Razaq appeared in this case they seem to have appeared in their personal capacity as owners of property sought to be taken in execution of a decree not passed against them. They were not yet persons who had taken Razaq's place as judgment-debtors, a position which would not be theirs until the decree-holder had obtained substitution of their names in his execution petition. The Subordinate Judge's order seems to have been understood by the parties as meaning that the execution could not proceed against the heirs of Razaq though the point he had to decide was that the sale could not be held so long as no representative of Razaq was on the record. In that view he was certainly right and the District Judge was in error. Some colour is lent to the view of law taken by the District Judge by a decision in 47 Mad 63[5] where it seems to have been held that a sale of the effects of a deceased judgment-debtor was merely irregular and not illegal. But this decision was overruled by the Full Bench of the same Court in 59 Mad 461,[1] a decision based on the Privy Council authority in 42 Cal 72[3] which was interpreted in a similar sense in this Court in 11 Pat 241.[4] The view taken by the Full Bench of the Madras High

2. Fakhrul Islam v. Bhubaneshwari Kuer, (1929) 16 A I R Pat 79=117 I C 648=7 Pat 790.
3. Raghunath Das v. Sundar Das, (1914) 1 A I R P C 129=24 I C 304=42 Cal 72=41 I A 251 (P C).
4. Smith v. Kailash Chandra, (1932) 19 A I R Pat 199=138 I C 99=11 Pat 241=13 P L T 323.
5. Doraiswami v. Chidambaram Pillai, (1924) 11 A I R Mad 130=75 I C 46=47 Mad 63 = 45 M L J 413.

Court was that such a sale was void and not merely voidable. Such a sale cannot proceed.

When the execution case is properly constituted by bringing heirs of Razaq on the record, the time will come for them as his representatives to raise objections, if any, as to the result of the departure from the regular order of procedure in the matter of the initiation of execution proceedings against Razaq, and for the Court to consider those objections.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 145

ROWLAND J.

Janki Rai and others — Appellants.

v.

Maharaja Bahadur Ram Ran Bijaya Prasad Singh — Respondent.

Appeal No. 124 of 1939, Decided on 8th November 1939, from appellate order of Addl. Sub-Judge, Arrah, D/- 27th March 1939.

(a) Bihar Tenancy Act (8 of 1934), Sch. 3, Art. 6—Suit by sixteen annas proprietor for sixteen annas rents of two tenures recorded under different khewats held by different persons—Suit decreed separately in respect of each khewat for less than Rs. 500 — Execution in respect of either decree is governed by Art. 6.

A suit was instituted by sixteen annas proprietor for sixteen annas rents of two tenures recorded under different khewats held by different persons. The suit was decreed separately in respect of each of the khewats and separate decree for less than Rs. 500 was passed in respect of each khewat:

Held that as the decree-holder held two separate decrees each of them for amounts less than Rupees 500, execution in respect of either of them was governed by Art. 6, Sch. 3 : *34 Cal 298, A I R 1918 Cal 929 and A I R 1929 P C 171, Expl.*

[P 147 C 1]

(b) Civil P. C. (1908), O. 1, R. 9—Multifarious suit allowed to proceed and resulting in decree — Defect is considered to have been waived.

Under O. 1, R. 9 suits are not to be dismissed for misjoinder or non-joinder of parties and in case of misjoinder of causes of action the Court can in proper cases call on the plaintiff to amend his plaint by limiting the relief claimed to what he is entitled to in respect of one cause of action so as to avoid embarrassment. When this procedure is followed the plaintiff can of course bring a separate suit in respect of the other cause or causes of action. But when this course is not taken nothing turns on the fact that it might have been taken. Once a multifarious suit has been allowed to proceed and has resulted in a decree the defect is considered to have been waived and is irrelevant.

[P 147 C 1]

(c) Bihar Tenancy Act (8 of 1934), Sch. 3, Art. 6—"Decree under this Act."

It is not necessary that a suit should at its institution be framed in accordance with the provisions of the Bihar Tenancy Act in order to result in a decree under that Act : *A I R 1926 Cal 545, Disting.*

[P 147 C 1]

D. N. Varma — *for Appellants.*

Mahabir Prasad and A. B. N. Sinha — *for Respondent.*

Judgment. — This is an appeal by the judgment-debtors against whom execution was taken. In the Munsif's Court they objected that the execution was barred by Art. 6 of Sch. 3, Bihar Tenancy Act, and this objection succeeded, the application to execute having been presented more than three years after the passing of the decree. On appeal the Subordinate Judge thought that limitation was governed not by Art. 6 of the said Schedule but by Art. 182 of the Schedule to the Limitation Act. He, on this view, considered that the question whether the execution was time barred would depend on whether there had been an intermediate application to execute the decree at a date which would save limitation under Article 182.

Against that order this appeal is presented, and it is contended that the limitation for this application to execute the decree is that prescribed by Art. 6, Sch. 3 to the Bihar Tenancy Act which cannot be extended beyond the period of three years in consequence of the presentation of an intermediate application to execute the decree. It is necessary to state the particulars of the suit and of the decree passed. The plaintiff, who is the sixteen annas proprietor of the estate, instituted a suit claiming the sixteen annas rents of two tenures for four years. These tenures are those recorded in khewat Nos. 2 and 4 of the record of rights, khewat No. 2 bearing an annual rent of about Rs. 47 and khewat No. 4 the annual rent of Rs. 69. The persons interested in khewat No. 2 were not identical with those interested in khewat No. 4, for the holders of khewat No. 2 were defendants 1 to 12 of the suit and the holders of khewat No. 4 were defendants 1 to 9 only. There was also a claim in respect of some jagir and balagan lands. The suit was defended and an objection taken on the ground of multifariousness. By compromise between the parties it was settled that the suit be dismissed as regards the jagir and other miscellaneous items claimed but be decreed separately in respect of each of the two khewats with the result that the decree-holder was given a decree for Rs. 204-4-6 against the defendants 1 to 12 in respect

of khewat No. 2 and another decree for Rs. 309-11-9 against defendants 1 to 9 in respect of khewat No. 4. The Munsif thought that the judgment creditor should be deemed to hold two separate decrees, each of them for amounts less than Rs. 500, so that Art. 6 was applicable. The Subordinate Judge thought that the decrees were money decrees and not rent decrees and also that they are to be treated as a single decree. In my opinion, the Subordinate Judge was in error in both these points. He has drawn a wrong inference from 11 C W N 497=34 Cal 298,[1] the true effect of which decision can best be gathered by reading it in connexion with subsequent decisions of the same High Court and of the Privy Council in 36 I C 398=26 C L J 118[2] and 56 I A 238=10 P L T 829,[3] respectively. The case in 34 Cal 298[1] decided this, that if a single decree is obtained against more tenancies than one, and if those tenancies are put up to sale in execution of such a decree, the sale will not carry the special consequences which the Tenancy Act attaches to the sale of a tenancy in execution of a decree for its own arrears. The consequences of the sale will be as against incumbrancers nothing more than the consequences of a sale in execution of a money decree. The Subordinate Judge appears to have read into this decision more than the Judges decided.

In the next case, 36 I C 398,[2] a single suit had been instituted by the plaintiffs for rent claimed from the defendants in respect of three distinct tenancies held under three separate contracts. It is clear that in such a suit if a decree was obtained for the entire sum due, such decree could not be executed as a decree for rent against any of the tenures. This is in accordance with what was settled by the case I have previously cited. So, at the instance of the plaintiffs a decree was drawn up which specified the amount realizable by the sale of each of the three tenancies respectively. It was held that the position resulting was precisely the same as if the plaintiffs had brought three distinct suits for rent against the defendants, one in respect of each tenancy, and it was said to make no difference that instead of being drawn up on three different sheets of paper the three separate decrees had been drawn up on one sheet of paper. Each decree, it was said, carried the consequence that it could be executed as a rent decree against the tenancy in default, and it was further held that for the purpose of limitation also it was to be considered that there were three separate decrees. In the Privy Council case in 56 I A 238,[3] their Lordships had to consider the effect of a sale of a number of separate tenures in execution of a single decree with particular reference to the right of the auction-purchaser to annul incumbrances consisting of sub-tenures. Their Lordships held that it could not be said that each of the tenures had been sold for its own arrears, that the sub-tenure-holders were entitled each to save from sale the tenure under which he held by paying up the arrears of that tenure, and it would defeat the objects of the Act if several tenures could be lumped together in one order for sale. Thus, in deciding the case before them the decision of their Lordships was in agreement with that in 34 Cal 298[1] and other decisions of the Calcutta High Court. But their Lordships went on to comment on a view that had been expressed in this country that when a plaintiff has joined in one suit claims in respect of more than one tenure such a suit cannot result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure. Their Lordships did not accept this view and pointed out that there was nothing in the Code of Civil Procedure or the Tenancy Act to prevent the decrees and orders from being so moulded as to enable their provisions to apply distributively to the separate holdings in respect of which the suit is brought. "It would be a misfortune," said their Lordships,

> to find a system of procedure so rigid as to lead to an illogical and inconvenient result and their Lordships are not prepared to hold that this difficulty exists. But obviously if the original suit is brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately.

Reading these three decisions together, it is clear that the result of what was done in the original suit was to bring into existence two separate decrees, one against defendants 1 to 12 for the rent due to the plaintiff in respect of khewat No. 2 and another against defendants 1 to 9 for the rent due in respect of khewat No. 4. Each

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1. Hridoy Nath Das v. Krishna Prasad, (1907) 34 Cal 298=11 C W N 497=6 C L J 153.
2. Dhirendra Nath v. Nischintapore Co., (1918) 5 A I R Cal 929=36 I C 398=26 C L J 118=22 C W N 192.
3. Prafulla Nath v. Satya Bhusan, (1929) 16 A I R P C 171=119 I C 618=56 I A 238=10 P L T 829 (P C).

of these decrees was executable as a rent decree in accordance with the provisions of the Tenancy Act; each of them is for a sum of less than Rs. 500 ; and I have no doubt that execution of either of them is governed by Art. 6 of Sch. III to the Tenancy Act. It has been argued for the respondent that the nature of the decree depends on the frame of the suit and that this having been a suit for the rent of more than one tenure was a suit in which only a money decree could be passed. Indeed, it has been said that the suit was multifarious and was liable to be dismissed on this ground. As to that I must observe that under O. 1 R. 9, Civil P. C., suits are not to be dismissed for misjoinder or nonjoinder of parties and that in case of misjoinder of causes of action the Court can in proper cases call on the plaintiff to amend his plaint by limiting the relief claimed to what he is entitled to in respect of one cause of action so as to avoid embarrassment. When this procedure is followed the plaintiff can of course bring a separate suit in respect of the other cause or causes of action. But when this course was not taken nothing turns on the fact that it might have been taken. Once a multifarious suit has been allowed to proceed and has resulted in a decree, the defect is considered to have been waived and is irrelevant.

Mr. Mahabir Prasad also invited me to hold that unless a suit was at its institution framed in accordance with the provisions of the Bengal Tenancy Act, it could not result in a decree under that Act. He relied on 91 I C 478[4] but the decision was on facts very different from those before me and does not seem to be applicable here. If it were applicable, I would point out that it was pronounced before the decision of the Judicial Committee of the Privy Council in 56 I A 238,[3] and in so far as it might lead to results at variance with the decision of their Lordships it could not be regarded as good law. The decision of the Munsif was correct and that of the Subordinate Judge erroneous. The appeal is allowed and the decision of the Munsif restored. The appellants will have their costs.

D.S./R.K. *Appeal allowed.*

4. Mahendra Nath v. Ashutosh Pradhan, (1926) 13 A I R Cal 545=91 I C 478.

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* A. I. R. 1940 Patna 147

HARRIES C. J. AND FAZL ALI J.

Sarjuprasad and another —
Judgment-debtors — Appellants.

v.

Deoki Singh and others —
Decree-holders — Respondents.

Second Appeal No. 85 of 1939, Decided on 13th September 1939, from appellate decree of Dist. Judge, Gaya, D/- 21-12-1938.

*** Limitation Act (1908), Art. 182, Expln. 1 — Partition decree allotting certain properties in severalty to each of parties but reserving certain portion as joint—Such decree is joint—Application for execution by one party enures for benefit of all.**

Where a partition decree has allotted certain properties in severalty to each of the parties but has reserved a portion as joint between the parties, such decree must be regarded as joint decree within the meaning of Expln. 1 of Art. 182. This being so, an application for execution by one of the interested parties brought within three years of the decree enures for the benefit of all the parties and a subsequent application for execution by another party within three years of the previous application is not barred though it is more than three years from the date of the decree : *A I R 1931 Cal 581 Disting ; AIR 1932 Cal 869, Foll. ; AIR 1933 Mad 789, Rel. on.* [P 148 C 2 ; P 149 C 1]

Rajkishore Prasad — *for Appellants.*

K. V. Varma — *for Respondents.*

Harries C. J. — This is a second appeal from an order of the learned District Judge of Gaya in an execution matter. The decree-holders, who are respondents in this appeal, brought proceedings claiming partition of an estate. A preliminary decree was passed which was eventually made final. Four takhtas were prepared and allotted to the respective parties and one plot of land was left joint between the parties. The date of the final decree in this partition suit is 26th October 1923. On 22nd December 1936, the decree-holder-respondents filed an execution application praying for delivery of possession of the takhta allotted to them. It is to be observed that this application was made more than three years after the date of the partition decree; but it is common ground that during the interval two of the interested parties had made applications in execution and had obtained possession of their respective takhtas. If these two applications enure for the benefit of all the parties, then it has to be conceded that the application of the decree-holder-respondents was within time.

In the execution case filed on 22nd December 1936, the decree-holders impleaded all the parties to the partition suit, but only the present appellants raised an objection.

On 27th September 1937, the appellant Sarju Prasad filed an objection praying that the execution case be dismissed on the ground that it was barred by limitation. It is to be observed that in this objection the appellant Sarju Prasad impleaded only the present decree-holder-respondents. He did not implead the other parties to the partition proceedings. This objection was treated as separate miscellaneous case and numbered Miscellaneous Case No. 99 of 1937, and in due course, this miscellaneous case was heard and determined by the learned Subordinate Judge. He held that the previous application in execution did not enure for the benefit of the decree-holder-respondents, and accordingly he came to the conclusion that their application for execution was barred by limitation in that it was presented beyond the period of three years from the date of the partition decree. On appeal the learned District Judge was of opinion that the execution application was not barred by time and reversed the decision of the Court below. It is against the order of the learned District Judge that the present second appeal has been filed.

In the first place, it has been argued that the application for execution made by the decree-holder was barred by time. Counsel for the appellants has urged that the two previous applications made by other parties could not be regarded as applications made by holders of a joint decree and thus would not enure for the benefit of the decree-holder-respondents. Counsel has relied upon the case in 35 C W N 448.[1] In that case it was held that an application by one of several parties to a partition decree to be put in possession of land allotted to him in severalty is not an application by one of a number of joint decree-holders, and thus such an application would not prevent time running against other parties to the partition decree. It must be remembered that in 35 C W N 448[1] no property had been left joint by the partition decree. The facts of the present case cannot be distinguished from the facts in 36 C W N 772.[2] In this latter case the partition decree allotted certain properties in severalty to each of the parties but reserved a certain property as ijmali between the plaintiff and the defendants; the plaintiff applied for execution and received part satisfaction. Subsequently some of the defendants applied for execution beyond three years of the date of the decree but within three years of the plaintiff's application for execution. A Bench held that the decree was passed jointly in favour of the plaintiff and the defendants within the meaning of Expln. 1 of Art. 182, Limitation Act, and the defendants' application having been made within three years of the plaintiff's application for execution, it was not barred by time. No distinction whatsoever can be drawn between the present case and the case in 36 C W N 772,[2] and in my judgment this latter Calcutta case should be followed. Expln. 1 to Article 182, Limitation Act, is in these terms:

> Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in cl. 5 of this Article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

The question to be decided here is whether the decree passed in this partition suit was a joint decree or not. It certainly gave the plaintiffs and defendants joint possession of part of the property, though it also gave them separate possession of other properties. The decree cannot be regarded as both a joint decree and a several decree. It cannot be regarded as though there is one decree for joint possession in favour of the plaintiffs and the defendants and another decree for separate possession of their respective allotments. In 36 C W N 772[2] at page 773, Rankin, C. J. observed:

> It seems to me that the decree before us is certainly one passed jointly in favour of the plaintiff and the present respondents so far as the kalikhola and the road are concerned, and unless the decree is for the present purpose to be regarded as though there was one decree for joint possession in favour of the respondents and the plaintiff and another and different decree for separate possession of their allotments by the respondents, I think this appeal must fail.

He held that the decree in that case which was very similar to the decree in the present case, was a joint decree and could not be regarded both as a joint decree and a decree held by each of the parties in severalty. The view expressed by the Calcutta High Court has been approved of in the case of 145 I C 968.[3] In my judgment

1. Ram Nath Rai v. Harendra Kumar Rai, (1931) 18 A I R Cal 581=131 I C 860=58 Cal 1102=35 C W N 448=53 C L J 225.
2. Man Mohan Gope v. Madhusudan Gope, (1932) 19 AIR Cal 869=139 I C 786=56 C L J 10=36 C W N 772.
3. Muhammad Sahoob Levai v. Mayamad Ammal, (1933) 20 A I R Mad 789=145 I C 968=65 M L J 582.

the present decree must be regarded as a joint decree, and that being so, the previous applications for execution must be regarded as applications which would take effect in favour of all the parties. It is common ground that the present application was made within three years of the previous execution application, and that being so, the application was not barred by Art. 182, Limitation Act.

In the second place, it has been argued that the appeal before the learned District Judge was bound to fail for want of parties. The learned District Judge held that there was no defect, but it has been strenuously urged before us that the learned District Judge could not decide the question of limitation in the absence of all the parties to the partition decree. The decree-holders impleaded all the parties to the partition decree in their execution application but as I have stated only one of them, namely the appellant, raised an objection. He filed an objection impleading the decree-holder-respondents only, and this objection was treated as a separate miscellaneous case. What the Subordinate Judge decided was a proceeding between the appellant and the decree-holders and having decided it in favour of the appellant the decree-holders were fully entitled, in my view, to appeal to the District Judge and implead only the appellant as respondent to the appeal. The appellant by his objection had invited the Court to decide the matter between him and the decree-holders, and that being so, he cannot now raise an objection that the decree-holders should have impleaded other parties who were not made parties by the appellant himself in Miscellaneous Case No. 99 of 1937. The matter was one purely between the parties to this appeal, and that being so, the respondents were not bound to implead the other parties to the partition decree.

It has been contended that a decision of the Court on the question of limitation binds all the other parties to the execution decree. Clearly, in this case, the appellant only invited a decision between him and the decree-holder, and it is unnecessary for us to consider at this stage what the possible effect of any finding on limitation might be. It is sufficient to say that the order under appeal was an order made between the parties to this appeal, and that being so, it cannot be said that the appeal before the learned District Judge could not be sustained by reason of failure to join other persons who might be interested. The appellant himself limited the scope of the proceedings and he cannot object to the manner in which the appeal was preferred in the Court of the learned District Judge. In my view, there is no merit whatsoever in this objection. For the reasons which I have given, I hold that this appeal fails and would accordingly dismiss it with costs.

Fazl Ali J.—I entirely agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 149

ROWLAND AND CHATTERJI JJ.

Nathuni Prasad and others —

Appellants.

v.

Firm Radha Kishun Dutt Rai —

Respondent.

Misc. Appeal No. 55 of 1939, Decided on 29th August 1939, from order of Addl. Dist. Judge, Saran, D/- 3rd December 1938.

(a) Hindu Law—Debts—Father—Son's pious obligation to pay father's debts ceases by discharge of insolvent father.

The son's pious obligation arises on account of the existence of father's debt. If the debt itself is extinguished, e. g. by order of discharge of the father, the very foundation of the pious obligation is gone. [P 150 C 2]

(b) Civil P. C. (1908), O. 21, R. 50—Applicability.

Order 21, R. 50 applies even to a joint Hindu family firm consisting of father and son : *A I R 1930 Pat 205, Rel. on.* [P 151 C 1]

(c) Limitation Act (1908), S. 15 — Stay of execution during insolvency of one judgment-debtor does not bar execution against others.

Where a decree to be executed is against several judgment-debtors and the execution proceedings are stayed during the insolvency proceedings against one of them, the decree-holder is entitled to execute his decree against the others and cannot claim the benefit of S. 15, Limitation Act. [P 151 C 1, 2]

B. N. Mitter and Jaleshwar Prasad —

for Appellants.

Girindra Nath Mukherji —

for Respondent.

Chatterji J.—This appeal arises out of an execution proceeding. The decree under execution which is a money decree was obtained by the respondent on 12th December 1925, in the Munsif's Court at Benares against a firm named Ajodhyaram Nandji. This firm, according to the decree-holder, was a joint Hindu family firm consisting of Nandji and his sons and nephew: the nephew has since died leaving a widow. In the suit Nandji was the only person who was served with the summons. The decree-holder got the decree transferred to the

Munsif's Court at Siwan and presented in that Court an application for execution on 6th February 1926, which was registered as execution case No. 36 of 1926. This execution was directed against the firm. On 24th April 1926, Nandji filed an application for insolvency; on the same day he made an application in the execution case praying for stay of further proceedings till the disposal of the insolvency case. The prayer was allowed by order dated 3rd May 1926. It appears however that no injunction was passed in the insolvency case staying the execution. Nandji was adjudicated an insolvent on 25th May 1926. The execution case was ultimately struck off on 31st January 1927, as neither party took any steps. The insolvency case was finally disposed of on 3rd February 1936, when Nandji was granted discharge.

In the course of the insolvency proceedings the decree-holder proved his debt and made attempts to realize it by sale of the joint family properties of Nandji and his sons and nephew. He succeeded in selling the interest of Nandji alone in those properties as the sons and nephew of the latter took the objection that their interest could not be sold by the receiver. This objection was accepted by the Court by its final order, dated 3rd February 1936. The decree-holder thereafter filed the present application for execution on 23rd December 1937, for recovery of the decretal amount less what was realized by sale of Nandji's share in the insolvency proceedings. In the application in the column of judgment-debtors are mentioned, besides Nandji, his four sons and three widows of the family, one of whom is the brother's widow of Nandji. The four sons of Nandji and his brother's widow came up with objections under S. 47, Civil P. C., alleging that they were not judgment-debtors under the decree sought to be executed, that the execution was barred by limitation and that they were not liable for the debt of Nandji. The learned Munsif substantially accepted these objections and dismissed the execution case. On appeal the learned District Judge has reversed his decision and ordered execution to proceed. He has found that the objectors are not judgment-debtors, but they are liable for the payment of the decree against Nandji to the extent of their shares in the joint family property. He has also overruled the plea of limitation. This appeal has been preferred by the four sons and the brother's widow (of Nandji).

On behalf of the appellants, three points have been urged by Mr. Mitter. (1) That Nandji's debt was extinguished by reason of the provisions of S. 44 (2), Provincial Insolvency Act; (2) that having regard to the provisions of O. 21, R. 50, Civil P. C., execution cannot be granted against the objectors because they never appeared in the suit as partners, nor were they individually served as such with summons in the suit; and (3) that the execution is barred by limitation both under S. 48, Civil P. C., and under Art. 182 of Sch. 1, Limitation Act. In my opinion all these contentions must prevail. As regards the first contention, there can be no doubt that if the decree was against Nandji alone, the effect of the order of discharge was to extinguish the debt. S. 44 (2), Provincial Insolvency Act, is decisive on the point. It lays down that "save as otherwise provided by sub-s. (1) an order of discharge shall release the insolvent from debts provable under the Act." For the present purpose the provisions of sub-s. (1) are not relevant and need not be referred to. Mr. Mukherji on behalf of the respondent suggests that though by virtue of the provisions of S. 44 (2), Provincial Insolvency Act, the debt payable by Nandji might be extinguished, the sons' pious obligation nevertheless remained. This is a proposition which it is difficult to understand. The sons' pious obligation arises on account of the existence of the father's debt. If the debt itself is extinguished, the very foundation of the pious obligation is gone.

Mr. Mukherji's main contention however is that the decree was not against Nandji alone but against the joint family firm, in other words, against the other co-parceners as well. But neither of the Courts below has found as a fact that the firm Ajodhyaram Nandji is the joint family business of Nandji and his co-parceners. The sons specifically denied that it was their joint family business. The learned District Judge seems to have accepted the position that the judgment-debtor under the decree was Nandji and Nandji alone. If however it is assumed that Nandji's sons and nephew also were judgment-debtors under the decree, the institution and continuance of the insolvency proceedings did in no way prevent the decree-holder from proceeding to execute the decree as against them. Consequently, the present execution is hopelessly out of time. It is contended by Mr. Mukherji that in the insolvency proceedings

the decree-holder was throughout attempting to realize his decree by sale of the entire joint family properties and therefore so long as those proceedings were in progress, it was not open to him to take out execution. But in the insolvency proceedings the only remedy which the decree-holder could, and did pursue was to realize the debt so far as it was payable by the insolvent. The liability of the other judgment-debtors in respect of the decree was not in any way affected by the insolvency proceedings.

As regards the second contention, I do not see how the decree-holder can escape from the clear provisions of O. 21, R. 50, Civil P. C. That rule provides that where a decree has been passed against a firm, execution may be granted (a) against any property of the partnership; (b) against any person who has appeared in his own name under R. 6, or R. 7 of O. 30 or who was admitted on the pleadings that he is, or who has been adjudged to be, a partner; (c) against any person who has been individually served as a partner with a summons and has failed to appear.

It is clear that execution cannot be granted against the objectors, unless it is shown that the requirements of cls. (b) and (c) have been satisfied. There is nothing on the record to show that this has been done. Consequently execution cannot proceed against the objectors. It is contended by Mr. Mukherji that O. 21, R. 50 does not apply to a joint Hindu family firm. But here again he is assuming that the firm Ajodhyaram Nandji is a joint family firm which has not been found as a fact. However assuming that it is a joint family firm, there is no reason why the provisions of O. 21, R. 50, should not be applied. In A I R 1930 Pat 205[1] a similar question came up for decision before a Division Bench of this Court. There a joint Hindu family firm consisting of father and son was sued and the father alone being served with summons, a decree was obtained against the firm. Execution was taken out against the father and son. The son raised the objection that execution could not be granted against him in view of O. 21, R. 50. This objection was upheld by this Court.

The objection as to limitation is sought to be met on the ground that by reason of the order dated 3rd May 1926, staying execution, the decree-holder would, under S. 15, Limitation Act, be entitled to exclude the period from that date till 3rd February 1936, when the insolvency case was finally disposed of. But the effect of the order staying execution was to prevent the decree-holder from executing the decree as against Nandji, the insolvent. The decree-holder was still at liberty to execute the decree against the present objectors. As against them the order dated 3rd May 1926, did not interpose any bar so as to stop the running of time. The present execution therefore is barred both under Art. 182 of Sch. 1, Limitation Act, and under S. 48, Civil P.C. In the view I take it is unnecessary to decide the question that was raised before us as to whether S. 48, Civil P. C. is controlled by S. 15, Limitation Act. The result is that the appeal should be allowed and the execution case be dismissed. The appellants will be entitled to costs throughout: hearing fee Rs. 16 in each Court.

Rowland J.—I agree.

G.N./R.K. *Appeal allowed.*

1. Satchidanand v. Prayag Sah Sabeh Ram, (1930) 17 A I R Pat 205=127 I C 573.

A. I. R. 1940 Patna 151

HARRIES C. J. AND FAZL ALI J.

Ganesh Mahto — Appellant.

v.

Bhawan Mahto and another — Respondents.

Appeal No. 936 of 1937, Decided on 14th September 1939, from decision of Sub-Judge, First Court, Chapra, D/- 26th July 1937.

Limitation Act (1908), Art. 99 — 'Date of payment' must be determined with reference to circumstances of each case — Date of payment held date on which payment order was made over to decree-holder's pleader.

It is not safe to lay down any rigid formula for the purpose of determining the date of payment as the question of payment being a question of fact must be determined with reference to the circumstances of each case. [P 153 C 1]

In execution of a joint decree for rent against *A* and *B*, the decree-holder obtained from the execution Court an order for the attachment of certain sum lying to the credit of *A* in another Court. The execution Court directed the attached money to be transferred to the credit of the decree-holder. Subsequently, payment order was made over to the decree-holder's pleader by the Court in which the sum was lying to the credit of *A*. *A* brought a suit against *B* for contribution :

Held that the date of payment for the purpose of Art. 99 was the date when payment order was made to the decree-holder's pleader : *A I R 1928 Cal 361 and A I R 1936 Mad 782, Disting.* [P 153 C 1]

Hareshwar Prasad Sinha — *for Appellant.*

Harnarayan Prasad and B. B. Sahay — *for Respondents.*

Fazl Ali J. — This is an appeal by the plaintiff in a suit for contribution which was decreed by the trial Court but has been dismissed on appeal by the lower Appellate Court on the ground of limitation. The only question to be decided in this Court is whether the decision of the lower Appellate Court as to limitation is correct. It appears that one Jitan Mahto had a joint decree for rent against the plaintiff and defendants, and in execution of that decree he obtained from the third Munsif of Chapra, to whom he had applied for the execution of the decree, an order for the attachment of a sum of Rs. 163-2-6, which had been paid into the Court of the Fourth Munsif by one Parmeshwar Mahto, a judgment-debtor of the plaintiff, to the credit of the latter. On 30th July the original order of attachment was modified by the Third Munsif as follows :

> Decree-holder is allowed to withdraw Rs. 40-8-3 only out of Rs. 163-2-6 and in respect of the balance amount, the attachment is withdrawn. Inform the Court concerned accordingly. Put up on the date fixed for further orders.

Subsequently on 20th August, the same learned Munsif passed the following order :

> Let the attached money be transferred to the credit of decree-holder and send the payment order to the Court concerned and put up on 2nd September 1932 for orders.

On 3rd September 1932, the payment order was made over by the Fourth Munsif to the decree-holder's pleader. Article 99, Limitation Act, which is undoubtedly the proper Article applicable to the present suit provides that the period of limitation in a suit for contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, is three years from the date of the payment in excess of the plaintiff's own share. Thus the real question to be decided in this appeal is what was "the date of the payment" in the present case. The plaintiff's contention is that the date of the payment was 3rd September 1932, when the payment order was handed over by the Fourth Munsif who held the plaintiff's money, to the decree-holder's pleader. On the other hand it is contended on behalf of the defendants that the date of the payment was 20th August 1932, because on that date the Third Munsif directed that the attached money be transferred to the credit of the decree-holder and the payment order sent to the Court concerned. The learned Subordinate Judge whose judgment is under appeal has held that limitation began to run from 20th August, and as the present suit was brought more than three years after this date, it was barred by time.

In my opinion the view expressed by the learned Subordinate Judge is not correct. It is to be remembered that the attached money was in deposit in the Court of the Fourth Munsif and that before it was paid to Jitan Mahto (the decree-holder under the rent decree), a payment order had to be sent to him by the Third Munsif who had issued the order of attachment. All that happened on 20th August, was that the Third Munsif directed his office to note the transfer of the attached money to the decree-holder's account and send the payment order to the Court of the Fourth Munsif. There is nothing in the judgments of either of the two Courts below to show when the payment order was actually prepared and when it was actually sent to the Fourth Munsif, but both the Courts below are agreed that it was not until 3rd September, that the payment order was actually issued to the decree-holder's pleader. It further appears that the Third Munsif did not record satisfaction of Jitan Mahto's decree until 16th September, and presumably he did so only after he received intimation that money had been withdrawn by Jitan Mahto. In my judgment the payment to the decree-holder cannot on these facts be deemed to have been made prior to 3rd September 1932.

The learned advocate for the respondents has, in support of his contention that the payment in the present case must be deemed to have been made on 20th August, referred us to 56 Cal 192[1] and A I R 1936 Mad 782.[2] The facts of both these cases however are easily distinguishable from those of the present case. In 56 Cal 192[1] the landlords of a certain taluk had obtained a decree for rent against the plaintiff and defendants who were co-sharers in that taluk and when the property was advertised for sale, the plaintiff deposited the entire decretal amount in Court, which was accepted by the Court and the landlord's decree was recorded as satisfied. The deposit was made by the plaintiff in Court on 4th February 1920, and the money was actually withdrawn by the decree-holders on 14th February 1920. On these facts it

1. Gahar Ali v. Abdul Owahab, (1928) 15 A I R Cal 361=114 I C 134=56 Cal 192=49 C L J 5=32 C W N 1030.
2. Meghavarnam Naidu v. Mahamad Mohideen Sahib, (1936) 23 A I R Mad 782.

was held in a suit for contribution brought by the plaintiff against the defendants that the period of limitation for the suit began to run from the date on which the money was appropriated by the Court in payment of the decree-holder's dues and not from the date when the decree-holder withdrew the money. In the second case the suit for contribution was based on a payment made by the plaintiffs, who owned lands in a holding of which defendants 2 to 4 were also pattadars, in order to save the holding from sale for arrears of rent due to defendant No. 1 ; and it was held that the period of limitation for the suit began to run from the date on which the plaintiff had deposited the amount in question for saving the property.

It is to be noted that both these cases were cases of voluntary payment, and as such, are clearly distinguishable from the present case, where the alleged payment was made under compulsion. It is contended that the test as to the date of payment is as laid down in 56 Cal 192[1], to find out on what date the plaintiff lost dominion over the money which he paid. But in my opinion that is not a test which can be applied to every case, and it is certainly not the correct test so far as the present case is concerned, because here the plaintiff may well be said to have lost control over the money on the date the money was attached by the Third Munsif at the instance of the decree-holder. It will be perhaps more accurate to say that the true test is to find out when the money ceased to become the money of the plaintiff, but it is not safe to lay down any rigid formulla for the purpose of determining the date of payment, as the question of payment being a question of fact must be determined with reference to the circumstances of each case. In my opinion it is impossible to hold on the facts of the present case that time could begin to run against the plaintiff prior to 3rd September and as the present suit was brought within three years of that date, I am unable to hold that it was barred by limitation. I would therefore allow this appeal with costs, set aside the judgment and decree of the lower Appellate Court and decree the plaintiff's claim with interest at six per cent. from 3rd September 1932 until realization.

Harries C. J. — I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 153

FAZL ALI AND DHAVLE JJ.

Lal Tirathnath Sahi Deo and others — *Plaintiffs* — Appellants.

v.

Lal Mritunjoya Nath Sahi Deo and others — *Defendants*— Respondents.

Appeal No. 891 of 1934, Decided on 25th July 1939, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 28th April 1934.

Chota Nagpur Encumbered Estates Act (7 of 1876), Sec. 21-B — Suit by holder — Same manager representing plaintiff and defendant — Suit not sham contest but properly defended — Decree is not nullity.

Even if in a suit by a holder the same manager represents both the plaintiff and the defendant, the decree passed in such suit cannot be a nullity if the proceedings in the suit did not represent a mere sham contest and the suit was properly defended : *25 Bom 606, Disting.* [P 154 C 2; P 155 C 1]

Govt. Pleader and K. K. Banerjee — *for Appellants.*

N. N. Sen — *for Respondents.*

Fazl Ali J. — This appeal arises out of a suit in which the plaintiffs claimed partition of two annas share in a tenure known as the Badla estate. The suit was decreed by the trial Court but dismissed on appeal by the Judicial Commissioner of Chota Nagpur. Hence this second appeal by the plaintiffs.

It appears that on 10th June 1873 one Lal Gagan Nath Sahi Deo, who owned a ten annas share in the estate, executed two mukarrari deeds, one in respect of four annas share in favour of the plaintiffs' father and another in respect of three annas share in favour of certain other persons. Between the years 1917 and 1919 two suits were brought by the two sets of mukarraridars against defendants 1 and 2 (who alone disputed their title) for a declation of their respective titles under the two mukarrari pattas and for possession, and both the suits were ultimately decreed. The plaintiffs' suit, which was Title suit No. 35 of 1919, was decreed in respect of only two annas share in the estate, and it is not disputed that if the decree in that suit is held to be good and valid, the present suit must succeed. As to the legal effect of the decree however the two Courts below have expressed conflicting views. The trial Court has held that the decree was a perfectly valid one and both the parties were bound by it. The lower Appellate Court has on the other hand expressed the view that the decree is a nullity and the plaintiffs have therefore no subsisting title in the property

sought to be partitioned. One of the main questions to be determined in this appeal is which of the two views is correct.

It appears that the plaintiffs' estate which is known as the Mesmano estate was placed under a manager under the provisions of the Encumbered Estates Act in the year 1906. In 1919 the estate of defendants 1 and 2 also, who are khorposhdars claiming ten annas interest in the Badla estate in spite of the decree passed against them in the suit brought on behalf of the plaintiffs in 1919, (there is no dispute with regard to the remaining six annas which is admittedly owned by defendants 4 to 10) was brought under the protection of the Encumbered Estates Act. Thus, when Title Suit No. 35 was instituted on behalf of the plaintiffs in 1919 the estate of the plaintiffs as well as defendants 1 and 2 was in the hands of the common manager named Mr. Durham Waite. Now, S. 21-B, Chota Nagpur Encumbered Estates Act (7 of 1876) provides firstly that

> every suit or appeal by the holder shall be instituted in his name by the manager;

and secondly that

> no person other than the manager shall be ordered to sue or to be sued as next friend or guardian, or be named as guardian of the holder for a pending suit.

In view of these provisions Mr. Durham Waite had to represent both the plaintiffs and the contesting defendants as their next friend. The High Court in disposing of the appeal in Title Suit No. 35 noticed this anomaly and observed as follows :

> If the plaint is accepted to be properly verified the written statement must be held to be not verified in accordance with law. The written statement is a later document wherein the facts stated in the plaint have been contradicted. Therefore it becomes impossible to act upon the plaint also. The law requires that the pleadings must be verified by a person who either knows personally, or has reliable information as to the truth of the facts stated therein. In this view the pleadings become illegal in this case. But as the legal representatives of the parties do not press this matter and want a decision on the appeal and as the questions involved in the appeal are almost the same as those that arose in F. A. No. 65 of 1919 which we have just disposed of where the defendant was not under the Court of Wards, we do not want to throw out the pleadings. We however doubt if the defendants when released from the Court of Wards will not challenge the conduct of the case. This matter should be brought to the notice of the manager and the authorities concerned.

Referring to these observations, the learned Judicial Commissioner says in his judgment :

> It seems to me clear therefore that in view of these observations of the Hon'ble High Court and of the objections taken by the defendants in this present suit, the decree of 1919 in the plaintiffs' favour cannot be held to be binding on the defendants. Further discussion of the other issues raised in this suit is therefore unnecessary.

Now the learned Judges of the High Court thought that if any decree passed in the suit would be a nullity, they would not have upheld the judgment of the trial Court. Indeed they definitely remarked that in the circumstances of the case they did not feel disposed to throw out the pleadings which they said had not been verified in accordance with law. They have undoubtedly said that the defendants might perhaps challenge the conduct of the case after the estate was restored, but they did not state that they would be able to challenge it successfully or that the decree passed in the suit could be avoided without bringing a suit to set it aside. The learned advocate for the respondent relies strongly on an observation made in 25 Bom 606[1] that :

> It was an elementary rule of procedure that the same individual even in different capacities cannot be both a plaintiff and defendant to one and the same action.

But in my opinion those observations do not strictly speaking apply to the present case in which the parties were entirely different. The fact that the same manager represented both the plaintiff and the defendant undoubtedly made the proceedings highly anomalous, but if we bear in mind the special circumstances of the case, it is difficult to hold that the decree is a nullity. The question which we have to ask, is whether there was a genuine and bona fide contest in the suit. I have already referred to the provisions of the Encumbered Estates Act which made it necessary that the parties should be represented by the manager of the encumbered estate. Thus the anomaly which is pointed out on behalf of the appellant was to some extent due to the provisions of the Act as it stood at the time of the suit. The manager of the encumbered estates had to bring the suit within the period of limitation, otherwise the plaintiff's right would have been barred. At the same time he seems to have done everything to ensure that the defendant's case was properly presented to the Court.

Neither in the Court below nor before us it was suggested on behalf of the appellant that the manager did not properly defend

1. Rustomji v. Purshotamdas, (1901) 25 Bom 606 =3 Bom L R 227.

the suit or that he failed to put forward any pleas which would have defeated the plaintiff's action. That the defendants were not in any way prejudiced in the litigation is borne out by the fact that a suit of a similar nature which has been brought by the mukarraridars of the three annas interest to enforce their mukarrari lease was decreed both by the trial Court as well as by the High Court in spite of the fact that that litigation was contested by the defendants themselves on the same grounds as Suit No. 35 of 1919. Thus, the utmost that can be said in favour of the appellant is that the procedure adopted in the suit was somewhat irregular, but that by itself would not make the decree passed in the suit a nullity, especially as the Court had complete jurisdiction to try the suit. After all what we have to look to is the substance and not the form of the action, and once it is clear that notwithstanding the fact that the parties were represented by the same manager, the proceedings in the suit did not represent a mere sham contest and that the suit was properly defended, the decree must be held to be a good decree. It is not denied that the decree was fully given effect to and that the plaintiffs are still in possession under that decree. Thus the plaintiffs having established their title as well as possession are entitled to a decree in the suit and in this view I would allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore the decree of the trial Court. The appellants will be entitled to their costs in all the Courts.

Dhavle J.—I agree. The respondents challenge the decree in the suit of 1919 on the sole ground that the same individual Mr. Durham Waite acted both for the plaintiffs and for the defendants in that suit; but he did so under the express provisions of the Chota Nagpur Encumbered Estates Act as it stood at the time. The Act has since been amended to get over the patent anomaly of the same individual in different capacities appearing to act for the plaintiff and the defendant in one and the same action, but the rule against permitting an individual to do so is a rule of procedure. It is not a rule of jurisdiction. Were it otherwise, a case like 25 Bom 606[1] could not have stood for a moment. That was a case where at the appellate stage it had come to pass that the same individual figured amongst the appellants and was also the sole respondent. The Court referred to what is called "the elementary rule of procedure, too often disregarded in this country" and observed that though the Courts of Equity had strictly followed the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties; for provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights. That in the circumstances of 1919 the rule could not possibly be regarded as more than a mere rule of procedure is indicated not merely by the terms of S. 21-B, Chota Nagpur Encumbered Estates Act, without the proviso that has been subsequently added to it in 1924, but also by the fact that the learned advocate for the respondents has not been able to urge that the application of the Act to an encumbered estate saves the limitation applicable to ordinary cases. The suit had therefore to be brought within the ordinary period of limitation, and it had to be brought in conformity with S. 21-B. It would have been impossible for any Court to have thrown out such a suit on the ground of jurisdiction or as not competently framed. There is also no question that if the decree in the suit of 1919 stands, the partition suit brought by the respondents must succeed, for we now have a definite finding of fact by the lower Appellate Court on remand that the plaintiff-respondents were at the date of the suit in possession of the two annas share which they had claimed as the subject of the partition, while the decree in the suit of 1919 establishes their title to that share vis-a-vis the appellant, the respondent's possession having, as a matter of fact, commenced under but some years after the passing of that decree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 155

HARRIES C. J. AND FAZL ALI J.

Sheonarain Prasad Singh and others — Defendants — Appellants.

v.

Ganga Prasad Sahu — Plaintiff — Respondent.

Appeal No. 778 of 1938, Decided on 1st September 1939 from appellate decree of Dist. Judge, Gaya, D/- 11th January 1938.

Limitation Act (1908), Art. 116—Decree-holder assigning his decree and out of consideration leaving certain sum with assignee to be paid to assignor's creditor after realization of decree —Assignee refusing to pay—Suit by creditor of

assignor to recover amount payable to him is suit for compensation for breach of contract and is governed by Art. 116—Interest on amount payable can be granted.

Where a decree-holder has assigned his decree and out of the consideration has left certain amount with the assignee to be paid to the creditor of the assignor after the decree is realized and on assignee's failure to pay, the creditor of the assignor brings a suit to recover the amount payable to him, the suit is one for compensation for breach of contract and not a suit to recover money lent or money due as result of transaction similar to a loan. The suit is therefore governed by Art. 116: *A I R 1930 Pat 46, Rel. on.* [P 157 C 1]

In such a suit in ascertaining the amount of compensation reasonable rate of interest should be granted on the amount payable under the agreement: *A I R 1933 Pat 196, Disting.* [P 157 C 2]

Nawal Kishore Prasad II and R. P. Jaruhar — *for Appellants.*

B. C. De and K. N. Lal — *for Respondent.*

Harries C. J. — This is a defendants' appeal from concurrent decrees of the Courts below decreeing the plaintiffs' claim for Rs. 1,700 and interest thereon at the rate of twelve per cent. per annum from 27th July 1933. On 12th July 1920, one Prasad Sahu, predecessor-in-interest of plaintiffs 2 and 3, obtained a preliminary mortgage decree for Rs. 7379 against Asfandiar Khan, and on 13th June 1921, this decree was made absolute. On 1st August 1924, Prasad Sahu assigned this mortgage decree to defendants 1 to 3 and two other persons for Rs. 5,000. A sum of Rs. 3300 was paid to Prasad Sahu and the remainder, namely Rs. 1700, was left with defendants 1 to 3 to be paid to plaintiff 1 who was a creditor of Prasad Sahu. It was a term of the agreement that this sum was not to be paid to plaintiff 1 until defendants 1 to 3 had realized the decree. Defendants 1 to 2 executed the decree assigned to them in execution case No. 289 of 1932 and on 11th July 1933, the judgment-debtor deposited the decretal amount in Court. On 18th July 1938, this amount was attached by some third party, but on 21st July 1933, the attachment order was withdrawn and the execution case was dismissed on full satisfaction to the decree-holder. On 24th July 1933, defendants 1 to 3 withdrew the money which had been so deposited. For some reason or other defendants 1 to 3 refused to pay the sum of Rs. 1,700 to plaintiff 1 as they had agreed in the contract of 1st August 1924, and on 22nd July 1936, the plaintiffs brought this suit to recover the sum of Rs. 1,700 together with interest. Both the Courts below decreed the plaintiffs' claim; but it has been contended by Mr. Nawal Kishore Prasad on behalf of the appellants that the decrees of the Courts below cannot be sustained.

The first point taken by the appellants is that this suit was barred by limitation. As I have stated earlier, the sum of Rs. 1700 was not payable by defendants 1 to 3 to plaintiff 1 until the defendants had realized the decree. The decretal amount was deposited by the judgment-debtor in Court on 11th July 1933, but this was attached by a third party. However, on 21st July 1933, the attachment order was withdrawn and the execution case dismissed because the decree had been fully satisfied. It has been contended that the decree was realized at latest by 21st July 1933, and that time ran from that date. The suit was actually brought on 22nd July 1936, over three years from the date when the decree was realized. If this was a suit to recover a sum of money due, it would have been barred in three years, and it might well be said that the present suit was out of time. The trial Court appears to have thought that the present suit was one for specific performance and that Art. 113, Limitation Act applied. It was, however, held that time began to run not from the date when the execution case was dismissed on the ground of full satisfaction but from the date when the money was actually withdrawn, namely 24th July 1933. Accordingly the learned Munsif held that the suit was within time. The lower Appellate Court was of opinion that this was a suit to which Art. 116, Limitation Act applied and as that article gave the plaintiffs six years to bring the suit, the suit was well within time. It has been strongly urged that this is a suit for specific performance, but, in my view, it is clearly not so. Specific performance can only be asked for in suits falling within S. 12, Specific Relief Act, and clearly this is not such a suit.

It was further argued that this was a suit for indemnity; but in my view it is not such a suit. The contract entered into by defendants 1 to 3 was not to indemnify plaintiffs 1, 2 and 3 against any loss but it was a contract to pay plaintiff 1 a sum of money on the happening of a specific event, namely the realization of the decree. It appears to me that this is a case where compensation is sought for breach of contract. Defendants 1 to 3 promised to pay plaintiff 1 Rs. 1700 when the decree was realized, and this promise they have broken.

It is not a suit to recover money lent or money due as a result of some transaction similar to a loan. It is clearly a case where the plaintiffs are suing for compensation for the defendants' breach of contract. That being so, Art. 116, Limitation Act applies, and that Article gives the plaintiffs six years to bring the suit. The suit, therefore, was well within time, and the defence of limitation was of no avail to the defendants. In my view this case cannot be distinguished from the case in 8 Pat 860.[1] In this latter case money had been left with a vendee to pay a debt due from the vendor to a third party. The vendee failed to pay, and a Bench of this Court held that his failure gave the vendor a right to sue for compensation for breach of contract, and that Art. 116, Limitation Act applied to such a suit. It is impossible to distinguish that Bench case from the case now before the Court, and that being so, it must be held that the present suit is within time.

It was further argued that if this suit was a suit for compensation, then the plaintiffs' claim was bound to fail by reason of the fact that plaintiffs 2 and 3 had failed to establish that they had suffered any loss. It was contended that before plaintiffs 2 and 3 could succeed, they would have to show that they had been compelled to pay plaintiff 1 the sum of Rs. 1700 which the defendants had contracted to do. In the first place, this argument entirely overlooks the fact that plaintiff 1, the person who was to receive the money, is a party to the suit. Both the Courts held that he was a privy to this contract, and that being so, he has obviously suffered loss, because he has not received the sum which the defendants contracted to have paid over to him. Further, it appears to me that plaintiffs 2 and 3 have suffered serious loss even if they have not been called upon as yet to pay what is due to plaintiff 1. Their liability to plaintiff 1 is still undischarged, and that being so, they can sue for compensation for breach of contract. This point also has been clearly decided in 8 Pat 860[1] to which I have already referred. In my view, howsoever this case is regarded, the plaintiffs have a cause of action for compensation.

Lastly, the appellants have argued that the Courts below were wrong in granting interest upon this sum of Rs. 1700, and reliance has been placed upon a Bench decision of this Court: 12 Pat 216,[2] in which it was held that in the absence of an agreement, express or implied, interest on money wrongfully detained is not recoverable either under the Interest Act or under the proviso to the only Section in that Act. If this was a claim for money wrongfully detained, there can be no doubt that interest could not be recovered; but if the suit is to be regarded as a suit for compensation, then the plaintiffs are entitled to such an amount as would compensate them for the loss which they have suffered by reason of the defendants' breach of contract. The defendants, the moment they realized this money, were bound by their contract to pay it to plaintiff 1, and this they failed to do. The Court must, therefore, consider what damage the plaintiffs have suffered. It appears to me that plaintiff 1 has clearly suffered damage in excess of Rs. 1700 and if this is regarded as a claim by plaintiffs 2 and 3 they also suffered loss in excess of Rs. 1700. They have been deprived of the use of this money because of the defndants' breach of contract and the latter are bound to compensate the plaintiffs for their loss. It appears to me that the correct measure of damages is the loss sustained by the plaintiffs, and such loss can very properly be estimated as Rs. 1700 plus a reasonable rate of interest thereon. That would be a fair and reasonable manner of ascertaining the amount of compensation due by reason of the breach of contract. Both the Courts below have considered 12 per cent. per annum simple to be reasonable interest upon this money. It may be that the lower Courts were wrong in granting a decree for Rs. 1700 together with interest in terms; but the decree can be justified when it is regarded as a decree which gives the plaintiffs the actual loss which they have suffered. In my view interest at 12 per cent. together with the amount of Rs. 1700 fairly and reasonably represents the loss suffered by the plaintiffs. That being so, they were entitled to recover such a sum by way of damages for breach of contract. The argument that they were not entitled to interest as such is really academic. If they are entitled to the full amount granted by the Court below by way of damages then the decrees of the Courts below must be sustained. The result therefore is that

1. Ram Rachhya Singh v. Raghunath Prasad, (1930) 17 A I R Pat 46=122 I C 244 = 8 Pat 860 .

2. J. H. Pattinson v. Bindhya Debi, (1933) 20 A I R Pat 196=146 I C 56=12 Pat 216 = 14 P L T 149.

this appeal fails and is dismissed with costs.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 158

HARRIES C. J. AND MOHAMAD NOOR J.

Harekrishna Das — Petitioner.

v.

Sunamani Dei and others —

Opposite Party.

Civil Revn. No. 86 of 1937, Decided on 15th August 1939, from order of Sub-Judge, Cuttack, D/- 29th May 1937.

(a) Hindu Law — Reversioner — Suit by — Declaratory— Reversioners are not entitled to possession until death of widow and have no right to an injunction—Fact that interim injunction was prayed for and granted does not alter nature of suit nor does a second prayer of general nature in the plaint.

A suit by reversioner against widow during her lifetime for a declaration that the widow had only a limited interest of a Hindu widow in the inheritance and consequently certain alienations made by her without legal necessity were not binding upon the reversionary body is a declaratory suit only. The reversioners have no right to possession until the death of the Hindu widow and they have no right to anything while the widow is alive beyond a declaration. They have no right to ask for an injunction and it should never be granted by the Court. The fact that through ill advice they applied during the suit for ad interim injunction and obtained it does not change the real nature of the suit and consequently the suit cannot be regarded as a suit for a declaration coupled with some consequential relief. Nor does a second prayer in the plaint "that the suit may be decreed with costs and the plaintiffs may be allowed to any other relief to which they are entitled" alter the nature of the declaratory suit as the above clause is the usual omnibus relief clause which appears in practically every plaint in India and a plaint cannot be construed as being a plaint for a declaration and consequential relief merely because this omnibus relief clause appears : *39 Cal 704, Expln.; A I R 1926 Pat 249, Not approved.* [P 158 C 2 ; P 159 C 1, 2]

(b) Court-fees — Declaratory suit — Several alienations challenged by reversioner—Separate court-fee in respect of each alienation should be paid.

Where a reversioner challenges several alienations by a Hindu widow and asks for declaration that the same do not bind the reversioners, the reversioner in fact asks for a number of declarations and must pay a court fee of Rs. 15 in respect of each of the alienations : *18 Mad 459, Foll.* [P 159 C 2]

B. N. Das — *for Petitioner.*

B. K. Das and G. G. Das —

for Opposite Party.

Harries C. J. — This is a civil revision brought by the plaintiffs directed against an order passed by the learned Subordinate Judge of Cuttack in a court-fee matter. The plaintiffs brought the suit out of which this application arises alleging that they were the reversioners of a certain last male owner and they claimed a declaration that the widow of the last male owner had only a limited interest of a Hindu widow in the inheritance and that alienations made by her without legal necessity would not enure beyond her lifetime and would not be binding upon the reversionary body. During the course of the proceedings the plaintiffs asked for an interim injunction to restrain the widow from making further alienations and the learned Subordinate Judge acceded to their application and granted an ad interim injunction. The adequacy of the court-fee paid, namely Rs. 15, was raised and eventually the learned Judge ordered that the plaintiffs should pay a court-fee calculated on an ad valorem basis. Against that order the plaintiffs have applied in revision to this Court. It has been strenuously contended on behalf of the plaintiffs that this is not a case where there was a claim for a declaration and consequential relief and consequently court-fee on an ad valorem basis cannot be charged. On perusal of the plaint it is clear that the plaintiffs merely asked for a declaration that defendant 1 had only a life estate in her inheritance and that certain alienations would not be binding upon the reversionary body. That prayer as it stands is one purely for a declaration. There does not follow a second prayer in these terms :

> That the suit may be decreed with costs and the plaintiffs may be allowed to any other relief to which they are entitled.

This is the usual omnibus relief clause which appears in practically every plaint in this country and we cannot construe a plaint as being a plaint for a declaration and consequential relief merely because this omnibus relief clause appears. The learned Judge however came to the conclusion that as the plaintiffs had applied and had obtained an ad interim injunction the suit was clearly a suit for a declaration and consequential relief. It has been argued on behalf of the opposite party that the learned Judge's view is supported by authority of this Court and of the Calcutta High Court. In 5 Pat 211,[1] Jwala Prasad J. sitting singly held on somewhat similar facts that the suit was a suit for a declaration and consequential relief and accordingly he directed that an ad valorem court-fee was

1. Gangadhar Misra v. Devendrabala Dasi, (1926) 13 A I R Pat 249=94 I C 22=5 Pat 211.

payable. Jwala Prasad J. in the main based his decision upon the case in 39 Cal 704,[2] but in my view the Calcutta case does not support the view taken by Jwala Prasad J. In the Calcutta case the learned Chief Justice in delivering judgment makes it clear that in his view the suit was not a suit for a declaration. It is true that two prayers for declarations had been made in the plaint but in the view of the learned Chief Justice neither of the matters included in those two prayers could be made properly the subject-matter of a declaration. In his view though the suit was framed as a declaratory suit it was a suit for something more, and the learned Chief Justice points out that subsequent events showed that it was a suit for something more. The plaintiff in that suit obtained an interim injunction and the learned Chief Justice uses that fact to support his view that the suit was not one properly for a declaration but was one for consequential relief also. The Calcutta case does not decide that because a plaintiff has obtained an ad interim injunction his suit must inevitably be a suit for a declaration with consequential relief. Further it would appear that in the Patna case decided by Jwala Prasad J. there was at the time the appeal came to the High Court a subsisting injunction though how the injunction could have subsisted up to that time is not clear.

In the present case, the prayer was the usual prayer in a case of this kind, namely that it be declared that the widow's interest was the limited interest of a Hindu widow and consequently that certain alienations which she had made without legal necessity would not be binding upon the reversionary body. Looking purely at the relief claimed in the plaint this is a declaratory suit and a declaratory suit only. Can the whole nature of the suit be changed by reason of the fact that the plaintiffs were so ill advised as to apply for an interim injunction which they ought never to have been granted? The plaintiffs as reversioners have no right to possession until the death of the Hindu widow and in this suit they have no right to anything while the widow is alive beyond a declaration. They had no right to ask for an injunction and it should never have been granted to them. In my view the fact that they applied during the suit for this ad interim injunction does not change the real nature of the suit. It still remains a suit for a declaration that certain alienations made by a Hindu widow were not binding upon the reversionary body. Upon the suit as framed no decree other than a purely declaratory decree could have been passed and even after the granting of this interim injunction no relief could have been given to the plaintiffs by the decree other than the declaration asked for. In my view this suit is a purely declaratory suit and even in the events that have happened it cannot now be regarded as a suit for a declaration coupled with some consequential relief. The suit is a pure declaratory suit and court-fees must be assessed from that point of view.

The question now arises what court-fee is payable. All that was paid was Rs. 15 and in my view this is not sufficient. Sixteen alienations were alleged by the plaintiffs to be without legal necessity and therefore not binding beyond the widow's lifetime. Each alienation without legal necessity gives the reversioners a cause of action and time would begin to run in a suit for a declaration from the time of each particular alienation. The plaintiffs in this case were in fact asking for a number of declarations and in my view they must pay a court-fee of Rupees 15 in respect of each of the alienations. The suit is in fact a suit for a large number of declarations. This view has been accepted and acted upon by the Madras High Court in 18 Mad 459.[3] In that case a Bench held that when reversioners sue to have declared invalid as against them alienations made by a Hindu widow a court-fee of Rs. 10 (now Rs. 15) must be paid in respect of each of the alienations in question. I respectfully agree with that view and in my judgment the plaintiffs in this case must pay Rs. 15 in respect of each alienation which they propose to challenge.

As I have stated earlier the plaintiffs originally intended to challenge some sixteen alienations but it would appear that compromises have been effected with respect to two or three of them. In my view the plaintiffs can only be compelled to pay court-fees at this stage upon the alienations which they now propose to challenge. Credit of course must be given to them for the Rs. 15 they have already paid. It is quite clear that the plaintiffs had no right whatsoever to an interim injunction in this case. They have no right to possession and they have no right to restrain the widow

2. Deokali Koer v. Kedar Nath, (1912) 39 Cal 704 =15 I C 427=16 C W N 838.

3. Daivachilaya Pillai v. Ponnathal, (1895) 18 Mad 459.

in this suit. It is a suit purely for a declaration and consequently an interim injunction should not have been granted. As the matter is before us in revision the Court has power to discharge the interim injunction and I would therefore discharge it. In the result therefore I would allow this application in part and vary the order of the Court below and direct that Court to calculate the court-fee upon the lines indicated in my judgment. The ad interim injunction will also be discharged. Each party will bear their own costs.

Mohamad Noor J. — I agree.

G.N./R.K. *Application allowed.*

A. I. R. 1940 Patna 160

WORT J.

Ramdahin Pande and others —
Defendants — Appellants.

v.

Parmeshwar Singh and others —
Plaintiffs — Respondents.

Appeal No. 284 of 1938, Decided on 10th February 1939, from appellate decree of Sub-Judge, Bhagalpur, D/- 21st December 1937.

Civil P. C. (1908), S. 91—Representative suit by limited class of villagers for right of passage regarding rasta is maintainable without consent of Advocate-General and without proof of special damage.

Under the general rule the consent of the Advocate-General is required in a suit with regard to a public right, but an action brought by a particular section is an exception to the general rule. Hence, a representative suit brought by a limited class of villagers for right of passage regarding a rasta is maintainable without consent of Advocate-General and without proof of special damage : *(1868) 4 Ex 43, Rel. on.* [P 160 C 2]

S. N. Bose and S. Mustafi —
for Appellants.

G. P. Singh — *for Respondents.*

Judgment.—This appeal arises out of an action in which the plaintiffs were a limited class of villagers and claimed certain easements. The rights claimed were in connexion with plots Nos. 12, 13 and 14; as regards plots Nos. 12 and 13 there was a right of irrigation claimed, and as regards plot No. 14 the claim was for a right of passage, plot No. 14 being admittedly a rasta, and it is admitted by the defendant-appellant that he has got no right thereon. I have stated that the plaintiffs are a limited class and they sued on a right of action under O. 1, R. 8.

I propose to deal with the plaintiffs' case so far as the rasta is concerned as it is contended by Mr. Bose appearing on behalf of the appellant that claiming, as he does not, right over the rasta, the only case that can be made by him is that so far as that plot is concerned the action was not maintainable in the absence of the consent of the Advocate-General under S. 91. I have had occasion to deal with this matter on two previous occasions at least, and my decisions are reported in 17 and 18, Patna Law Times.* I propose, however, to deal with the matter by referring to an authority to which I referred on those two occasions but which was not cited at the Bar either on those occasions or this. It is the decision in (1868) 4 Ex 43.[1] There the same question came up and Channell B, one of the learned Barons of Exchequer who delivered one of the judgments of the Court, pointed out that the principle, that an action cannot be maintained without proof of special damage, is a principle which does not apply in the case where the parties complaining belong to a particular class or section of the public. Under the general rule the consent of the Advocate-General is required in a suit with regard to a public right, but an action brought by a particular section is an exception to the general rule. It is perfectly clear in this case that as regards the rasta the action was by a particular class of persons and therefore maintainable without proof of special damage.

So far as plots Nos. 12 and 13 are concerned, I find myself in some difficulty. The plaintiffs failed to establish their rights of irrigation, and, had it been open to me, I do not think I should have any hesitation in dismissing their suit entirely with respect to plot Nos. 12 and 13. But the learned Judge in the Court below has given them a declaration and presumably an injunction as regards their right of watering cattle in both the plots. I have looked at the evidence for the purpose of understanding the case and the arguments put forward by both parties, and it seems to me perfectly clear that the right which the learned Judge has granted to the plaintiffs should be limited to plot No. 13, the nadi, and with that modification I am of opinion that the appeal should be dismissed; that is to say the plaintiffs have got the right of watering cattle from the nadi plot No. 13

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* [*Reported in* 17 P L T 842=A I R 1937 Pat 54 and 18 P L T 459=A I R 1937 Pat 481.]

1. Harrop v. Hirst, (1868) 4 Ex 43=38 L J Ex 1 =19 L T 426=17 W R 164.

and they have the right of way as a village pathway over plot No. 14. To make the matter clear there will be a declaration that the plaintiffs have a right of watering their cattle from the water in plot No. 13; subject to such right and without prejudice to such right the defendants may use such plot as proprietors; and that as regards plot No. 14 the plaintiffs, together with other villagers on behalf of whom they sue, are entitled to such plot as a village path. There will be liberty to apply in the Court below should there be any difficulty in working out this judgment. The appeal with this modification is dismissed, each party bearing their own costs in this Court.

D.S./R.K. *Decree modified.*

A. I. R. 1940 Patna 161

HARRIES C. J. AND FAZL ALI J.

Mangtu Lal Bagaria — Plaintiff — Appellant.

v.

Secretary of State — Defendant — Respondent.

Letters Patent Appeal No. 15 of 1939, Decided on 7th September 1939, from decision of Varma, J., D/- 23rd January 1939.

(a) Practice—New plea—Appeal.

The plaintiff cannot be allowed to abandon the case put forward by him before the lower Courts and set up a new case in appeal to High Court. [P 162 C 1]

(b) Bengal Cess Act (9 of 1880), Sec. 45 — Word "recovered"—Meaning explained.

The word " recovered " in Sec. 45 means " sued for " or " recovered by means of an action." The cess which is payable under the Act may be recovered either under the Public Demands Recovery Act or by a suit. [P 162 C 2]

(c) Bengal Cess Act (9 of 1880), Sec. 45 — Revenue Court deciding that cess was recoverable and claim made for its recovery was within limitation—Decision whether right or wrong cannot be set aside by Civil Court.

The question whether cess was recoverable in a case under S. 45 of the Act is one to be decided by the Revenue Court which issued the certificate, and if that Court has decided rightly or wrongly that the cess was recoverable and the claim made for the recovery was not barred by limitation, a suit cannot be entertained in a Civil Court to set aside that decision, because a Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction and not because the decision pronounced by the Court is not correct. [P 162 C 2 ; P 163 C 1]

S. K. Mitra — *for Appellant.*

Government Pleader — *for Respondent.*

Fazl Ali J.—This is an appeal under the Letters Patent from a decision of Varma J. in a second appeal. It appears that plaintiff is the receiver of an estate which owns certain coal-mines in Dhanbad. In 1929-30 a certificate was issued under the Public Demands Recovery Act to recover certain arrears of cess payable by the estate and a sum of Rs. 52 was realized in May 1930. In 1934-35 a fresh proceeding was started to realize the balance, and the plaintiff was obliged to deposit a sum of Rs. 438-2-3. Thereafter, he brought the present suit to recover this amount on the allegation that the assessment of cess was wholly illegal and the proceedings by which the sum of Rs. 438-2-3 was realized from him was without jurisdiction.

The suit was resisted by the Secretary of State on various grounds and the trial Court as well as the first Court of appeal held that the suit could not succeed. The plaintiff thereupon preferred a second appeal which was heard by Varma J. In this appeal the points raised by him were, first, that the proceedings of 1934-35 were without jurisdiction inasmuch as two certificates could not be issued in respect of the same demand; and, secondly, that the certificate Court could not under Sec. 45, Cess Act, recover the said amount more than three years after it became due. Both these points have been decided against the plaintiff by Varma J., and hence this appeal under the Letters Patent. As to the point that two certificates were issued in regard to the same demand, Varma J. observed as follows :

> Now, with regard to the first part of the argument I must say at once that in spite of the strenuous efforts of Mr. Mitra he has not been able to refer to any materials on the record which could satisfy me that two certificates were actually issued, and although I agree with the proposition of law that two certificates could not be issued for the same period, on the question of fact this part of his contention must fail.

Notwithstanding these observations, it was contended on behalf of the appellant that in fact two certificates were issued, and learned counsel for the appellant pressed us to allow him an opportunity to produce certain papers as additional evidence to establish his contention. Now, the judgments of the first two Courts clearly show that the contention raised on behalf of the appellant is an entirely new one. From the judgment of the learned Munsif it appears that one of the issues framed in the suit was " whether the certificate proceedings of 1934-35 were illegal, without jurisdiction and barred by limitation. In discussing this issue, the learned Munsif

has set out the case put forward before him on behalf of the plaintiff in these words:

> His next contention is that there was certificate of non-payment issued against him which was put into execution in certificate execution case No. 107-R. C. 1929-30, that that case was struck off in 1930 and then more than three years after, in 1934 a fresh execution for recovery of the unpaid amount was instituted by the certificate officer of Dhanbad against him under case No. 171-R. C. of 1934-35; that this latter case was clearly time-barred. . . . .

From this it is quite clear that what the appellant contended before the Munsif was not that a second certificate had been issued in 1934-35 but that the execution proceedings of that year were time-barred inasmuch as they were instituted more than three years after the first execution proceeding. The learned District Judge also states in his judgment that the proceedings of 1934-35 were attacked before him on the ground that they were time-barred and the plea of limitation was

> based on an assertion of fact viz., that the previous certificate case of 1929-30 was struck off in May 1930, so that more than three years elapsed between the disposal of that certificate case and the filing of the next.

Thus, it seems to me that neither before the Munsif nor before the District Judge it was seriously contended by the plaintiff that there were two successive certificates for the same dues. On the other hand, it appears that one of the main points urged on behalf of the plaintiff was that the proceedings of 1934-35 were execution proceedings and they were barred by limitation inasmuch as they were started more than three years after the termination of the first execution proceedings. In my view, the plaintiff cannot be allowed to abandon the case put forward by him before the Munsif and the District Judge and set up a new case in this Court. I am also of the opinion that the plaintiff cannot be allowed to produce any additional evidence at this stage. The power of this Court to admit additional evidence is limited by the provisions of O. 41, R. 27, Civil P. C. This rule provides, amongst other things, first, that additional evidence shall be allowed only when the Appellate Court requires any such evidence to be produced to enable it to pronounce judgment, or for any other substantial cause; and secondly, that additional evidence shall not be allowed to be adduced unless the party who wishes to adduce it satisfies the Appellate Court that such evidence, notwithstanding exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made. The present case does not satisfy any of these conditions. On the other hand, it appears to me that the plaintiff could have very well produced the documents which he is trying to produce now in the Courts which had to deal with the facts of the case. It is not the case of the plaintiff that these documents, notwithstanding exercise of due diligence, were not within his knowledge or could not be produced by him when the matter was before the trial Court or the lower Appellate Court. The first point raised by the appellant must fail. The next point urged on behalf of the appellant is that the proceeding of 1934-35 was without jurisdiction inasmuch as under S. 45, Cess Act, the arrears of cess cannot be recovered more than three years after they became due. S. 45, Cess Act, runs as follows:

> If any instalment of local cess or part thereof payable to the Collector shall not be paid within fifteen days from the date on which the same becomes due, the amount of such instalment or part thereof may be recovered at any time within three years after it became due, with interest, &c . . . . . .

I entirely agree with the view expressed by Varma J. that the word "recovered" which is in the Section, means "sued for" or "recovered by means of an action." In my opinion, this is the only readable meaning which can be attributed to the expression. The cess which is payable under the Act may be recovered either under the Public Demands Recovery Act or by a suit. If the meaning attributed by the plaintiff to the expression is the meaning which the expression was intended to convey, it follows that in many cases cess will become irrecoverable, because the proceedings instituted to recover it may be delayed for reasons beyond the control of the plaintiff. In my opinion, it would be wholly unreasonable to construe the expression in the manner in which the plaintiff asks us to construe it. There is also a further answer to the plaintiff's contention. The question whether cess was recoverable in this case under S. 45 of the Act was one to be decided by the Revenue Court which issued the certificate, and if that Court has decided rightly or wrongly that the cess was recoverable and the claim made for the recovery was not barred by limitation, a suit cannot be entertained in a Civil Court to set aside that decision. A Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction and

not because the decision pronounced by the Court is not correct. In my opinion no question of jurisdiction arises in this case and the plaintiff's suit was rightly dismissed. I would therefore uphold the decision under appeal and dismiss the plaintiff's appeal with costs.

Harries C. J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 163

VARMA AND MEREDITH, JJ.

Emperor

v.

Kommoju Brahman—Accused—Appellant.

Death Ref. No. 13 (Orissa) and Criminal Appeal No. 34 of 1939, Decided on 24th November 1939, reference made by Agency Sess. Judge, Koraput, D/- 29th September 1939.

(a) Criminal P. C. (1898), Ss. 364 and 533—Confession not recorded in language of accused, though possible, but in English — Defect is curable under S. 533.

Where a Magistrate has not recorded the confession in the language of the accused though he could have done so, but has recorded it in English the defect is curable under S. 533 : *A I R 1923 All 90, Rel. on.* [P 170 C 1]

(b) Criminal P. C. (1898), S. 164 (3) — Confession recorded without asking any question directed to reveal whether confession is voluntary is inadmissible.

The provisions of S. 164 (3) are mandatory. Though it is not necessary that the questions must be in any special form, yet there must be some question or questions designed to reveal whether the statement is being made voluntarily. To ask a question which can only test the accused's memory is not a compliance with the provisions of S. 164 (3). Where there was no question asked to reveal whether the statement is voluntary the Magistrate has no jurisdiction to record a confession. A confession recorded without asking any question to reveal voluntary nature of the confession is therefore inadmissible : *A I R 1936 P C 253 ; A I R 1925 Lah 432 and A I R 1917 Pat 475, Rel. on.* [P 166 C 1 ; P 168 C 1, 2]

(c) Criminal Trial—Extra-judicial confession — Extra-judicial confession made to doctor is admissible under S. 21. Evidence Act.

No doubt an extra-judicial confession by accused to a doctor cannot carry the same weight as a confession duly recorded under S. 164, but it is admissible under S. 21, Evidence Act. [P 170 C 1]

(d) Criminal P. C. (1898), Ss. 164 (3) and 533 — Under S. 533 defect of form can be cured and not defect of substance — Questions required by S. 164 (3) not asked by Magistrate —Defect cannot be cured under S. 533.

By using provisions of S. 533 a defect of form can be removed but not a defect of substance. Where the Magistrate is able to say in Court that he had asked the necessary questions but had forgotten to record them, then S. 533 would be applicable ; and S. 91, Evidence Act will cause no difficulty since S. 533 expressly states that it shall not do so. But where the Magistrate does not or cannot supply the defect in the written form with oral evidence, S. 533 cannot help. Hence, if no questions required by S. 164 (3) were actually asked, S. 533 will not help; but if the Magistrate's evidence shows that the questions were asked, then that is merely a defect of form and S. 533 will cure it: *A I R 1922 Lah 237; A I R 1925 Lah 605 and A I R 1925 Pat 191, Rel. on.* [P 169 C 1, 2]

(e) Criminal Trial—Extra-judicial confession —Extra-judicial confession made to Magistrate cannot be proved unless provisions of S. 164, Criminal P. C., have been complied with.

Though an extra-judicial confession to any ordinary person (other than a police officer) can be proved, such a confession cannot be proved at all if made to a Magistrate, unless the provisions of S. 164, Criminal P. C., have been complied with ; and it will not help for a Magistrate to say that he did not purport to act under the provisions of S. 164 : *AIR 1936 P C 253, Rel. on.* [P 169 C 2]

Public Prosecutor for Orissa — *for Reference.*

S. N. Banarji — *against Defence.*

Varma J. — This is a reference under S. 374, Criminal P. C., by the Agency Sessions Judge of Koraput, in the case of one Kommoju Brahman, aged 35, Viswa Brahmin by caste, a goldsmith by occupation, of village Sovai, Taluk Pottanghi, within the jurisdiction of Nandapur police station in Koraput, who has been convicted under S. 302, I. P. C., and sentenced to death for having killed a woman named Kali Moni, aged 20, who belonged to the Payako caste, at about 3 A. M. on 24th April 1939. There is also an appeal by the accused against his conviction and sentence.

Kali Moni was a kept woman of the accused. The accused and the deceased used to live in a verandah of Morchomalia Lokhon (P. W. 9), an uncle of the deceased woman. The verandah was enclosed by a matting, and the accused and the deceased woman used to sleep therein. There they lived together for three years and a child was born to them about six months before the date of the occurrence. P. W. 9 and his wife Hiramani (P. W. 10) lived inside the house, and the door of their room communicated directly with the verandah in which the accused and the deceased slept. P. Ws. 9 and 10, the accused and the deceased, as well as their child went to sleep on the night of 23rd April 1939. Early in the morning at about 3 A. M., P. Ws. 9 and 10 were both awakened from sleep by hearing of the voice of the deceased — "Father ! I am dying." P. W. 9 lit a lamp, opened the door, and as he attempted to come out he found the accused standing with a blood-stained knife in his hand and the body of the deceased at his feet with a number of

stab wounds from which blood was gushing out. The accused threatened P. W. 9 to stab him also, whereupon P. W. 10 pulled him back into the room and the door of the room was shut. P. W. 9 raised an outcry from inside the room calling out loudly by names P. Ws. 11, 12, 13 and 14. Kichi Syamo and Pujari Raghunath (P. Ws. 11 and 12), whose houses are at a distance of 2 and 10 steps, respectively, from the house of P. W. 9, were the first to respond to the cries of P. W. 9. They came out of their houses and saw the accused proceeding towards the direction of Nandapur police station. Then they came to the house of P. W. 9 and on announcing their arrival, P. W. 9 opened the door and came out with a light. These two witnesses saw the body of Kalimoni with a number of stab wounds from which blood was still flowing. To them P. W. 9 narrated what he had seen and heard. About this time P. Ws. 13 and 14, Hanthalo Syamo and Burudi Domburu also came up and they too saw the body with blood still running from the wound, and heard the account given by P. W. 9. Kalapari Budhu (P. W. 8) the village Naik was then called, and together with the Naik all of them went to the Nandapur police station where they reached at about 7 A. M. or a little later next morning. When they reached the police station they found that the accused had preceded them and had given himself up to the police, having made a statement surrendering the knife.

What happened at the Nandapur police station before the witnesses and the Naik arrived there, may now be noted. Lokhono Dolai (P. W. 3), a constable, was in charge of the police station. The accused appeared before him at about 7 A. M. on 24th April 1939, and made a statement. The constable entered the statement in the station diary (Ex. C) and prepared a seizure list (Ex D) for the knife which was handed over to him by the accused in a blood stained condition, and for the khadi (country made cloth) which the accused was wearing and was deeply stained with blood. The constable sent a report to the Sub-Inspector who was then in camp with the Assistant Sub-Inspector. The Assistant Sub-Inspector arrived at the thana at 2 P. M. which is at a distance of six miles from the village where the occurrence took place. He found the accused at the police station, and having perused the entry in the station diary, he registered a case under Sec. 302, Penal Code, and recorded the First Information Report. The Assistant Sub-Inspector recovered the blood stained cloth from the accused and then proceeded to the scene of occurrence where he arrived at 5 P. M. and held an inquest on the dead body that evening. The Inquest Report is Ex. F. He sent the dead body to the medical officer for post mortem examination and started the investigation. The Sub-Inspector of Police, Janardhan Patnaik (P. W. 7), reached village Sovai at 9 P. M. on 24th April. He prepared a rough plan of the scene of the occurrence, which is Ex. G, and forwarded the accused from village Sovai to Pottangi on 25th April to obtain a remand order from the Magistrate there. He also submitted a requisition to the Taluk Magistrate at Jaypur to record the confession of the accused. The accused was produced before the Magistrate on 1st May 1939 to have his confession recorded, but the confession was actually recorded on 2nd May (Ex. A). After police investigation and inquiry by the committing Magistrate the accused was committed to the Court of Session where he stood his trial with the result already mentioned.

The nature of the injuries on the body of the deceased may be gathered from the evidence of P. W. 2, the Sub Assistant Surgeon who held the post mortem examination. He says that he discovered seven stab wounds on the chest, two stab wounds on the neck, and seven wounds on the left hand, forearm and arm, all, except one, caused by a sharp, cutting instrument such as the knife (Ex. I). In his opinion four of the seven stab wounds on the chest were quite fatal, death was due to shock and haemorrhage caused by the injuries and the victim could not have survived the injuries for more than an hour. The learned Judge has relied upon the confession of the accused and on the evidence of P. W. 9, the uncle of the deceased, P. W. 10, the wife of P. W. 9, and also on the evidence of P. Ws. 11 to 14 who had seen the accused going towards the Nandapur police station with a knife in hand. The accused pleaded not guilty to the charge and at the trial retracted his confession before the Taluk Magistrate. Although he admitted his statement made before the constable at Nandapur police station, he said that he had made the statement in a confused state of mind. His defence is also to be gathered from the statements made by him under Sec. 342, Criminal P. C., in the Court of Session. Those statements are as follows :

Q. You have heard all the evidence against you. What have you to say ?

A. I admit the statement I made in the lower Court. Will I kill my own wife ? Before three months of the day of occurrence I had been working in outside villages. My father-in-law and mother-in-law tutored my wife to go and live as wife with Madhu Bisoi. She and I had no enmity. She used to go and live with Madhu Bisoi as his wife. On my return from the other villages she used not to talk to me. It is not I that killed her. Madhu Bisoi might have done so. On the Sunday night I and my wife and child all slept on the verandah of my father-in-law's house. I do not know if he called her or not. I do not know when he arrived at that place. May be she refused to go with him and so he stabbed her. When she cried out I woke up and saw Madhu Bisoi stabbing her. While I tried to obstruct him he injured my left hand. I snatched the knife from his hand and ran after him when he ran away. Because I saw blood on the body of my wife I was distraught and went to the police station and reported what had happened, that is that Madhu Bisoi had killed my wife. The constable asked if my wife was living or dead. I replied that I did not know. That is all I have to say.

Q. Is the knife your property ?

A. The knife (Ex. I) is my property. I do not know how it came into Madhu's hand.

Q. Are the shirt and cloth (Exs. II and III) your property ?

A. Yes. The blood stains upon them are from the cut on my wrist.

Q. What have you to say about the confession made to the Taluk Magistrate ?

A. I told the facts that I have told here to the Magistrate. I do not know how he has come to write down that I confessed to killing my wife. I did not confess to him that I had killed her.

Q. Have you any defence ?

A. I have no defence. All the villagers are speaking together against me.

Mr. S. N. Banerji, appearing on behalf of the accused, has urged that the statement made by the accused to the constable at the Nandapur police station (Ex. C) is inadmissible in evidence. I accept the contention. The statement amounted to a confession, and it having been made to a police officer, under S. 25, Evidence Act, it could not be used against the accused. Mr. Banerji then contends that the confession (Ex. A) made before the Taluk Magistrate is also not admissible in evidence for he says, it has not been recorded in the language of the accused and no attempt seems to have been made by the Magistrate to find out whether the confession was made voluntarily. I do not see any force in the first part of this contention, because S. 364, Criminal P. C., says that the whole of the examination of the accused

including every question put to him and every answer given by him, shall be recorded in full, in the langnage in which he is examined, or, if that is not practicable, in the language of the Court or in English : and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his answers.

In this case the Magistrate who took down the confession of the accused, has been examined and to a Court question he answered :

It is impossible that I misunderstood what he confessed. I have used his own words. He spoke in Telugu which I speak.

A similar objection was raised in A I R 1923 All 90 = 45 All 166.[1] In that case the statements of the accused were recorded in the narrative form in English, and it was argued that those statements were inadmissible in law. Their Lordships of the Allahabad High Court overruled the objection and observed that any formal defects which might have been made in the recording of the confession was cured by the provisions of S. 533, Criminal P.C. The second part of the contention raised by Mr. Banerji is however a serious one. Under S. 164 (3) of the Code :

A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him, and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily.

In the case before us it appears that the Magistrate before recording the confession questioned the accused in a manner to warn him that he was not bound to make any confession and that if he did so it could be used as evidence against him, but it does not appear from the record of the confession that the Magistrate questioned the accused to find out whether the statements were going to be made by the accused voluntarily as contemplated by S. 164. Neither the record of the confession nor the statements of the Magistrate made in Court disclose such a state of affairs. No doubt there is a memorandum recorded by the Magistrate to accompany the record of the confession. The memorandum says as follows :

In spite of two warnings in the absence of the police, he has made quite voluntarily the statement enclosed. I fully believe that his confession statement is quite voluntarily free from any influence.

Even in his evidence before the Court the Magistrate says :

I sent the police escort away and warned accused that he was not bound to make a statement and that if he made any statement it could be used against him .... I am convinced that the state-

1. Deo Dutt v. Emperor, (1923) 10 A I R All 90 = 71 I C 54 = 45 All 166 = 24 Cr L J 6 = 20 A L J 915.

ment was purely voluntary and that no extraneous influences were brought to bear upon him to induce accused to make his statement.

The facts disclosed in the memorandum no doubt amount to a compliance with the provisions of S. 164; but the question is whether the Magistrate was entitled to take down the confessional statements before he had actually questioned the accused in the manner contemplated in the Section. On the explicit terms of S. 164, Criminal P. C., the confession Ex. A is inadmissible in evidence. In 6 Lah 183[2] it was held that the provisions of S. 164 (3), Criminal P. C., as amended, render it incumbent upon the Magistrate who is called upon to record a confession, to explain to the person who is to make it (a) that he is not bound to make a confession at all; and (b) that if he does so, it may be used as evidence against him; and, further (c) the Magistrate should record the confessions, only if upon examination of the person making it he has reason to believe that it will be made voluntarily. Thus, where in the Magistrate's memoranda at the foot of the confessions these explanations were not complete, their Lordships held that the presumption under S. 80, Evidence Act, that the confession was 'duly taken' did not arise, and the question whether the above mentioned defect was curable under S. 533 of the Code depended upon whether the required explanation, though not recorded, had as a matter of fact been made. In the case before us, as I have already said, neither in the memorandum nor in the depositions of the Magistrate is there anything to show that questions were put by the Magistrate to the accused to find out if the statements were going to be made voluntarily.

In 17 P L T 594[3] their Lordships of the Judicial Committee laid down that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all; other methods of performance being necessarily forbidden. In that case reliance was placed by the prosecution upon the evidence of a First Class Magistrate entitled to proceed under S. 164. His evidence was that on the application of the police and on the orders of the District Magistrate he had proceeded to the scene of the occurrence and to the places material to the events connected with it. The object was said to be that the accused, including the appellant, might be given the opportunity of voluntarily and after a caution leading the way and showing to the Magistrate the places where incidents in the crime occurred. On arrival, the Magistrate said that he excluded the police, or sent them to stand apart at a distance, and then was led round by each man and the places were pointed out. The appellant before their Lordships, according to the Magistrate, made a full confession, and the Magistrate said that he made rough notes of what he was told, and after dictating to a typist a memorandum from the rough notes, he destroyed the rough notes. He produced, and there was put in evidence, a memorandum, called a note, signed by him, containing the substance but not all of the matter to which he spoke orally. The note was signed by him and at the end, above the signature there were appended a certificate somewhat to the same effect as that prescribed in S. 164 and in particular stating that the Magistrate believed that the pointing out and the statements were voluntarily made. But it was not suggested that the Magistrate though he was manifestly acting under Part V of the Code either purported to follow or in fact followed the procedure of Ss. 164 and 364. Appellants denied the statement in the Sessions Court but the confession was accepted by the Additional Sessions Judge before whom the trial took place, and the appellants were convicted. Their Lordships, as I have stated, held that this confession was inadmissible and in connexion with the point raised with regard to S. 533 said:

> In this case no question of the operation or scope of S. 533 arises and their Lordships desire to express no opinion on that matter.

In the present case also there is no indication either in the statement of the Magistrate or in Ex. A that questions were put to the accused to find out whether the statements were being made voluntarily. The question that now arises is whether without the confessional statements which are excluded, there are materials on record to bring the guilt home to the accused. In this connexion the evidence of P. W. 9 the uncle of the deceased, and of P. W. 10 is of importance. P. W. 9 says that on hearing the cry of the deceased he lit a lamp, opened the door and looked out. He stepped out in the verandah and found the

2. Bahawala v. Emperor, (1925) 12 A I R Lah 432=88 I C 854=26 Cr L J 1238=26 P L R 331=6 Lah 183.
3. Nazir Ahmad v. Emperor, (1936) 23 A I R P C 253=1936 Cr C 752=163 I C 881=37 Cr L J 897=17 P L T 594=17 Lah 629=63 I A 372 (P C).

accused standing holding a knife which was blood stained with the woman lying at his feet. He was standing over her on her left hand. She had wounds on her chest and blood was flowing from them. He threatened to stab the witness if he remained there and so he went in and closed the door and started shouting. Upon his shouting P. Ws. 11 and 12 turned up and then he opened the door, and after he opened the door P. Ws. 13 and 14 also arrived. His wife P. W. 10 supports him in this statement. P. Ws. 11 and 12 saw the accused running away towards the Nandapur police station with the knife in hand, and they also saw that the accused was wearing the clothes (Exs. 2 and 3). P. Ws. 13 and 14 say that when they arrived at the house of P. W. 9, he told them that the deceased was stabbed by the appellant and they also heard P. Ws. 11 and 12 say that they had seen the accused going away with a knife in hand. Nothing has been elicited in their examination which might lead one to believe that their statements are not correct. It is also in evidence that he handed over the knife to the police officer at Nandapur, and he does not deny the ownership of the knife. Then there is the evidence of the Sub-Assistant Surgeon who says that he examined the accused soon after the murder, found a cut injury on his left wrist, and that the accused explained to him that the injury had been caused by himself when he was stabbing the deceased and that he had placed his left hand on her chest while he stabbed her and had misjudged.

Mr. Banerji urges that this extra-judicial confession before the witness should not be taken against the accused, because it was not given in the Court of the committing Magistrate. I am not prepared to accept this contention inasmuch as there is nothing to indicate that the Sub-Assistant Surgeon could in any way be called a partisan witness, and no question seems to have been put in cross-examination about this man before the committing Magistrate. On the evidence disclosed on the record I have no doubt in my mind that the accused is responsible for causing the injuries upon the deceased as a result of which she died and that he is guilty under S. 302, I. P. C. His statement before the Sessions Court is too fantastic to be accepted and there is nothing to support it, and there is no evidence to show that Madhu Bisoi killed the woman.

Then the question is about the sentence. The appellant and the deceased lived as husband and wife for three years, and a child was born to them about six months before the date of the occurrence. They went to sleep as usual and, according to the witness, it was early in the morning before dawn that the occurrence took place. There is nothing to indicate that there was any premeditation on the part of the accused to commit the offence. His subsequent conduct in going to the thana with the blood stained knife shows that he was in a state of frenzy. As to what actually led him to commit the crime it is very difficult to say; but it is not difficult to imagine that something must have taken place at that hour of the night which caused him to fly into a rage, and he might at the time be remembering some incidents connected with Madhu Bisoi and the deceased whom he treated as his wife. The majority of the prosecution witnesses curiously enough denied all knowledge of the person Madhu Bisoi; but P. W. 14 says that there is such a man in the village although he did not know anything about the relationship between the deceased and Madhu Bisoi. Under the circumstances I have no doubt in my mind that the accused killed his wife under some sudden provocation, and therefore the extreme penalty of law is not called for in this case. The ends of justice will be met if he is sentenced to the lesser sentence of transportation for life.

In the result I would discharge the reference and allow the appeal only to this extent that the sentence of death will be commuted to one of transportation for life.

Meredith J.— I agree with the view taken by my learned brother. That the first information report is inadmissible cannot be questioned. It is a confession to the police and as such under S. 25, Evidence Act, it cannot be proved as against the accused. The principle in 25 C W N 788[4] is not applicable in this case as there are no parts of the first information report which can be extracted from the rest and said to be relevant in themselves and admissible as not being incriminatory. The first information report in this case forms a single connected story. No part of it has any meaning or significance except in relation to the whole. It would be quite wrong to extract fragments from it in which the accused

4. Superintendent and Remembrancer of Legal Affairs, Bengal v. Lalit Mohan Singha Roy, (1921) 8 A I R Cal 111=62 I C 578=22 Cr L J 562=25 C W N 788.

does not make any self-incriminating statement, for, there are no such fragments which in themselves have any relevance or significance. In the case of the confession made to a Magistrate the position is not so clear, but I have no doubt that it is inadmissible, as it has not been duly recorded under S. 164, Criminal P. C., and the defect cannot be cured by S. 533 of that Code. S. 164, cl. (3) is in the following terms:

> A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession, he shall make a memorandum at the foot of such record to the following effect:
>
> 'I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it, and admitted by him to be correct, and it contains a full and true account of the statement made by him.'

These provisions are mandatory, as has been laid down by the Privy Council in 17 P L T 594.[3] The Magistrate must act strictly in accordance with the provisions of S. 164, or not at all. One of the provisions just quoted says that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. Therefore, the Magistrate must ask the accused questions designed to ascertain and to satisfy himself whether the confession is being made voluntarily or not. It would, I think, be going too far to say that the questions must be in any special form, for S. 164 does not prescribe that; but clearly there must be some question or questions designed to reveal whether the statement is being made voluntarily. What happened in the present case was that the Magistrate, when the accused was produced before him, warned him that he was not bound to make a statement and that it might be used as evidence against him. He then put him back for 24 hours for cool reflection. When he was produced the second time he asked him one question preparatory to recording his confession and one question only. This question was:

> Have you remembered the warning I gave you yesterday that you are not bound to make a statement and that it may be used as evidence against you?

to which the accused answered "I have heard your present warning also. I am prepared to make a statement." In his certificate at the foot of the confession the Magistrate recorded:

> The accused was produced before me on 1st May 1939 from the Sub-Jail, Jaypur. I have asked the police escort to go out of my Court hall and gave him warning that he is not bound to make a statement and that the said confession if any made may be used as evidence against him. I have given him time till today for 24 hours for cool reflection. To-day, i. e. 2nd May 1939, he is again produced. I have again warned him as stated above. In spite of two warnings in the absence of the police, he has made quite voluntarily the statement enclosed. I fully believe that his confession statement is quite voluntarily, free from any influence.

That is the position so far as the Magistrate's written record is concerned. When he was examined as a witness the Magistrate took the matter no further. He said:

> The accused was produced before me on 1st May .... I sent the police escort away and warned the accused that he was not bound to make a statement and that if he made a statement it could be used against him. I gave him 24 hours to reflect and recorded his statement the next day. At that time no police officer was present or within sight .,.... I am convinced that the statement was purely voluntary and that no extraneous influences were brought to bear upon him to induce the accused to make his statement.

Clearly the Magistrate amply warned the accused, and so fully complied with the first part of S. 164, cl. (3); but he did not, in my opinion, comply with the mandatory provisions of the second part of that clause, and consequently he had not jurisdiction to say that he was satisfied that the confession was voluntary. The only question asked was not a question regarding the voluntary character of the statement, but only a question with regard to the accused's memory of the previous warning. If fully answered, it could reveal no more than the fact that the accused remembered the warning made 24 hours before, and as the same warning had just been made in identical terms it could not possibly take the matter any further or add in any way to the warning just given. In the circumstances it was a question which could reveal nothing, and was not in my view a question at all within the meaning of S. 164, cl. (3). To ask a question which can only test the accused's memory is not a compliance with the provisions of this Section. The question or questions, whatever the form, must be designed to show whether the accused is making the statement voluntarily. Such questions, for example, might be: "Are you making your statement as a result of any threat or inducement? Are you making your statement entirely of your own free will, and not as a

result of anything anyone has said to you? What is your motive for making a statement which must incriminate you?" These are only examples. Others might be thought of. As I have said, the law does not compel any particular questions or any particular form of questions. There must be some question, and some question the answer to which will indicate whether the confession is a voluntary one. Where there was no such question, the Magistrate has no jurisdiction to record a confession, and it will not do to point to some question which may have been asked but was directed to some other end. All this follows from S. 164 itself, which says that in the absence of the question the Magistrate shall not record the confession. He has no jurisdiction to record as a Magistrate so as to bring into operation the provisions of S. 80, Evidence Act, and, secondly, he has no jurisdiction to record a statement that he has satisfied himself that the confession is voluntary. It has been laid down in 39 I C 991[5] that if the Magistrate fails to question the accused in the proper manner he has no jurisdiction to say that he had satisfied himself that the confession was voluntary. With that view I entirely agree. Having regard to conditions in India, the Legislature has thought it proper to prescribe certain safeguards before a confession made to a Magistrate can be used against the person making it, and it is most important that these safeguards should not be whittled down.

In a case like this, S. 533, Criminal P. C., cannot be brought in to cure the defect. It is true that under that Section oral evidence can be taken to show that the defect was one of form only, and not of substance, and that though the Magistrate's record does not show that he had fully complied with the provisions of S. 164, yet, in fact, he had actually done so. But that is all that S. 533 can do. By using its provisions a defect of form can be removed, but not a defect of substance. Where the Magistrate is able to say in Court that he had asked the necessary questions but had forgotten to record them, then S. 533 would be applicable; and S. 91, Evidence Act, will cause no difficulty since S. 533 expressly states that it shall not do so. But where the Magistrate does not or cannot supply the defect in the written form with oral evidence, S. 533 cannot help. That is the view taken in 2 Lah 325[6] and 6 Lah 415.[7] These cases lay down that S. 533 can be used to cure defects of form but not of substance. The view taken in these cases seems to me to be correct. If no questions were actually asked, S. 533 will not help; but if the Magistrate's evidence shows that the questions were asked, then that is merely a defect of form and S. 533 will cure it. Such a case is reported in 3 Pat 872[8] where the real point was that the Court found that the accused had been questioned sufficiently, although not in proper form.

It might be said that even if the confession is not one properly recorded by the Magistrate under S. 164, it might still be proved, not under the provisions of S. 80, Evidence Act, not as a confession formally recorded by a Magistrate, but as a sort of extra-judicial confession made to a person whose position renders him worthy of credit. It might be argued with some plausibility (sic) that if a casual confession to an outsider made without any warning, such as the extra-judicial confession to the doctor in the present case, can be proved, then why cannot the confession to the Magistrate be equally proved? Is not a Magistrate as worthy of credence as a doctor or as a chance bystander who hears an extra-judicial confession? And if the provisions of S. 80, Evidence Act, are not applicable, why not the provisions of Ss. 17, 21, 24 and 26?

The answer to this is that the Privy Council in 17 P L T 594[3] has considered this very question and has said "No." In view of that decision it must be held that, though an extra-judicial confession to any ordinary person (other than a police officer) can be proved, such a confession cannot be proved at all if made to a Magistrate, unless the provisions of Sec. 164, Criminal P. C., have been complied with; and it will not help, in view of that decision, for a Magistrate to say that he did not purport to act under the provisions of S. 164. A second objection was taken to the confession in the present case, namely that it was not recorded in Telugu, the language in which it was made. Though the Magistrate stated that he spoke Telugu, he did not say that he could write the Telugu script. He was not asked in cross-examination if he could

5. Jiubodhan Bhuian v. Emperor, (1917) 4 A I R Pat 475=39 I C 991=18 Cr L J 623.

6. Farid v. Emperor, (1922) 9 A I R Lah 237 = 65 I C 613=2 Lah 325=23 Cr L J 149.
7. Partap Singh v. Emperor, (1925) 12 A I R Lah 605=93 I C 978=27 Cr L J 514=6 Lah 415.
8. Ramai Ho v. Emperor, (1925) 12 A I R Pat 191=84 I C 458=26 Cr L J 314=3 Pat 872.

write Telugu, or why, if so, he did not record the confession in Telugu but in English. Assuming however that he could have recorded the confession in Telugu and that the provisions of S. 364 (1), Criminal P. C., were not fully complied with, that is a defect which is clearly curable under S. 533, Criminal P. C., and it has been so held in 45 All 166.[1] The confession however is inadmissible by reason of the first objection, though not by reason of the second.

Excluding the first information report and the confession, I agree with my learned brother that there is ample evidence to prove the guilt of the accused. I see no reason why P. Ws. 9 and 10 should not be believed, and their evidence is inconsistent with the innocence of the accused. That P. Ws. 9 and 10 gave out their story at once is proved by P. Ws. 11 and 14. Then there is the evidence of P. Ws. 11 and 12 that the accused was seen running away with the blood-stained knife. This again is not the conduct of an innocent man. There is the evidence that he appeared at the police station and made over the blood-stained knife, which has been proved to be his own, and with his clothes covered with blood. Though the first information report cannot be used, the evidence that he appeared at the thana covered with blood, made over his blood-stained knife, and did not lay any information accusing anyone else of the murder, is admissible. Then there is the evidence that he retired for the night alone with the deceased and instantly after the murder he was found alone with her body. He is proved to have had the opportunity, and he has himself given the motive. Lastly, there is the extra-judicial confession made to the doctor in which he stated that he had caused an injury to his left hand, seen by the doctor, while committing the murder. He placed his left hand on the woman's chest, he said, to hold her down, and one of his blows had been slightly misdirected and cut his own hand. No doubt this extra-judicial confession cannot carry the same weight as a confession duly recorded under S. 164, but it is admissible under S. 21, Evidence Act. There is no reason whatever why the doctor should make a false statement, and the evidence does serve to corroborate the circumstantial evidence in the case.

D.S./R.K. *Sentence reduced.*

*** A. I. R. 1940 Patna 170**

HARRIES C. J. AND FAZL ALI J.

Durga Singh and others—Appellants.

v.

Kesho Lal and another—Respondents.

Letters Patent Appeal No. 1 of 1939, Decided on 29th August 1939, against judgment of Rowland J., D/- 11-11-1938.

(a) Transfer of Property Act (1882), S. 6 — Debt or part of debt is property only if action to recover it is sustainable.

Under the Transfer of Property Act "debt" belongs to a particular species of property, namely actionable claims. An actionable claim has been defined as "a claim to a debt .... which the civil Courts recognise as affording grounds of relief." It follows that a claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation is not property. The same limitation must apply to a part of a debt ; and in order to determine whether or not it is property, it must be found out whether an action can be sustained to recover it. [P 173 C 2]

***(b) Transfer of Property Act (1882), S. 130 — Assignment of part of debt is valid — O. 2, R. 2, Civil P. C., does not affect right of transfer — R. 2 is merely rule of procedure** (Per *Fazl Ali J.*) *(Obiter).*

The Transfer of Property Act does not recognise any distinction between whole debt and part of a debt. Both may be transferred under the Act if they come under the category of "actionable claims" as an actionable claim is "property". O. 2, R. 2, being a rule of procedure, does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory, as under O. 2, R. 2, Civil P. C., a single cause of action cannot be allowed to be split up into several causes of action : Indian and English *Case law reviewed.*

[P 174 C 2]

K. Sahi and Avadhesh Nandan Sahai — *for Appellants.*

Bhubaneshwar Prasad Sinha — *for Respondents.*

Fazl Ali J.—This is an appeal from a decision of Rowland J. in a suit brought by the respondents to recover a certain sum of money from the appellants. The suit was decreed by the trial Court, but was dismissed on appeal by the lower Appellate Court. Rowland J. has in second appeal set aside the judgment of the lower Appellate Court and restored the judgment of the trial Court. The defendants first party who contested the suit have accordingly preferred this appeal under the Letters Patent.

The circumstances which gave rise to this litigation may be briefly stated as follows : On 6th November 1923, defendant 11 executed a zarpeshgi lease in respect of a seven pies share in Mauza Bahpuri Majurahi in favour of the appellants (defen-

dants first party). On 10th November 1928, he mortgaged the same property to defendant 12 for a sum of Rs. 1000 and on 13th October 1932, he borrowed a sum of Rs. 330 from the latter by executing a hand-note in his favour. On 23rd June 1933, he sold to the appellants the property already mortgaged to them and defendant 12 for a sum of Rs. 5000. It was recited in the sale-deed that out of the total sum of Rs. 5000, Rs. 2125 had been set off against the mortgage debt due to the vendees on the basis of the mortgage dated 6th November 1923, and a sum of Rs. 2227 had been left in deposit with them for the purpose of paying off the mortgage dues of defendant 12. The balance of the consideration money, namely Rs. 648, was paid in cash. As the debt due to defendant 12 from defendant 11 on the hand-note was not paid by the appellants, defendant 11 had to borrow a sum of Rs. 450 from the plaintiff for the purpose of paying it off and on 28th January 1935, in consideration of the advance made by the plaintiff to him he executed a registered deed (Ex. 1) by which he assigned to him (the plaintiff) his right to realize a sum of Rs. 500 from the appellants.

It was recited in the deed of assignment that the sum of Rs. 2227 which had been left with the vendee represented the total sum due on the date of the sale to defendant 12 from defendant 11, both on the mortgage bond dated 10th November 1928 and the hand-note dated 13th October 1932. It was also stated that by mistake the dues under the hand-note had not been mentioned in the sale-deed though the understanding between the parties was that this debt should also be paid off out of the money left with the appellants. After the assignment the plaintiff brought the present suit to recover the sum of Rs. 500 with interest up to the date of the suit calculated at the rate mentioned in the hand-note dated 13th October 1932, and prayed that the money claimed should be charged on the property which had been sold by defendant 11 to the defendants first party. The suit was decreed by the Munsif but his decision was reversed by the Subordinate Judge on the ground that in law a part of a debt could not be assigned and therefore the plaintiff had no right of suit. This view was not accepted in second appeal by Rowland J. who accordingly set aside the judgment of the Subordinate Judge and restored the decree of the Munsif. The principal point therefore which arises in this appeal is whether the assignment of a part of a debt is valid in India. The point is a somewhat difficult one and it does not appear to have been fully discussed in any of the Indian authorities cited at the Bar. In 42 I C 684[1] at p. 693 Seshagiri Ayyar J. sitting singly made an observation to the effect that the omission of the word "absolute" from S. 130, T. P. Act, which deals with the assignment of actionable claim,

> was a deliberate departure from the rule of English law and indicated that an assignment of part of a chose in action can be given effect to under the Transfer of Property Act.

In 48 M L J 432[2] Ramesam J. (also sitting singly) dissented from the observation of Seshagiri Ayyar J. and after referring to certain English cases expressed the view that the assignment of part of a debt is not valid. In 52 Mad 465[3] a Bench of two Judges of the Madras High Court followed an earlier case of 1919 in preference to the decision of Ramesam J. in 48 M L J 432,[2] but all that they said on the point is to be found in the following passage :

> The transfer of a part of a debt was not recognized in English Common Law, but the assignment of a part of a debt was always held to be good in equity and was deemed to pass the property in that portion of the debt. In enforcing such claim, it would be necessary to implead the owner of the other portion of the debt, but apart from that there is no objection in equity to enforcing a claim for part payment of a debt: *vide* (1921) 1 Ch 349.[4] It has also been held that the partial transfer of a debt is valid in Appeal No. 53 of 1919 in this Court, and this objection must therefore be disallowed although there is a remark in 48 M L J 432[2] which throws some doubt upon this conclusion.

In 62 Cal 510[5] a Division Bench of the Calcutta High Court consisting of Lort-Williams and Jack JJ. expressed a contrary view but they did not discuss the point and based their decision wholly on 48 M L J 432[2] decided by Ramesam J. It will not be out of place here to refer to certain cases decided in England after the passing of the Judicature Act of 1873. It is well-known that according to the Common Law of

1. Sabjan Sahib v. Abdul Azzeez Sahib, (1918) 5 A I R Mad 1337=42 I C 684.
2. Doraiswami Mudaliar v. Doraiswami Aiyangar, (1925) 12 A I R Mad 753=87 I C 382=48 M L J 432.
3. Raja of Ramnad v. Subramanian Chettiar, (1928) 15 A I R Mad 1201 = 116 I C 827=52 Mad 465.
4. In re Steel Wing Co., (1921) 1 Ch 349=90 L J Ch 116=(1920) B & C R 160=124 L T 664=65 S J 240.
5. Ghisulal Ganeshi Lal v. Gambhirmal, (1938) 25 A I R Cal 377=164 I C 111=62 Cal 510=39 C W N 606.

England choses in action could not, as a rule, be assigned but in equity such assignments were allowed to be made from a very early date and even at Common law an assignee was generally allowed to sue in the name of the assignor and in some cases under a power of attorney obtained from him. After the passing of the Judicature Act 1873, however, S. 25 (6) of that Act enabled the legal right in debt or other thing in action to be transferred to the assignee together with all remedies including the right to sue in his name. S. 25 of the Judicature Act has now been superseded by S. 136 of the Law of Property (15 Geo. V, Ch. 20) which runs as follows :

Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor . . . . is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (a) the legal right to such debt or thing in action ; (b) all legal and other remedies for the same, and (c) the power to give a good discharge for the same without the concurrence of the assignor, etc. etc.

Now, the question as to whether a part of a debt was assignable under S. 25 of the Judicature Act appears to have been raised in many cases, but it has not yet been authoritatively answered. In (1878) 3 Q B 569[6] Lord Coleridge expressed the view that such an assignment fell within the Act, but on appeal Cotton L. J. treated the particular assignment as a case of equitable assignment. In (1898) 1 Q B 765[7] Chitty L. J. questioned the correctness of the view expressed by Lord Coleridge in (1878) 3 Q B 569[6] and observed :

The decision of Lord Coleridge C. J. in (1878) 3 Q B 569[6] that the case fell within S. 25 appears to me to be open to question . . . . The Section speaks of an absolute assignment of any debt or other chose in action. It does not say "or any part of a debt or chose in action." It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit. However it is not necessary to decide the point in the present case, and I leave it open for future consideration.

In the same case Collins L. J. while agreeing with Chitty L. J. refrained from pronouncing any opinion on the question whether an assignment of a part of a debt was within S. 25, sub-s. (6), Judicature Act of 1873. In (1902) 1 K B 10[8] an assignment of

so much and such part of my income, salary and other emoluments from H as shall be necessary to pay a definite sum and any further sums in which I may hereafter become indebted to you

was held by Darling J. to be not such an assignment as was contemplated by S. 25 sub-s. (6), Judicature Act. The learned Judge observed that

having regard to the expression of opinion by Chitty L. J. in (1898) 1 Q B 765[7] it is extremely doubtful whether the assignment being of part of a debt only would come within the Act.

Lord Alberston C. J. and Channel J. however refrained from expressing any opinion in that case as to whether an assignment of a part of a debt fell within the Section. In (1910) 2 K B 636[9] a judgment-creditor having assigned a part of the judgment-debt for valuable consideration, the assignee applied for leave to issue execution. It was held by Bray J. that there could not be an absolute assignment within S. 25 (6), Judicature Act, of a definite part of an existing debt or other legal chose in action. The Court of Appeal however without expressing an opinion on the point held that as the original judgment-creditor could only issue a single execution upon his judgment and could not split up the judgment-debt and issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment-debt a right which he himself did not possess. In (1902) 2 K B 190[10] Mathew L. J. did not express any definite opinion on the question, but observed :

In the course of the argument the question was raised whether an assignment of part of a debt comes within S. 25, Judicature Act, 1873. We are not called upon to decide that question in this case, and I will express no opinion upon it further than to say that, as at present advised, I think, when that question arises for decision, much may be said in favour of the view that an assignment of part of a debt could not be an absolute assignment within the Section.

In (1910) 2 K B 630[11] Darling J. (notwithstanding the fact that he had expressed a contrary view in (1902) 1 K B 10[8]) held that an assignment of part of a debt came within S. 25, Judicature Act, but in (1910)

6. Brice v. Bannister, (1878) 3 Q B 569 = 47 L J Q B 722=38 L T 739=26 W R 670.
7. Durham Bros. v. Robertson, (1898) 1 Q B 765 =67 L J Q B 484=78 L T 438.
8. Jones v. Humphreys, (1902) 1 K B 10=71 L J K B 23=85 L T 488=50 W R 191=18 T L R 54.
9. Forster v. Baker, (1910) 2 K B 636=79 LJKB 664=102 L T 522=26 T L R 421.
10. Hughes v. Pump House Hotel Co. Ltd., (1902) 2 K B 190=71 L J K B 630=86 L T 794=50 W R 660=18 T L R 654.
11. Skipper & Tucker v. Holloway & Howard, (1910) 2 K B 630=79 L J K B 91=26 T L R 82.

2 K B 636,[9] Bray J. refused to follow the decision and observed as follows :

> But if an absolute assignment of part of a debt is valid under S. 25, sub-s. (6), the consequence is that the asssignee is able to sue the debtor without joining the assignor or the assignee of the other part of the debt, if there have been two assignments; and it may happen that if the debt had been split up into two, three or four parts, there might be two, three or four actions with different results. All sorts of difficulties would arise, and a great burden, an unnecessarily great burden, would be placed upon the debtor. In the case of a judgment-debtor that consideration applies with even greater force because the remedy on a judgment-debt is execution, and the result would be that if a judgment-debt was divided into, say, three or four parts, each of which was assigned to a different person, there might be three or four executions, and three or four petitions in bankruptcy, and the debtor might be considerably and unnecessarily harassed. These considerations, in my opinion, point to the fact that I ought not, unless compelled by the language of the Section, to construe the words "legal debt or chose in action" as including part of a legal debt or part of a chose in action.

In (1921) 1 Ch 349,[4] P. O. Lawrence J. agreed with the opinion of Bray J. as expressed in (1910) 2 K B 636[9] and held that the assignment of part of a debt does not operate to pass the legal right to that portion of the debt as it is not an assignment within S. 25, sub-s. (6), Judicature Act. He however held at the same time that such an assignment does operate in equity to transfer the part assigned and it constitutes the assignee a creditor for the original debtor. It may be stated here that this view was perfectly in consonance with the opinion expressed in a long line of cases and even in (1898) 1 Q B 765[7] Chitty L. J., though he questioned the correctness of Lord Coleridge's dictum in (1878) 3 Q B 569,[6] conceded that the assignment in question before him was valid as an equitable assignment.

In (1927) 43 T L R 29[12] which was decided in 1926, it was held firstly, that an assignment of a debt which limited the amount to a certain sum was good on the ground that it was an assignment of the whole debt with a proviso that any excess of certain sum must be held by the assignee as trustee for the assignor and secondly, that even if it was an assignment of part only of the debt, it would still be a good equitable assignment and the plaintiffs were entitled to recover. It will thus appear that though the point cannot be taken to have been finally settled in England, the weight of authority in that country seems to be in favour of the view that the assignment of a part of a debt does not operate to pass the legal right to that portion of the debt under S. 25, sub-s. (6), Judicature Act, but such an assignmant would operate in equity to transfer, the part assigned and constitute the assignee a creditor for the original debtor. In India however the position is somewhat different, because if it is found that a part of a debt cannot be assigned under the Transfer of Property Act, it will be difficult to hold that such an assignment can still be valid in equity. The first question to be answered therefore is whether a part of a debt can be validly assigned under the Transfer of Property Act. The answer to this question depends on whether a part of a debt is "property," because S. 6 of the Act clearly provides that

> property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force.

Now, at the first sight it would seem that if the whole debt is property, as it undoubtedly is, a part of the debt must be so. The matter is however not so simple as it seems. Under the Transfer of Property Act "debt" belongs to a particular species of property namely actionable claims. An actionable claim has been defined as "a claim to a debt the ..... which the Civil Courts recognize as affording grounds of relief." It follows that a claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation, is not property. The same limitation must, in my opinion, apply to a part of a debt; and in order to determine whether or not it is property, we must find out whether an action can be sustained to recover it. At this point it seems necessary to refer to O. 2, R. 2, which runs as follows :

> (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

This rule in my opinion meets the point so emphatically raised in the judgments of Chitty L. J., in (1898) 1 Q B 765[7] and of Bray J., in (1910) 2 K B 636.[9] Both the learned Judges have pointed out that if a part of a debt can be legally transferred, it would seem to leave it in the power of the original creditor to harass his debtor by splitting up the single cause of action of his debt into as many legal causes of action as he might think fit. This rule will, in my

12. Bank of Liverpool and Martins, Ltd. v. Holland, (1927) 43 T L R 29=32 Com Cas 56.

opinion, prevent him from doing so. It appears to me to be elementary that a creditor cannot confer upon his assignee a higher right than what he himself possesses. Thus, if he himself could not sue the debtor twice with regard to parts of the same debt under O. 2, R. 2, he cannot be allowed to defeat that provision by assigning one part of a debt to one person and another part to another. There is however nothing to prevent him from relinquishing one part of the debt and transferring another part, as such an assignment will be tantamount to an assignment of the whole debt which remains unpaid after a part of the debt has been relinquished. He may also transfer one part of the debt to one person and another part to another person and the two assignees may possibly jointly sue the debtor in a common action and ask for a joint decree in respect of the whole debt. But once a suit has been brought on a part of the debt, then no suit can be brought subsequently for the remaining part either by the creditor or by any person to whom he assigns the remainder. It appears to me that the assignment of the remainder in such a case must be ineffectual because, as the creditor himself cannot sue upon it, it ceases to be his property and he cannot by transferring it to another person confer upon him a higher right than what he himself possessed.

Reference may also be made in this connexion to S. 130, T. P. Act, which provides the mode of transferring an actionable claim. The language of this Section bears some resemblance to the language of S. 25 (6), Judicature Act, 1873, and S. 136, Law of Property Act, 1925, but it is not precisely the same. One of the points of difference which alone need be pointed out here is that while the two English Acts speak of the assignment of "any debt or other legal chose in action," S. 130, T. P. Act, purports to deal with the "transfer of an actionable claim" only. The difference may at first sight appear to be one without distinction as the definition of "actionable claim" includes a claim to a debt, but that definition also provides that it must be such a claim 'as the Civil Courts recognize as affording grounds of relief." Thus, if claim to a part of a debt cannot be enforced under O. 2, R. 2, it is not an actionable claim and S. 130 can have no application to it.

Thus, the conclusion which I have arrived at may be summed up in a few words. The Transfer of Property Act does not recognize any distinction between whole debt and part of a debt. Both may be transferred under that Act, if they come under the category of "actionable claims" as an actionable claim is "property." The transferee of a part of a debt may, however, find that what is transferred to him is not an actionable claim as under O. 2, R. 2, a single cause of action cannot be allowed to be split up into several causes of action. O. 2, R. 2, being a rule of procedure, does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory.

I have dealt with the question as to whether or not a part of a debt can be transferred at some length in view of the general importance as well as because we have been pressed to do so by the learned counsel for the appellant. In my opinion, however, the present case can be decided on a short and simple ground apart from this question. As I have already said, it was recited in the appellants' own sale deed that a sum of Rs. 2227 had been left in deposit with them for the purpose of paying off the mortgage dues of defendant 12. On calculation it appears that the mortgage dues of defendant 12 amounted only to Rs. 1,855 odd on the date of the sale deed and the dues on the hand-note amounted to Rs. 371 odd on that date and to Rs. 501 on 28th January 1935, when Ex. 1 was executed by defendant 11 in favour of the plaintiff. Thus, defendant 11 had left with the appellants a surplus sum of money over and above the amount which was payable to defendant 12 on the basis of his mortgage. This sum clearly represented a single and whole debt and not part of a debt and there can be no doubt that it could be validly assigned by defendant 11 to the plaintiff. The appellant's counsel has pointed out that in the deed which was executed by defendant 11 in favour of the plaintiff it has been expressly stated that what had been transferred to the plaintiff was a part of Rs. 2227. That is undoubtedly so, but the deed must be read as a whole, and when read as a whole, it clearly shows that according to the statement made by defendant 11 in that deed, he left with him two distinct sums, one payable to defendant 12 on the basis of a mortgage deed and another on the basis of a hand-note. These two items being quite separate, there was nothing to prevent de-

fendant 11 from recovering them by two separate suits brought on two different occasions especially when in the deed executed by defendant 11 in favour of the appellants no time was fixed for the payment of the two debts due to defendant 12. Thus, the debt of Rs. 500 which was assigned by defendant 11 to the plaintiff was a distinct and separate debt and not merely part of a debt. In my opinion therefore even if we were inclined to hold that a part of a debt cannot be assigned under the Transfer of Property Act, the assignment in favour of the plaintiff could not be held to be invalid. Another point which was raised on behalf of the appellants was that the amount decreed by the trial Court cannot be charged on the property sold to them. It is unnecessary to decide this point as the respondent does not press for a charge. I would therefore direct that instead of a decree for charge, a money decree only be passed in this case, and subject to this modification, I would dismiss the appeal with costs.

Harries C. J.—I agree that this appeal should be dismissed. Upon the facts of the case, I agree that two sums were left in deposit with the purchaser, one sum to pay off what was due on the mortgage and one sum to pay off what was due on the hand-note. What the assignor assigned was the sum left with the purchaser to pay off the hand-note dues together with interest thereon. The assignment was not an assignment of part of a debt but was in substance and in fact an assignment of a distinct and separate debt. It was accordingly a valid assignment which gave the assignee a right to sue. This is sufficient to dispose of the appeal, and the point whether part of a debt is assignable does not strictly arise. In these circumstances, I prefer to express no opinion in this judgment upon the very difficult point as to whether a part of a debt is assignable.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 175

AGARWALA J.

Shah Md. Naim — Appellant.

v.

Lachhu Sahu and others—Respondents.

Appeal No. 727 of 1938, Decided on 4th October 1939, from appellate decree of Dist. Judge, Patna, D/- 29th April 1938.

Bihar Tenancy Act (8 of 1934), Sec. 23-A Proviso — Entry in Record of Rights recording landlord's possession in respect of trees on the occupancy holding of his tenant — Landlord is entitled to produce of trees — No question of limitation arises in respect of exercise of right to produce of trees.

Ordinarily one expects a person in possession of a tree to be entitled to its produce and from that point of view the entry in the Record of Rights expressly recording the landlord's possession of the trees on the holding of his occupancy tenant indicates that the landlord has the right to the produce and therefore occupancy tenant cannot prevent the landlord from exercising his right to tap the palm trees on his holding. [P 176 C 1]

The trees being on the tenants' holding, the landlord must be deemed to be in possession through his tenant; and no question of limitation can possibly arise in the absence of any assertion of hostile title to the trees by the tenant. [P 176 C 1, 2]

Chowdhry Mathura Prasad and Dhanushdhari Prasad — *for Appellant.*

A. H. Fakhruddin and Awadh Behari Jha — *for Respondents.*

Judgment. — This is an appeal by the plaintiff from a decision of the Additional District Judge of Patna reversing a decision of the Additional Munsif of Bihar. The appeal arises out of a suit by a landlord against an occupancy raiyat for compensation on account of the defendant having prevented the plaintiff from exercising his right to tap palm trees standing on the defendant's holding. The claim is in respect of 20 trees at Rs. 2 per tree per annum for the years 1339 to 1342. The defence to the suit was that the defendant had purchased the trees from the plaintiff's ancestor for Rs. 150. That defence has been found to be false by both Courts. The trial Court however held that the plaintiff was entitled to tap the trees and therefore was entitled to compensation for the act of the defendant in wrongfully preventing him from exercising his right. That decision has been reversed on appeal by the Additional District Judge. The lower Appellate Court held that by reason of the provisions of S. 23-A, Bihar Tenancy Act, the defendant was entitled to the produce of the trees and therefore the landlord plaintiff had no cause of action. The material portion of Section 23-A is as follows :

> Notwithstanding anything contained in Sec. 23 when a raiyat has a right of occupancy in respect of any land, if the rent of such land is paid in cash, the raiyat may appropriate the flowers, fruits and other produce of any trees or bamboos standing on such land.

It is not disputed that the defendant has a right of occupancy in the land or that he pays rent in cash. Prima facie therefore the decision of the Appellate Court would appear to be correct. But there is a Proviso to this Section and the language of that Proviso is as follows :

Provided that if there is a specific entry in the latest Record of Rights regarding any tree or bamboo which was standing on any land specified in the Section before the date of the final publication of such Record of Rights, the rights of the landlord and the raiyat in such tree or bamboo shall be in accordance with such entry or with any decision of a Civil Court affecting such entry.

Now, the Record of Rights was published in 1912. It recorded that there were 30 trees on the defendant's holding and that they were in the possession of the landlord. At present there are only 20 trees. The question is what meaning is to be attached to this entry in the Record of Rights.

On behalf of the appellant it is contended that the entry means that the landlord is entitled not only to his common law right to the timber but also to the produce of the trees. On behalf of the respondents however it is contended that the tenant has a common law right in the produce of the trees and that the landlord is not entitled to the produce unless there is an agreement between them to the contrary. Ordinarily, one would expect a person in possession of a tree to be entitled to its produce and from that point of view the entry in the Record of Rights expressly recording the landlord's possession of the trees would indicate that the landlord has the right to the produce. That interpretation of the entry is supported by the fact that the defendant set up a claim to have purchased the trees. If the entry in the Record of Rights was not intended to confer a right to the produce of the trees the defendant could have resisted the plaintiff's claim without putting up the defence of purchase. I think therefore that the decision of the trial Court was right that the plaintiff had the right in the produce of those trees and I will therefore set aside the decision of the Appellate Court and restore that of the Munsif.

Before leaving the matter however it is necessary to refer to an observation in the judgment of the Appellate Court that the plaintiff had not shown that he ever had these trees tapped before. The Appellate Court does not say expressly that the plaintiff's suit is barred on this ground. But that contention was put forward by the respondent in this Court. The trees being on the defendant's land and the defendant being the tenant of the plaintiff, the plaintiff was in possession through his tenant and therefore no question of limitation can possibly arise in the absence of any assertion of hostile title to the trees by the tenant. No such question appears to have arisen between the parties until the defendant refused to allow the plaintiff to tap the trees in 1339. The mere fact that the plaintiff has not exercised his right before is insufficient to bar his suit when he was in possession through his tenant without any assertion of an adverse right by the latter. The plaintiff is entitled to his costs throughout.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 176

AGARWALA J.

Bodh Narain Mahto — Appellant.

v.

Mahabir Pd. and others — Respondents.

Misc. Second Appeal No. 287 of 1939, Decided on 14th September 1939.

Civil P. C. (1908), O. 41, R. 1—Appeal from order under S. 47 —Appellant is not bound to file a copy of order.

Where there is an appeal from an order under S. 47 which has the force of a decree, the appellant is not bound to file a copy of the order especially where a copy of the judgment is already on the record in an analogous appeal from the same order and which is available for use in both the appeals. [P 176 C 2]

R. K. Sahay and B. Nath — *for Appellant.*

Order. — In one of the two analogous appeals between the same parties arising out of the same judgment the appellant filed a copy of the judgment and prayed that copy of the judgment in the other appeal should be dispensed with. The Registrar has taken the view that as the appeal is from an order under S. 47, Civil P. C., which has the force of a decree the appellant is bound to file a copy of the order as required by R. 1 of O. 41 of the Code. That rule requires that the memorandum of appeal shall be accompanied by a copy of this decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded. In this Court no formal decree is prepared in a case under S. 47 of the Code. There seems to be no reason why the appellant should be obliged to file a copy of the judgment which is already on the record in the analogous appeal and which is available for use in both the appeals as R. 1 does not expressly require that an order which has the force of a decree but which is not a decree shall be filed with the memorandum.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 177

MANOHAR LALL J.

Dirghayu Pande — Appellant.

v.

Shrimati Kishori Kuer — Respondent.

Application in Second Appeal No. 358 of 1939, Decided on 16th October 1939.

Civil P. C. (1908), O. 22, R. 10—Assignment during pendency of appeal—Assignee not availing himself of O. 22, R. 10 — Assignor cannot file second appeal — Nor can assignee be substituted under R. 10 on abatement of second appeal by death of sole assignor appellant.

Where during the pendency of an appeal the plaintiff-respondent transferred his interest to a third person and the assignee did not avail himself of the provisions of Order 22, the assignor cannot prefer second appeal nor can the assignee be substituted in second appeal on its abatement by death of the sole assignor appellant for, by the death of the assignor during second appeal by him, the assignee does not derive any right; the right under which he claims to be substituted accrued to him when he professed to purchase property from the then living assignor, but having failed to avail himself of provisions of O. 22, he cannot be allowed to be substituted under R. 10 in second appeal : *A I R 1934 All 442; A I R 1935 Lah 119 and A I R 1936 Pat 123, Rel. on ; A I R 1924 Cal 90; A I R 1924 Cal 188 and A I R 1936 Pat 420, Disting.*

[P 179 C 1, 2]

N. K. Prasad II and Ramanugrah Prasad — *for Appellant.*

Sarjoo Prasad, R. K. Sahay and Lalnarain Sinha — *for Respondent.*

Order. — This is an application for substitution by Mahanth Ramdhan Puri who claims to be substituted after setting aside the order of abatement of the appeal in place of the sole appellant Dirghayu Pande in the following circumstances. Dirghayu Pande sued to recover possession of four annas of the property in suit, described in the plaint, before the Munsif, third Court, Gaya, from defendant 2 and his transferees, defendants 3 and 4. That property had been sold in a certificate sale for recovery of arrears of cess on 3rd April 1934, by the Collector; and therefore the Secretary of State for India in Council was impleaded as defendant 1. During the pendency of the suit there was a compromise between defendant 4 and the plaintiff so that the suit of the plaintiff then remained for deciding the rights as to the remaining half share in the property in suit. The suit was ultimately decreed ex parte against defendant 3 only and dismissed against the Secretary of State on 10th December 1936. Defendant 3 preferred an appeal to the District Judge of Gaya. That appeal was heard by the learned Subordinate Judge who allowed the appeal and dismissed the suit so far as it concerned defendants 2 and 3 with respect to the subject-matter of the appeal. That decision was given on 7th December 1937. During the pendency of the appeal in the Court below the petitioner before me, Ramdhan Puri, obtained a sale deed from the plaintiff on 4th January 1937. That sale deed has been produced before me and I am informed that by the terms thereof the petitioner undertook to finance and carry on the litigation both in the Court below and also in the High Court, if necessary. But the petitioner, notwithstanding the devolution of the interest pendente lite, did not avail himself of the provisions of O. 22, Civil P. C., and did not get himself substituted or brought on the record of the appeal while it was pending in the Court below.

Against the decree of the learned Subordinate Judge dated 7th December 1937, allowing the appeal of the defendants, a second appeal was brought in this Court by the sole plaintiff; the memorandum of appeal was filed on 7th March 1938. The appeal was admitted by the Registrar on 4th May 1938 and after notice to the respondents it was placed in the ordinary course for hearing before the learned Single Judge of this Court who took up the case on 9th February 1939, when the learned advocate for the respondents informed the Court that the sole appellant had died. The learned advocate for the sole appellant then took time to ascertain the fact and date of death of his client and to make the necessary substitution. On 23rd February 1939, it having been discovered that the sole appellant had died on 25th August 1938, and therefore the appeal had abated, an application was filed before this Court asking that the abatement may be set aside and that the petitioner may be substituted in place of the deceased sole appellant. Notice was issued on 22nd March 1939, on this application and the matter was placed before me for orders on 25th September 1939. I then directed that the petitioner should produce before me the sale deed already referred to. The sale deed was produced on 29th September 1939 and arguments were then heard. The respondents objected on that date that the petitioner in the circumstances narrated above had no right to get himself substituted or get the abatement set aside. The petitioner, on the other hand, contended that as the sole appellant was dead it was but just and proper that the

name of the petitioner, who relied upon the sale deed of 4th January 1937, should be substituted so that he may carry on the litigation.

I am of opinion that I have no power to make any substitution as prayed for by the petitioner under the provisions of O. 22, Civil P. C. In the present case it will be noticed that the devolution of interest took place during the pendency of the appeal before the learned District Judge. No devolution of interest took place in August 1938 when the sole appellant died, while the appeal was pending in this Court. By the death the petitioner has not derived any right; the right under which the petitioner claims to be substituted was always with him since 4th January 1937 when he professed to purchase the property in dispute from the then living plaintiff. In these circumstances I do not see how the provisions of O. 22, Civil P. C., can come to the aid of the petitioner. The matter appears to be concluded by authority also. In A I R 1934 All 442,[1] Iqbal Ahmed J. in delivering the judgment of that Court observed that:

> Where the assignment in favour of the applicant has been made during the pendency of the suit in the Court below and not during the pendency of the appeal, the Appellate Court has no jurisdiction under R. 10 to implead the applicant as a party to the appeal

and he repelled the prayer of the applicant that under the provisions of S. 151, Civil P. C., he should be ordered to be brought upon the record—the reason given for the refusal was that where the applicant has a remedy provided elsewhere in the Code and has neglected to avail himself of it he is not permitted to invoke the inherent jurisdiction of the High Court. In A I R 1935 Lah 119[2] a Single Judge of the Lahore High Court took a similar view and held that

> where a person against whom a suit is dismissed in the trial Court assigns his interest to a third party during the period intervening between the passing of the decree and the institution of the appeal, the assignor has no subsisting interest which would entitle him to prefer an appeal,

and that

> to such a case S. 146 (Civil P. C.), is of no assistance and the Appellate Court could not make assignee appellant at the time of hearing the appeal.

This is exactly the situation in the present case and in my opinion as the assignment, relied upon by the petitioner, was made before the appeal was filed in this Court, Dirghayu Pande had no right to prefer an appeal and in any case the petitioner ought to have preferred an appeal either in his own name or by joining the plaintiff as an appellant in the memorandum of appeal filed in this Court. In A I R 1936 Pat 123[3] Mohammad Noor J., in delivering the leading judgment of a Division Bench of this Court, observed that the provisions of O. 22 could not help the appellant in that case because the right which he claimed did not accrue to him on the death of the plaintiff but on a transfer made to him by the plaintiff while she was living. He pointed out the distinction between Rr. 3 and 10 of that Order and came to the conclusion that the appellant could not derive any assistance from either of these rules read with S. 146, Civil P. C. In the concluding paragraph of the judgment the question whether the appellant could get leave to continue the suit under O. 22, R. 10 was also considered. The learned Judge pointed out that R. 10 empowers the Court to give leave to a person who has taken an assignment from a party to continue the suit and that the "party" obviously refers to a party already on the record.

Mr. Nawal Kishore Prasad No. 2 has placed reliance upon two decisions of the Calcutta High Court and one decision of this Court in support of his contention that he should be allowed to continue the appeal in his own right as transferee from Dirghayu Pande, and that in any case he, as the legal representative of Dirghayu Pande, has a right to have the abatement set aside in order to allow him to prosecute the appeal. The first case relied upon is the case in 27 C W N 710.[4] In that case (which was a partition suit) what happened was that during the pendency of an appeal from a final decree one of the respondents, whose share in the property had been sold and which share had been subsequently reacquired by his heirs, the other parties to the suit, having died, the appellant applied for substitution of his heirs out of time. The learned Judges held that, inasmuch as on the death of the said respondent, his interest was not in his heirs, but had devolved on a third party, who was made a party before the appeal came on for hearing, O. 22, R. 10, Civil P. C. applied. The

1. Phul Chand v. Tabir Husain, (1934) 21 A I R All 442=149 I C 970=1934 A L J 832.
2. Kanti Chander v. Pirbhu Dayal, (1935) 22 A I R Lah 119.
3. Gobardhan Mukharji v. Saligram Marwari, (1936) 23 A I R Pat 123 = 159 I C 828 = 15 Pat 82=17 P L T 73.
4. Rajani Kanta v. Jyoti Prasad Singh, (1924) 11 A I R Cal 90=75 I C 255=27 C W N 710.

facts of that case are wholly different from the facts of the present case, where the petitioner was never on the record of the appeal. In the next case, 27 C W N 755,[5] the facts were that during pendency of a suit the terms of settlement between the parties had been filed in Court; but before a decree had been actually drawn up in accordance with the terms of compromise, a stranger to the suit, who had purchased the interest of the plaintiff before the terms of settlement were filed in Court, applied to be substituted as the plaintiff in the suit. The learned Judges held that inasmuch as the decree had not been drawn up and the suit was still pending at the time the application was made, the stranger could be brought on the record. It will be noticed that in this case the suit had not been disposed of and therefore the interest, which had devolved upon a third party, was allowed to be represented by bringing him upon the record of a suit which was then alive.

Reliance was also placed upon the case in A I R 1936 Pat 420.[6] In that case the mortgagors had brought suits for redemption of their mortgages. The suits ended in a decree which fixed the amount to be paid by them within a stated time. The payment was not made within that particular time, and thereafter a suit for redemption was filed by their successors. It having been contended that the right of redemption was extinguished, the learned Judges held that inasmuch as the final decree had not been passed, the right of redemption was not extinguished. Here again the distinction between the facts of that case and those of the present is that no final decree had been passed and the right of redemption had not been extinguished. There is no appeal pending in the present case by reason of the dismissal of the appeal by this Court for non-prosecution or for abatement, and the decision of the lower Court stands and has become final.

It was lastly contended that the petitioner in fairness ought to be allowed to have the abatement set aside. In my opinion no right accrued to the petitioner afresh on the death of the person who, with the risk the petitioner took, was allowed to present and prosecute the appeal in all its stages before it terminated either by decision or by the death of the sole appellant. For all these reasons I would dismiss the application, but there will be no order for costs. Leave to appeal has been asked for, but I am unable to grant it if only for the reason that I am not dismissing the appeal but merely dismissing the application for setting aside the abatement and am not allowing the petitioner to be substituted in place of the deceased appellant at this stage.

G.N./R.K. *Application dismissed.*

5. Lakshan Chunder Dev v. Nikunjamoni Dassi, (1924) 11 A I R Cal 188 = 80 I C 538 = 27 C W N 755.

6. Joti Lal Sah v. Sheodhayan Prasad, (1936) 23 A I R Pat 420=163 I C 908=15 Pat 607=17 P L T 564.

A. I. R. 1940 Patna 179

AGARWALA J.

Sheodeni Pattak — Petitioner.

v.

Budheshwar Dubey — Opposite Party.

Criminal Revn. No. 436 of 1939, Decided on 21st September 1939, against order of Sessions Judge, Arrah, D/- 10th June 1939.

Penal Code (1860), S. 499 — Defamation — Possibility that accused might have some defence is no ground for dismissing complaint.

A complaint under S. 499 made on oath, cannot be dismissed on the ground that there is a possibility that the accused might have some defence to the complaint, if true. The Magistrate should ascertain whether there is any reason for disbelieving the complaint. [P 179 C 2 ; P 180 C 1]

A. B. N. Sinha — *for Petitioner.*

Raj Kishore Prasad and S. R. Ghosal — *for Opposite Party.*

Order — This is an application against an order of the Sessions Judge of Shahabad declining to interfere with an order of the Subdivisional Magistrate of Buxar refusing to prosecute one Budheshwar Dubey on a charge of defamation. It appears that prior to the present proceedings there was a report by the police with regard to allegations made by Budheshwar Dubey against the present complainant. The Magistrate then observed that Budheshwar's allegations appeared to be in the nature of blackmail but that he would not take criminal proceedings but merely issue a warning to Budheshwar not to commit the offence again. The complainant's allegation is that Budheshwar had persisted in repeating the defamatory allegations of which he complained and should therefore be prosecuted. Among other reasons for not prosecuting Budheshwar the Magistrate has stated that it is possible that Budheshwar will be able to shelter himself behind two of the explanations to S. 499, I. P. C. Whether he will be successful in that is immaterial. In the

present case all that the Magistrate should have directed his attention to was to ascertain whether there was any reason for disbelieving the complaint which was made on oath and not whether there was some possibility that the petitioner might have some defence to the complaint if true. I will therefore set aside the order of the Subdivisional Magistrate dismissing the complaint and direct him to summon the accused person and to proceed with the trial.

G.N./R.K. *Order set aside.*

A. I. R. 1940 Patna 180

HARRIES C. J. AND MANOHAR LALL J.

Rani Harsamukhi Dasi—Plaintiff — Appellant.

v.

Agadhu Mohapatra and others — *Defendants* — Respondents.

Appeal No. 2 of 1936, Decided on 7th August 1939, from decision of Rent Suit Deputy Collector, Puri, D/- 11th October 1933.

(a) Bengal Cess Act (9 of 1880), S. 37 — Tenure omitted from revaluation roll — Procedure under S. 37 not followed — Tenure is not liable for road cess.

Once it is proved that there was a revaluation, the rights and liabilities of the parties will be determined by valuation of tenures which may be found in the revised roll of the estate. But when the tenure in question has been omitted from revaluation and the remedy provided for by S. 37 has not been followed the result is that there is an escapement of revaluation and the tenure is not liable to pay any road cess either at the old rate or at any rate at all. [P 181 C 1, 2]

(b) Civil P. C. (1908), O. 8, R. 6—Rent suit —Set off—Counter claim by tenant in rent suit for ascertained sum of road cess paid erroneously is not equitable but legal set off within the meaning of O. 8. R. 6.

The counter claim by the tenant in a rent suit for an ascertained sum paid as road cess erroneously is not an equitable set off but a legal set off as it comes within the provisions of O. 8, R. 6. Therefore court-fee for the amount which is sought to be claimed to be set off must be paid.

[P 181 C 2; P 182 C 2]

(c) Civil P. C. (1908), O. 1, R. 8, O. 22 — Some of respondents allowed to represent all respondents not on record under O. 1, R. 8 — Death of some of respondents so representing during appeal — Failure to bring legal representatives on record does not abate appeal.

Where the respondents are given permission under O. 1, R. 8 by the Court to defend the entire appeal on behalf of all the respondents not on record, the appeal does not abate if some of the respondents appointed to represent the others die during the pendency of the appeal and their legal representatives are not brought on record : *A I R 1937 Pat 149 and A I R 1931 Mad 452, Rel. on; A I R 1920 Lah 338 and A I R 1925 Lah 124, Disting.; A I R 1931 Lah 610, Expl. and Dissent.*

[P 184 C 2]

S. K. Mullick and Nitai Chandra Ghosh — *for Appellant.*

G. P. Das and P. Misra—*for Respondents.*

Manohar Lall J.—This is an appeal by the plaintiff against the decision of the learned Rent Suit Deputy Collector of Puri dated 11th October 1933, by which the suit of the plaintiff was dismissed. That suit was instituted for recovery of arrears of rent and cess for the second kist of 1336 and both kists of 1337 and 1st kist of 1338 in respect of the Tanki Bahel tenure of the defendants in touzi No. 268 lying in certain villages the tenure has a large area of about 3170 acres. The principle question for decision in the present appeal is whether the claim of the plaintiff so far as road cess is concerned can be maintained and also whether the defendants can be allowed to claim a set-off for the amount of road cess which they say they have paid erroneously for about 10 years prior to the institution of this suit. A preliminary point as to the maintainability of the appeal was also raised on behalf of the respondents which will be considered in its proper place later on.

The facts necessary for determination of the controversy in the appeal may now be shortly stated. The plaintiff instituted the suit, referred to above, against a very large number of tenure-holders, the number being about 2000. The arrears of rent and cess claimed for the period in suit were stated to be recoverable jointly and severally from the defendants. On 8th August 1932, six of the defendants namely defendants 4, 7, 19, 48, 164 and 302 appeared and filed a written statement. In paragraph 10 of the written statement they stated that as they are the kartas and mamlatkars amongst all the defendants they have filed the written statement on behalf of all the defendants. In other words they attempted to defend the suit not only on their behalf but as representing the other defendants also. The Court did not allow the written statement to be treated as a representative written statement with the result that the written statement remained as a written statement filed on behalf of these six defendants only, the other defendants remaining unrepresented and the case proceeded ex parte against them.

The plaintiff claimed rent at Rupees 1994-9-10 per annum and road cess at the rate of Rs. 479-14-4 being the rate of cess

for the tenure included in the annual valuation of 1902 for the period 1337 to the first kist of 1338; but for the second kist of 1338 the plaintiff claimed cess at the rate of Rs. 876-1-6 on the basis of a revaluation in the current year. The defendants resisted the claim of the plaintiff so far as the road cess for the period ending the first kist of 1338 is concerned on the ground that though there was a revaluation in the year 1917 but in that year the tenures in suit escaped assessment and therefore the plaintiff was debarred from suing for cess for these years at the old valuation of 1902 which was superseded by the valuation of 1917. The plaintiff replied that it was true that there was a revaluation in 1917, but as there was no revaluation of the tenures in suit in 1917 the valuation of 1902, which was not interfered with, must be held to be payable by the defendants for these tenures. The learned Rent Suit Deputy Collector overruled this contention. He held that there was a revaluation in 1917, the new roll of the estate of that year was duly published but when no revaluation could be found of the tenure in question in the revaluation roll of 1917 the result was that there was an escapement of revaluation and the tenure was not liable to pay any road cess at all.

Mr. S. M. Mullick appearing on behalf of the plaintiff contested this proposition and asserted that by virtue of the provisions of Ss. 6, 12, 36, 38 and 40, Cess Act of 1880 it must be held that the plaintiff is entitled to recover road cess for the first period at the old rate fixed in 1902. In my opinion, this argument is fallacious. The moment it is admitted that there was a revaluation in 1917 the rights and liabilities of the parties will be determined by the valuation for the tenures which may be found in the revised roll of the estate. That roll has to be (and in the present case it was) published as provided by S. 35, Cess Act, and this provision applies both to the original valuation or any revaluation which may be made of a tenure under Ch. 2, Part 2 of the Act. Indeed, S. 37 provides for a remedy where any estate or tenure has been omitted from revaluation or assessment or which was not in existence when such revaluation or assessment was made. In the present case the procedure provided by S. 37 has not been admittedly followed for some reason with the result that from the year 1917 the tenures have escaped assessment. I therefore, conclude that for the first period in suit no cess is payable either at the old rate or at any rate at all. For the period which concerns the second kist of 1338 Fasli when another revaluation was again effected upon the tenures in suit the claim for cess is valid and has not been resisted. The result is that I agree with the learned Rent Suit Deputy Collector who held that the claim of the plaintiff so far as it is based upon the rate of cess fixed by the annual valuation of 1902 for the period ending first kist of 1338 Fasli must be disallowed.

The appellant argues in the next place that the learned Rent Suit Deputy Collector was in error in allowing a set off for a sum of Rs. 4628-12-2 which was paid on behalf of all the defendants for the period 1917 to 1928 evidenced by Ex. A series. The claim put forward by the defendants is for an ascertained amount, and therefore comes within the provisions of O. 8, R. 6, Civil P. C., being a claim for legal set off for an ascertained sum. The respondent argues that although there cannot be a set off in law his clients are entitled to claim an equitable set off. I do not agree with this contention. This is not a case of any equitable set off but a case of legal set off. If the argument of the respondent were correct there would be no need to resort to the provisions of a legal set off in any case and the requirements of the Code could be always nullified. No court-fee has been paid on behalf of the defendants for the amount which is sought to be claimed to be set off. The question is whether the claim should be allowed.

In the written statement, as I have already stated, which was on behalf of six defendants only, their request to defend the suit on behalf of all the defendants was negatived. The claim of set off is stated in paras. 7 and 8 of the written statement and may be summarized as a claim for recovery of the amount which the defendants paid by way of road cess at the rate of Rupees 479-14-4 per annum illegally from the year 1917 to 1928. The date of knowledge of the allegation that payments were made erroneously was attributed to some of these defendants only whose names are not disclosed in the written statement or in the evidence. The written statement merely states "some of these defendants brought these matters to the knowledge of the plaintiff herself at Calcutta." On a reading of the whole written statement I do not find any assertion as to the date when some or all of the defendants came to know of the illegal payment or payment under a mistake by

the defendants of the road cess, which I have held was not due. The evidence on behalf of the defendants is equally vague and consists of two witnesses only. Witness 1 is a tahsildar who said that he collected the tanki rent of the Brahmins of one of the villages in the tenure. He says that Rs. 479-14-4 was realized as cess annually and that no cess was assessed on these lands in the previous revaluation (meaning the revaluation of 1917). He says: "We came to know of this at the present assessment of revaluation from the revaluation amlas." The date of this information again is not disclosed. But we were informed at the Bar that Ex. E, an application for information, dated 24th March 1931, may be taken to be the date when the information was obtained by the defendants. Only one defendant, Anant Mohapatra, examined himself. He is witness 2 for the defendant. He is aged 36 and says that Rs. 479-14-4 was being paid by them (meaning the defendants) as the amount was assessed as road cess in the Provincial Settlement. He says:

> There was no revaluation of road cess after this so far as our village was concerned. Without knowing that it was not assessed we went on paying the amount.

The share of rent of this defendant is only Rs. 8 per year and he says that he cannot state the rent payable by other contesting defendants. In the face of the evidence referred to just now, which is the only evidence upon the record, I am unable to hold that this Court is in a position to determine accurately the date or dates when the defendants came to know that the payments made by them were made under a mistake. But there is a further difficulty. The six defendants have been unable to show that they have paid any specific sums to the plaintiff on account of road cess. The evidence, as I have stated, is extremely vague. In these circumstances I am of opinion that the claim for set off ought to have been disallowed. The defendants had a remedy open to them to institute a suit for recovery of the sums which they say they had paid under a mistake of law or fact by asserting and proving the date of the cause of action in a properly constituted suit. The plaintiff would then be able to defend his position by adducing proper evidence to rebut the allegations of the defendants. The Civil Procedure Code allows the defendants to seek the same relief by way of defence but by proceeding in the manner indicated therein for the making of a legal set off. The claim is required to be treated as a counterclaim or as a plaint and a proper court-fee is to be paid thereon. For these reasons the claim for set off is disallowed and the decree of the learned Rent Suit Deputy Collector should be varied accordingly.

The following amounts should be excluded from the claim of the plaintiff: Rs. 959-12-8 or any other sum being the claim for cess for the second kist of 1336, for both the kists of 1337, and for the first kist of 1338. The plaintiff's claim will also be reduced by a sum of Rs. 901 paid to her on 23rd September 1931 as well as the sum of Rs. 101-14-8 paid on 11th February 1933. The claim for interest will be reduced proportionately. The amount ultimately found due to the plaintiff will be worked out by the office showing how much is due from the defendants on the lines indicated. The learned Rent Suit Deputy Collector also reduced the claim of the plaintiff by a sum of Rs. 1071-9-0 as being the amount realized by the plaintiff in execution of a decree in certain rent suits against the defendants. This sum the learned Rent Suit Deputy Collector has allowed as a set off against the claim for cess in the present case. For reasons similar to those given above, as this sum relates to part of the cess paid for the period before 1927, the claim for set off is disallowed.

It now remains to deal with the preliminary objection that the appeal is no longer maintainable in the following circumstances. The present appeal was filed on 10th January 1934. On 6th December 1934, there was an order by the Registrar that the application of the appellants who wanted that the numerous respondents should be represented in a representative capacity through some of the respondents only under O. 1, R. 8, Civil P. C., should be put up on a future date. On 26th July 1935 notice was issued on this application under O. 1, R. 8. On 13th February 1936, order No. 8 passed by a Division Bench consisting of Mohamad Noor and Rowland JJ., dealt with the application under O. 1, R. 8 at length. It is pointed out in that order that the plaintiff-appellant seeks permission under O. 1, R. 8, to proceed only against those six defendants who had appeared and defended the suit in the trial Court, that the notice of this application was given by public advertisement and in response to it some of the respondents appeared, filed vakalatnama and were heard.

The order which the Bench passed was that the appellant will be permitted to proceed against the fifteen respondents, namely respondents 4, 7, 19, 48, 164, 302, 644, 723, 736, 744, 990, 1010, 1263, 1332 and 1492 as representatives of the entire body of respondents. The Bench also directed that the notice of this appeal will be served upon those respondents only and that the notice will also be published in the 12 villages where the tenures in suit are situated and in the newspapers, named in the order, which are published in Orissa. It was also directed that the notice which was to be published in the villages will be hung up on some conspicuous part of it followed by beat of drum or by such other method as the Rent Deputy Collector of Puri may decide. It was after these preliminaries, carefully enumerated, had been observed that the appeal was admitted on 16th April 1936. It is now argued on behalf of the respondents that two of these fifteen respondents who were permitted to be proceeded against as the representative of the entire body of the respondents are dead and that as no substitution has been made in their place the appeal has become incompetent. A large number of cases were referred to at the Bar in support of the contention of the respondents but in my view the matter so far as this point is concerned has been accurately decided by Khaja Mohamad Noor J., in the judgment which is reported in 17 P L T 926,[1] where he points out that in these cases the appeal cannot be held to have abated, the reason for the rule being that the provisions of O. 22, which relate to the death of plaintiff or defendant cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under Order 1, Rule 8.

In the present case, as already pointed out, fifteen respondents were given permission by this Court to defend the entire appeal on behalf of all the respondents and the only thing which this Court should consider is whether when two of these respondents have died the Court should allow the remaining persons to conduct the case or whether more persons should be added as respondents for this purpose. In the present case I do not see that by the mere death of two out of fifteen respondents the defence of this appeal cannot be or is not being properly conducted. Mr. G. P. Das appearing on behalf of the respondents has placed before us everything which could be urged on behalf of all the respondents and there is no trace of any collusion between the thirteen respondents who are now represented before us and the appellant. Accordingly it will be ordered that this Court permits the remaining thirteen respondents to conduct the appeal on behalf of all the respondents. In this view of the matter, it is unnecessary to consider as to what would be the situation if one or more of the persons who were represented through the fifteen respondents or through the thirteen respondents as they now stand had died and no substitution made in his or their places.

It is desirable to refer to the three cases decided by the Lahore High Court upon which reliance was placed strongly by the learned advocate for the respondents. In the case reported in 1 Lah 582[2] the facts were that some of the plaintiffs-respondents who had died were not among the six plaintiffs who had instituted the suit in accordance with the order of the Court under O. 1, R. 8, Civil P. C., but among the persons on behalf of whom the six plaintiffs had sued. It was held that as they were not parties to suit and were needlessly made respondents in the appeal the failure to bring their legal representatives on the record would not result in an abatement of the appeal. As I have stated above this question does not arise for consideration in the present case.

Four years later, a similar question arose in 5 Lah 429.[3] In that case the plaintiffs had sued 43 persons for a declaration to the effect that they were not entitled to have any share in certain lands and that the plaintiffs were the exclusive owners thereof. The suit was dismissed by the trial Court and the plaintiffs filed an appeal before the High Court. The appellants had made an application under O. 1, R. 8, Civil P. C., to the effect that four of the respondents should be permitted to defend the appeal on behalf of the others and this application had been accepted. When the appeal was called on for hearing it was found that some of the respondents who were allowed to be represented had died and no application had been made for bringing their legal representatives on the record. It was also found that one of the four respondents who were allowed to represent all the respon-

1. Jagdam Ram v. Asarfi Ram, (1937) 24 A I R Pat 149=168 I C 113=17 P L T 926.

2. Udmi v. Hira, (1920) 7 A I R Lah 338=60 I C 111=1 Lah 582.

3. Wali Muhamad v. Barkhurdar, (1925) 12 AIR Lah 124=86 I C 592=5 Lah 429.

dents had died but in his case an application had been made within time to bring his legal representatives on the record. A preliminary objection was taken by the respondents that the appeal had abated and the learned Judges held that the defendants-respondents who had died were not only parties to the suit in the Court of first instance but were also made parties to the appeal; and relying upon an unreported case of the same Court held that when certain respondents who have died were parties to the suit and to the appeal the order passed under O. 1, R. 8, Civil P. C., will not relieve the appellants from the necessity of impleading all those persons who were parties in the Court below and had obtained a decree in their favour and the representatives of any of those persons who had died during the pendency of the appeal. The circumstances in the present appeal are entirely different from what was decided by the case, just referred to. The next case referred to was 13 Lah 195.[4] In that case it was held that

where there are numerous respondents, some of whom have been allowed, under O. 1, R. 8, Civil P. C., to represent the others, the appeal does not abate, if one of the persons, who are represented by the others, dies and the legal representatives of the deceased are not brought on the record within time; but the appeal will abate if any one of the persons appointed to represent the others dies and his legal representatives are not so impleaded.

So far as the first point decided by this case is concerned, I have stated above that the question does not arise in the present case. But I respectfully differ from the conclusion arrived at in this case so far as the point which arises in the present appeal before us is concerned. I have already pointed out that I do not see how an appeal can be said to have abated if one of the persons appointed to represent the others dies and his legal representatives are not impleaded. The other persons were ordered to be represented by a certain number and if there is a diminution in that number by reason of death or any other cause the only effect is that a duty is cast upon the Court to decide whether the respondents should be allowed to be represented by the surviving persons who were allowed to represent the entire body of respondents as pointed out by my brother Khaja Mohamad Noor in 17 P L T 926.[1] It may again be respectfully pointed out that the learned Judges of the Division Bench in 13 Lah 195[4] did not follow the constitutional practice of referring the question to a Full Bench if they were disposed to take a different view from what was expressly decided by another Division Bench: *see* the observations of their Lordships of the Judicial Committee in 53 I A 164.[5] In 54 Mad 527[6] a similar question arose for decision and Ramesam J. gave the opinion that where sanction is given by the Court to a certain number of persons eo nomine to prosecute or defend a suit and one of them dies, the proper procedure is for the remaining persons to apply to the Court for directions; and it is for the Court to decide whether it will permit the remaining persons to whom the original sanction was given to continue to prosecute or defend the suit, or whether it will insist upon the original number being maintained by adding some of the respondents.

For the reason given above I agree that the correct view is laid by my brother Khaja Mohamad Noor in 17 P L T 926[1] where he approves of the correctness of the decision in the Madras case just referred to. The appeal in view of our order above remains competent and has not abated. The result is that the appeal is allowed. There will be a decree in favour of the plaintiff for the amount which the office will determine in the light of the directions given above; but in the circumstances of this case I will direct that each party will bear his own costs throughout.

Harries C. J.—I agree.

G.N./R.K. *Appeal allowed.*

4. Mt. Afzal-un-nisa v. Fayaz-ud-uddin, (1931) 18 AIR Lah 610=132 I C 657=13 Lah 195=33 P L R 302.

5. Bindeshwari Prasad Singh v. Kesho Prasad Singh, (1926) 13 A I R P C 79 = 95 I C 1025 =53 I A 164 = 5 Pat 634 (P C).

6. Venkatakrishna Reddi v. Srinivasachariar, (1931) 18 A I R Mad 452 = 130 I C 761=54 Mad 527=61 M L J 135.

A. I. R. 1940 Patna 184

FAZL ALI J.

Ram Chandra Singh and others — Petitioners.

v.

Baldeo Singh — Opposite Party.

Criminal Revn. No. 590 of 1939, Decided on 4th December 1939, against order of Dist. Magistrate, Saran, D/- 15th September 1939.

Bihar and Orissa Village Administration Act (3 of 1922), Ss. 68 and 53 (2)—Complaint filed before Magistrate transferred by him to Union Board—Accused wanting retransfer of case to

proper Court should follow procedure under Section 53 (2).

Section 68 does not empower the Union Board to re-transfer a case to the Court of a Magistrate but it only empowers it to direct the complainant to file a complaint before the proper Court.

[P 185 C 1]

Where a complaint has already been filed before a Magistrate and he transfers it to Union Board the accused wanting retransfer of that case to proper Court should follow procedure laid down in Section 53 (2). [P 185 C 1, 2]

T. N. Sahay — *for Petitioners.*

S. N. Sahay and K. P. Varma — *for Opposite Party.*

Order. — The only point raised in this case is that the Union Board of Naini has acted beyond its jurisdiction in trying this case. It appears that the opposite party preferred a complaint before a Magistrate charging the petitioners with an offence under S. 323, I. P. C. The Magistrate under S. 53 (2), Bihar and Orissa Village Administration Act, 1922, transferred the complaint to the Union Board. The accused were then summoned, whereupon as is stated in para. 4 of this petition, they filed a petition under S. 68 of the Act, praying that the case be retransferred to the proper Court at Chapra. The Union Board, however, rejected this petition and proceeded with the trial, and ultimately convicted the petitioners and sentenced petitioners Nos. 1 and 2 to pay a fine of Rs. 5 each and the remaining three petitioners to pay a fine of Rs. 9 each. The petitioners thereupon moved the District Magistrate against their conviction and sentence, but the learned District Magistrate rejected their application on the ground that he was unable to interfere with the conviction unless there was a failure of justice, and in his view there was no failure of justice, in the present case. The petitioners thereupon filed this petition for revision in this Court. S. 68 of the Act provides that :

If the accused appears and claims to be tried by a Magistrate, the panchayat shall direct the complainant to file a complaint before the proper Court.

Now, what is stated in para. 4 of the petition is that the petitioners prayed before the Union Board that the case be re-transferred to the proper Court at Chapra. S. 68 does not empower the Union Board to re-transfer a case to the Court of a Magistrate but it only empowers it to direct the complainant to file a complaint before the proper Court. In the present case the complaint had already been filed before the Magistrate and so the procedure to be followed by the petitioners was to move the District Magistrate or the Sub-Divisional Magistrate under S. 53 (2) (b) of the Act, which provides that

the District Magistrate or Sub-Divisional Magistrate may transfer any case from one panchayat to another or to any other Court subordinate to him.

In my opinion no case has been made out for interfering with the order passed by the panchayat, and the application is therefore rejected.

D.S./R.K. *Application rejected.*

A. I. R. 1940 Patna 185

MOHAMAD NOOR J.

Rama Barik and another — Petitioners

v.

Emperor.

Criminal Revn. Nos. 82 and 91 of 1938, Decided on 14th March 1939, against two orders of Subdivisional Magistrate, Jajpur, D/- 30th May 1938 and 29th July 1938, respectively.

(a) Criminal P. C. (1898), S. 144 — Rival business or hat started in close proximity to previously established business or hat—This by itself is no ground for restraining under S. 144 person interested in rival hat from holding it.

A Magistrate, as an emergency measure, has power to stop, by an order under S. 144 the holding of a hat, or the exercise of his rights by a man on his own land. But a man, who holds a hat on his own land, is perfectly entitled to do so and that by itself is not a wrongful act. Competition in trade, unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business, the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the newcomer from carrying his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. In such a case the best course is to prohibit the doing of the wrongful act or if necessary to bind down the wrongdoer under S. 107, Criminal P. C. But an order more or less of a permanent nature is not justified under S. 144, Criminal P. C., which is meant for speedy remedy : *11 C W N 79; A I R 1934 Pat 104 and A I R 1935 Pat 461, Rel. on.*

[P 186 C 2]

(b) Criminal P. C. (1898), S. 144 — Order under S. 144 — Interference by High Court — Practice.

It is not the usual practice of High Court to interfere with an order which has spent in its force unless there are special reasons for such interference.

[P 187 C 2]

B. K. Ray and B. Mahapatra — *for Petitioners.*

C. M. Acharjya and P. Mahanti — *for the Crown.*

Order. — These two applications in revision are directed against two orders of the Subdivisional Magistrate of Jajpur, one under S. 144, Criminal P. C., dated 30th May 1938 and the other dated 29th July 1938

directing that a complaint be made against the petitioners for their prosecution under S. 188, I. P. C. It appears that the proprietor of the Madhupur estate had for about two years a hat, in mauza Kainchi, called Madhuban Hat. It was being held on Wednesdays and Saturdays. No toll was levied on the shopkeepers who exposed their goods for sale in the hat. On 5th April 1938 the proprietor leased it out for Rs. 650 and for the first time toll was collected in it on 9th April 1938. This seems to have been resented to by the villagers of the locality who started a rival hat adjacent to the Madhuban Hat on a land belonging to a deity installed in the village of which the petitioners are the marfatdars or managers. The rival hat was held for the first time on a Wednesday. There was no police report of any apprehension of breach of the peace but a complaint was made to the Subdivisional Magistrate of Jajpur who called upon the petitioners to show cause why an order under S. 144, Criminal P. C., would not be passed against them. They appeared and showed cause. The learned Magistrate thereafter held a local enquiry, examined some witnesses on 30th May 1938 and holding that there was a likelihood of breach of the peace if the rival hat was allowed to be held, passed an order under S. 144, Criminal P. C., against the petitioners restraining them from holding the hat and calling upon them to prevent the sitting of the hat on their lands by withdrawing his (their) consent which they have given to the villagers for the holding of the hat on Wednesdays and Saturdays.

The petitioners moved the District Magistrate of Cuttack under S. 144 (4), Criminal P. C., but the learned Magistrate declined to interfere and rejected the application on 8th August 1938. Criminal Revision No. 82 of 1938 is directed against this order. The order under S. 144, Criminal P. C., referred to above, was affixed in front of the house of the petitioners and was also promulgated by beat of drum. The contents of the proceeding were explained by the Sub-Inspector of Police on the spot. The Sub-Inspector of Police reported on 13th June 1938 that the new hat continued to be held within the prohibited area and that the order under S. 144, Criminal P. C., was disobeyed. The petitioners were called upon to show cause against their prosecution under S. 188, I. P. C. They did not show cause but cross-examined the witnesses who were examined in support of the report of the Sub-Inspector of Police. As the learned Magistrate has observed, the trend of the cross-examination was that no order was served upon the petitioners and that the hat was not held on the prohibited land. There was however evidence that the hat was held on 1st June 1938 and on 8th June 1938 and also on 22nd June 1938 after the police report. The learned Magistrate then directed that a complaint be made to the District Magistrate for the prosecution of the petitioners under S. 188, I. P. C. A complaint was accordingly made and the District Magistrate after taking cognizance of the offence made over the case to a Magistrate of Cuttack for trial. Criminal Revision Application No. 91 of 1938 is directed against this order of prosecution. I shall take up these two applications separately.

Criminal Revision No. 82 of 1938.

It is now settled law that a Magistrate, as an emergency measure, has power to stop, by an order under S. 144, Criminal P. C., the holding of a hat, or the exercise of his rights by a man on his own land. This was the view which I took in 14 P L T 740,[1] and Rowland J. after reviewing all the leading authorities on the subject, came to the same conclusion in 16 P L T 624.[2] But in the former case I pointed out that a man, who holds a hat on his own land, is perfectly entitled to do so and that by itself is not a wrongful act. Competition in trade, unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the newcomer from carrying his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. In such a case the best course is to prohibit the doing of the wrongful act or if necessary, to bind down the wrongdoer under S. 107, Criminal P. C. But an order more or less of a permanent nature is not justified under S. 144, Criminal P. C., which is meant for speedy remedy. This was pointed out in 11 C W N 79.[3] In the second case, Rowland, J., after referring to 11 C W N 79,[3] mentioned above, pointed out that

1. Saligram Singh v. Baijnath Singh, (1934) 21 A I R Pat 104=1934 Cr C 198=150 I C 118=35 Cr L J 1057=14 P L T 740.
2. Hansraj Prasad Singh v. Abdul Jabbar, (1935) 22 A I R Pat 461 = 157 I C 760 = 36 Cr L J 1268=16 P L T 624.
3. Satish Chandra Roy v. Emperor, (1907) 11 C W N 79=4 Cr L J 433.

the real disadvantage of passing an order under S. 144 without going into the merits of the dispute is that on the expiry of two months which is the limit of the duration of such an order the whole dispute is left to break out again. To pass an order under S. 144 and to leave it as if that order disposed of the dispute finally is merely postponing trouble and inviting its recurrence in an aggravated and more complicated form at a later date.

It is true that in this case the learned Magistrate recorded some evidence a summary of which has been given in his judgment but his order did not touch the real trouble. From what he had said it appears that the villagers are annoyed on account of the levy of toll by the proprietor of the Madhuban hat and are determined to hold a rival hat at a different place where they can carry on their trade without the payment of toll. Commissions of wrongful acts were alleged against one Narain Misra, tahsildar of Ollas estate, and also against the paiks of the Madhupur estate, though the learned Magistrate has not believed the latter allegation. But no wrongful act is attributed to the petitioners. The only thing which they are said to have done is that they have permitted the villagers to hold the hat on the land which is under their management as marfatdars of a deity. In my opinion, therefore, this was preeminently a case in which those against whom allegations of wrongful acts were made should have been proceeded with under the suitable Section of the Criminal Procedure Code. The petitioners were ordered not to hold the hat and to withdraw their consent. There is nothing to show that they were holding the hat or were personally interested in it. I am not sure whether the withdrawal of the consent by itself will be sufficient to avert a breach of the peace if it were apprehended. Therefore though the Magistrate had power of passing an order which he did, I am not convinced of the suitability of the order which is in the nature of a permanent injunction and can hardly be said to be appropriate under S. 144, Criminal P. C., though it does come within its terms. How inefficacious in such cases an order like the one passed by the learned Magistrate is, will be apparent from what happened in this case. The order was against the petitioners in the terms already stated. Though it was published on the spot it was not directed against the villagers. Whether an order prohibiting them to hold a hat of their own and thus to force them to go to a particular hat and pay toll would have been justified is quite a different matter. They were however free to act as they liked and the hat was held.

It is clear from the facts of this case that the petitioners, apart from being the managers of the land on which the hat was being held, had no personal interest in it and, as I shall presently show, they were not responsible for the holding of the hat. Now, an order has been passed which was, as I have said, within the power of the learned Magistrate to pass and it is not the usual practice of this Court to interfere with an order which has spent in its force unless there are special reasons for such interference. There is none in this case. For this reason I reject the application in this criminal revision case.

Criminal Revision No. 91 of 1938.

The facts have already been stated. The petitioners have been prosecuted for disobeying an order passed under Sec. 144, Crminal P. C. There is nothing on the record to show that they disobeyed the order. The only thing which appears from the order of the learned Magistrate is that the hat was held, but there is nothing to show that they did not withdraw their consent. The hat might have been held in spite of the withdrawal of consent. If the villagers held the hat, the petitioners are in no way responsible for it. The learned Public Prosecutor was unable to point to any fact on which a prosecution can be based and had to concede that there is no material for the prosecution of the petitioners. The order for prosecution is unjustified and I set it aside. The complaint filed by the learned Sub-divisional Magistrate will be withdrawn and no proceeding will be taken on it and the proceeding so far taken is quashed.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 187

FAZL ALI AND MANOHAR LALL JJ.

Dammu Vighnesam and another — *Defendants* — Appellants.

v.

Varanasi Lakshmi Narasingha Murty and another — *Plaintiffs* — Respondents.

Appeal No. 22 of 1937, Decided on 13th April 1939, from original order of District Judge, Berhampore, D/- 9th August 1937.

(a) Practice — Duty of Court — In cases in which rights of parties are being decided, record should accurately show that proper procedure is being followed.

It is desirable in all cases in which the rights of the parties are being decided, and especially in appellate cases, that the record should show as accurately and faithfully as is possible in the circumstances that the proper procedure laid down by the law is being followed so that the parties litigant may not have any legitimate grievance that they are not afforded an opportunity to place their case before the Court. All the questions unless they are frivolous or scandalous should be allowed to be put so that the advocates may also realize their responsibility for the questions which they put in the interest of their clients and that justice may appear to be duly administered. [P 189 C 1]

(b) Insolvency—Provisions of Insolvency Act should be strictly observed before declaring person as insolvent.

An order declaring a person as an insolvent involves a certain amount of disgrace and harassment to the party and hence the provisions of the Insolvency Act should be strictly observed before the stigma is placed upon a person. [P 189 C 1, 2]

(c) Provincial Insolvency Act (1920), S. 6 — Test to determime whether transfer is with intent to defeat creditors or is with a view to give preference to a creditor laid down.

The words "with intent to defeat or delay the creditors" or having a "view to give preference to a creditor" are mental acts and can only be determined if one looks into the surrounding circumstances. The true test to apply in such cases is whether the alleged insolvent is in a position to pay his debt, and whether the property which has been transferred bears such a proportion to the whole property that the remaining or the residue of the property is still sufficient, from the point of view of an ordinary businessman to meet the debts of the creditors who remain unsatisfied : *A I R 1937 Pat 134, Rel. on.* [P 189 C 2; P 190 C 1]

(d) Practice — Pleading — Duty of Court — Variation between pleadings and proof ought to be carefully watched.

Court should be careful to see that cases are decided in accordance with the pleadings or upon the facts proved at the trial but consistent with the allegations made in the pleadings ; in other words, a variation between pleadings and proof ought to be carefully watched to see that the opposite party is not taken by surprise. [P 190 C 1]

(e) Practice — Appeal — Issue plain and depending on appreciation of oral evidence— Appellate Court should be slow to reverse trial Court's decision.

Where the issue is plain and simple and depends upon an appreciation of oral evidence in the case, the Appellate Court should be slow to reverse the decision of a Court who has seen and heard the witnesses. [P 190 C 2]

Subba Rao — *for Appellants.*

P. C. Chatterji — *for Respondents.*

Manohar Lall J.—This is an appeal by certain debtors against an order of the learned District Judge of Ganjam Puri, dated 9th August 1937, by which he held that the appellants before us had committed an act of insolvency and being also unable to pay their debts should be adjudicated insolvents. The proceedings began upon an application filed by the respondents, who are two creditors, on 30th April 1937 by which they prayed that the appellants should be adjudged insolvents. The main allegations in the petition were that the appellants had transferred all the immovable properties to their relations for payment of fictitious debts and that they had left their place of residence so as to place themselves beyond the reach of their creditors who were entitled to be paid their dues ; there was also an allegation that the books of account were being tampered with. The learned District Judge took up the case on 9th August 1937, after refusing an application by the appellants for an adjournment. The oral evidence consists of one witness for the petitioners and one of the appellants Dammu Vighnesam examined himself ; the appellants also placed upon the record a number of documents three of which are sale deeds, dated 16th April 1937 ; the fourth is a sale deed dated 17th April 1937 ; there are also two mortgage deeds bearing dates 17th April and 20th April of the same year. The learned Judge upon a consideration of the oral evidence and the documentary evidence adduced in the case and bearing in mind the circumstances under which the transfers were made came to the conclusion that the appellants were unable to pay their debts and that the transfers which they undoubtedly made in April 1937 were either no transfers at all or that these were transfers by which the creditors stated in these deeds were fraudulently preferred.

The learned advocate for the appellants strenuously argues before us that the order under appeal should not be allowed to stand. He argues in the first place that there has not been a proper trial of the case by the learned District Judge; he points out in particular to the fact that the record shows that the cross-examination of the first witness for the respondents was not recorded. Under the head cross-examination there is a note "nothing relevant to the issues." There would have been substance in this grievance if the learned advocate had been able to satisfy us as to the nature of the questions which were put on behalf of his client and which were disallowed or the answers whereof were not recorded by the learned Judge. There is no grievance on this point in the various grounds of the memorandum of appeal. The attention of the learned District Judge is, however, directed to the fact that it is

desirable in all cases in which the rights of the parties are being decided, and especially in appellate cases, that the record should show as accurately and faithfully as is possible in the circumstances that the proper procedure laid down by the law is being followed so that the parties litigant may not have any legitimate grievance that they are not afforded an opportunity to place their case before the Court. It was open to the learned Judge to have adopted the procedure of recording the questions which were being put in cross-examination and if irrelevant or inadmissible he could have overruled them by stating his reasons where necessary. The record would then have shown us clearly that the appellant had no grievance at all. I have come across cases in which questions which were put by the learned advocates at the Bar were put after a great deal of deliberation and the learned Judge having overruled them as being irrelevant or inadmissible, the Appellate Court took a different view resulting in great harassment to the parties. It seems desirable therefore that all the questions unless they were frivolous or scandalous should be allowed to be put so that the advocates may also realize their responsibility for the questions which they put in the interest of their clients and that justice may appear to be duly administered. But as I have already stated in this particular case we cannot interfere upon this ground alone because we are not satisfied that there is any grievance under which the appellants have suffered by the manner in which the cross-examination of the witness for the creditors was recorded. It was also contended that the learned Judge ought to have granted an adjournment because the appellants were not ready on the date fixed for the trial. It is sufficient to say that the adjournment which was asked for from the learned Judge was simply in order to enable the appellants to raise some money to pay off their creditors. The petition for an adjournment is not upon the record. It appears therefore that the adjournment was orally applied for and that the learned Judge was never asked to grant time on the ground that the appellants were not ready to conduct their case. I am therefore unable to see any grievance upon this score also.

Upon the merits of the case it was contended that the materials upon the record are not sufficient to justify the order declaring the appellants as insolvents. It was rightly pointed out that an order declaring a person as an insolvent involves a certain amount of disgrace and harassment to the party and that the provisions of the Insolvency Act should be strictly observed before the stigma is placed upon a person in the position of the appellants. These observations are undoubtedly true, but the question is whether anything has been done in this case which satisfies us that the learned Judge was not correct in the view he took when he came to the conclusion that the appellants should be declared insolvents. The evidence in the case discloses that some negotiations were going on between the respondents and the appellants for the transfer of certain houses in order to repay the debts of the former, but the negotiations fell through some time in the beginning of April 1937. The evidence of the witness for the creditors and of the appellant himself is clear upon this point. Within a few days thereafter a series of transfers mostly in favour of the female relations and the father-in-law of the appellants were entered into between 16th and 20th April 1937. All these transactions cover a sum of over Rs. 14,000 This itself was sufficient to rouse the suspicion of the learned Judge and we are not surprised that he took the view that upon these facts it must be held either that the transactions were fictitious or that they amounted to fraudulent preference of the female relations of the appellants and of their other relations without making any provision for the other creditors including the respondents. In these circumstances the authority relied upon by the learned advocate for the respondents, namely 17 P L T 857[1] is a clear answer to the contention of the appellants. It was pointed out in that case that in order to make S. 6, cl. (b) applicable it has only to be shown that the debtor transferred his property with a view to defeat or delay his creditors, and in order to make cl. (c) applicable it has to be shown (1) that there was a transfer of property in favour of a creditor or creditors; (2) that the debtor was unable to pay his debts when he made the transfer, (3) that the transfer was with a view to give a creditor or creditors preference; and (4) that the transfer was within three months of the date of the presentation of the petition.

In my opinion all these elements are present in the present case. The words, it

1. Firm Baijnath Rameshwar Lall v. Atal Prasad Kumar, (1937) 24 A I R Pat 134=168 I C 140=17 P L T 857.

might also be remembered, "with intent to defeat or delay the creditors" or having a "view to give preference to a creditor" are mental acts and can only be determined if one looks into the surrounding circumstances. For instance, if a man who is in serious pecuniary difficulties, his debts surpassing his assets, transfers a considerable portion of his properties or transfers properties in favour of some of the creditors having made no provision at all for the payment of debts due to others, a Court upon the facts of that case may come to the conclusion that the transfers were made with intent to defeat or delay the creditors or with a view to give preference to a particular creditor. In this case the appellant when he gave his evidence was silent and deliberately avoided asserting that he was able to pay his debts. All that he said was that "we promised to pay them when our zamindar creditors should pay us."

But it was contended vehemently by the learned advocate for the appellants that the respondents should not be allowed to rest their case upon an allegation which is not to be found in their pleadings. He pointed out that the respondents relied upon the allegation that all the transfers were farzi and he argues therefore that when the transfers, upon the materials such as they are, cannot be held to be *farzi* it was not open to the learned Judge to allow the respondents to change their case and rest it upon a different situation, namely, that the transfers were real transfers but amounted to a fraudulent preference of some creditor to the others. He relied upon a case of the Madras High Court, 119 I C 46,[2] but the decision of that case has to be examined with reference to the facts of that case. That case lays down no new principle. It is well established by a number of decisions of their Lordships of the Judicial Committee that a Court should be careful to see that cases are decided in accordance with the pleadings or upon the facts proved at the trial but consistent with the allegations made in the pleadings; in other words, a variation between pleadings and proof ought to be carefully watched to see that the opposite party is not taken by surprise. For instance, if the nature of the case is entirely altered from the case made out in the pleadings, the plaintiff must fail or if the case put forward by the plaintiff is found to be false in all the material allegations which he has made, it is not open to the Court to grant relief upon the case made by the defendant, because that case of the defendant is really an answer to the case set up by the plaintiff. In this particular case I do not think that there is such a variation in the case set up by the respondents as would justify us in holding that they ought not to be allowed to get a declaration that the appellants have committed an act of insolvency. The respondents always insisted that the transfers evidenced by the seven documents of April 1937 have obstructed them in realizing their dues. If the transfers are *farzi* the property still has to be reached by a declaration that the transfers are farzi and this would ordinarily be done by a protracted litigation. If the transfers are real, the properties covered by those deeds are blaced beyond the reach of the creditors and they have shown that no arrangements have been made for their dues and the appellants are unable to meet their just dues. Therefore I do not think that in the present case the principle laid down by the Madras High Court in 119 I C 46[2] can at all be applied. The true test to apply in such cases is whether the alleged insolvent is in a position to pay his debt, and whether the property which has been transferred bears such a proportion to the whole property that the remaining or the residue of the property is still sufficient, from the point of view of an ordinary business man, to meet the debts of the creditors who remain unsatisfied. Applying these tests to the present case I am satisfied that the appellants are unable to pay their debts and that the property which has still been left with them which is chiefly in shape of loans which they have advanced to certain zamindars, is not of such a character or of such value as to justify us in holding that it is at all sufficient to meet the debts of all their creditors which exceed Rs. 12,000.

Having considered all the circumstances of the case, I am unable to say that the judgment appealed from is erroneous and should be set aside. The issue in the case was comparatively simple and depended upon the appreciation of very short evidence of two witnesses only and therefore, as pointed out by their Lordships of the Judicial Committee, where the issue is plain and simple and depends upon an appreciation of oral evidence in the case, the Appellate Court should be slow to reverse the decision of a Court which has seen and heard

2. Kondappa v. Pullappa, (1929) 16 A I R Mad 910=119 I C 46.

the witnesses. I myself would have come to the same conclusion if I had heard the evidence myself. Having given the case my most anxious consideration in view of the paucity of the evidence on the record I am unable to interfere with the decision of the learned District Judge. The appeal is dismissed with costs; hearing fee one gold mohur.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 191

MOHAMAD NOOR J.

Gokul Bihari Das — Appellant.

v.

Kalandi Senda and others

— Respondents.

Appeal No. 28 of 1937, Decided on 13th March 1939, from Appellate order of Dist. Judge, Cuttack, D/- 31st August 1936.

Mortgage — Mortgaged property sold in execution and purchased by mortgagee decree-holder — Sale subsequently set aside under Order 21, R. 89, Civil P. C. — Mortgagee cannot be allowed to resell property for any amount which he left out inadvertently at time of execution.

Where the mortgaged property is sold in execution of a mortgage decree, the mortgage lien comes to an end. When the sale is subsequently set aside under O. 21, R. 89, Civil P. C., that lien is not revived and the mortgagee decree-holder even if he is auction-purchaser cannot re-sell the property to recover any amount left out by him inadvertently at the time of execution. Piecemeal execution of mortgage decree cannot be allowed. [P 191 C 2]

B. K. Ray — *for Appellant.*

B. K. Das, C. M. Acharjya and H. Mahapatra — *for Respondents.*

Judgment. — This is a miscellaneous second appeal arising out of an execution proceeding. The facts are these. The respondents had obtained a mortgage decree against the appellant and in execution of it the mortgaged property was sold and purchased by the decree-holders. The mortgagor, the appellant, got the sale set aside by making a deposit under O. 21, R. 89, Civil P. C. Thereafter, the decree-holders, respondents, discovered that the interest awarded to them in the mortgage suit was inadvertently omitted from the execution. The learned District Judge has made a mistake in stating that the cost decreed was omitted. However, the decree-holders wanted to execute the decree again as a money decree for the amount omitted from the previous execution. As no personal decree had been obtained by them against the mortgagor, the petition was disallowed. They then filed the present petition for execution for sale of the mortgaged property for the realisation of the amount omitted from the previous execution. The judgment-debtor objected and the learned Munsif of Balasore allowed the objection on the ground that the decree-holders having omitted to include this portion of the decree in the previous petition for execution were not entitled to sell the mortgaged property over again for its realization. On appeal by the decree-holders, the learned District Judge ordered the execution to proceed. The judgment-debtor has preferred this second appeal.

In my opinion the view taken by the learned District Judge is erroneous and his order must be set aside. After the mortgaged properties had been sold in execution of a mortgage decree the mortgage lien came to an end and the decree was satisfied. Thereafter, the mortgaged property cannot be sold again. It is true that the principle of O. 2, R. 2, Civil P. C., is not applicable to execution cases, but in my opinion higher principles, as stated above, are involved. By setting aside of a sale under O. 21, R. 89, Civil P. C., which strictly speaking is a matter between the auction-purchaser and the judgment-debtor and in which the decree-holder is not concerned, the mortgage lien over that property is not revived. The sale is set aside because the amount for which the property was sold has been paid up. When the order of the Court for sale has been carried out, the mortgagee is only entitled to money, the sale proceeds. It is immaterial to him whether he is paid out of the actual sale proceeds or out of the money deposited by the judgment-debtor within the time allowed by law. The law has provided for compensation to the auction-purchaser who is deprived of a right which he acquired from bidding at the sale of the property and no compensation to the decree-holder as he is not affected by the setting aside of the sale. It is of no consequence if, as in the present case, the auction-purchaser was the decree-holder himself. His right as decree-holder came to an end after the sale and the decree stood satisfied. I do not think he can be allowed to re-sell the property for any amount which he inadvertently left out at the time of the execution. To allow this will be to allow piecemeal execution of a mortgage decree. I allow this appeal with costs throughout, set aside the

order of the learned District Judge and restore that of the learned Munsif.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 192

HARRIES C. J. AND ROWLAND J.

Chakku Panda — Decree-holder — Appellant.

v.

Nemai Prasad Panda — *Judgment-debtor* — Respondent.

Appeal No. 8 of 1937, Decided on 6th December 1938, from appellate order of Dist. Judge, Cuttack, D/- 1st August 1936.

Limitation Act (1908), Arts. 166 and 181 — Decree executable only against assets of deceased father in hands of his son — Application by son to set aside sale on ground that part of property was personal property—Art. 166 and not Art. 181 applies.

Where certain property is sold in execution of a decree which is executable only against the assets of the deceased judgment-debtor in the hands of his son, an application to set aside the sale by the son on the ground that part of the property sold was his personal property falls under Art. 166 and not under Art. 181: *A I R 1920 Cal 165 and A I R 1922 Pat 507, Rel. on.* [P 193 C 1]

B. N. Das — *for Appellant.*

B. N. Dutta — *for Respondent.*

Rowland J. — One Gadadhar died leaving debts and leaving an estate which passed to Balaram Panda, a major, and Nimai Prasad Panda, a minor. The appellant before us after the death of Gadadhar sued these persons in respect of a debt due to him and obtained a decree in April 1933 limited as usual to execution against assets of the deceased in the hands of the judgment-debtors. Execution was taken out in June 1933 and certain property was sold to the decree-holder on 15th January 1934, the sale being confirmed on 23rd February 1934. The decree-holder took delivery of possession on 7th May 1934, and the first judgment-debtor, Balaram Panda, presented objections under S. 47 and O. 21, R. 100, Civil P. C., which were dismissed on 28th September 1934. The second judgment-debtor on 26th September 1935, through his guardian ad litem, presented the application to set aside the sale out of which this appeal arises. It was entitled an application under O. 21, R. 90, Ss. 47 and 151, Civil P. C. It was alleged that the minor was not properly represented in the execution case, that the decree-holder had proceeded against the personal property of the minor in contravention of the direction given in the decree, that a portion of the property purchased belonged to Raghunath Jiu Thakur and that there had been fraudulent suppression of service of sale processes leading to loss to the judgment-debtor.

The Munsif found that the processes had been correctly served and that the minor had been properly represented in the execution case. These findings were upheld by the District Judge on appeal. The Munsif was of opinion that the application was barred by the limitation of 30 days under Art. 166 of the Schedule to the Limitation Act and he did not express an opinion on the merits of the contentions that the decree-holder had proceeded in execution against the personal property of the objector and that part of the property purchased belonged to Raghunath Jiu Thakur. Accordingly he dismissed the application. On appeal the District Judge thought that the 30 days' rule of limitation was not applicable to the present case, because if it were found that the personal property of the judgment-debtor had been sold the result might follow that the sale was without jurisdiction, and in that case he thought the proper Article of limitation to apply was Art. 181. On this view he set aside the order of the Munsif and sent back the case on remand for disposal after inquiring into the allegations that the personal property of the objector had been sold.

In my opinion the view of the Munsif was correct and that of the District Judge erroneous. The sale which was held was not one which the Court could be said to have no jurisdiction at all to sell, as in cases when the power of sale is given exclusively to the Revenue Court the jurisdiction of the Civil Court being excluded. On the other hand, the Court sold property, which, if certain conditions were fulfilled, it had jurisdiction to sell. The judgment-debtor himself was a person subject to the jurisdiction of the Court. In 2 Pat 65[1] a question arose whether a sale should be set aside on the ground that there had been service of notice under O. 21, R. 22. Authorities were referred to showing that if non-service of notice was established there was no jurisdiction to hold the sale. It was held nevertheless that Art. 166, Limitation Act, applied as the absence of jurisdiction would not be presumed merely because complete proof was not available to establish the service of the notice under R. 22 which, if

1. Ramdhuri Chowdhury v. Deonandan Prasad, (1922) 9 A I R Pat 507=77 I C 957=2 Pat 65 =3 P L T 501.

proved, would have given jurisdiction. A decision of the Calcutta High Court in 46 Cal 975[2] is more directly in point. Here the applicant under S. 47, Civil P. C., to set aside the sale was a son of the original judgment-debtor against whom the decree-holder was entitled to proceed only to the extent of assets which had belonged to the father. The objection was based, as in this case, on the contention that the property which had been brought to sale was the personal property of the objector. It was held that Art. 166 was applicable and the objector was not entitled to agitate beyond the period of limitation the question whether the property had been his father's or not. I would allow the appeal, set aside the decision of the District Judge and restore that of the Munsif. The appellant should have his costs here and below.

Harries C. J. — I agree.

G.N./R.K. *Appeal allowed.*

2. Satish Chandra v. Nishi Chandra, (1920) 7 A I R Cal 165=54 I C 431=46 Cal 975.

A. I. R. 1940 Patna 193

HARRIES C. J. AND MOHAMAD NOOR J.

Yellayi Sannaya — Defendant 1 — Petitioner.

v.

Sannayajulu Ramesham and others, Plaintiffs and others, Defendants — Opposite Party.

Civil Revn. No. 107 of 1937, Decided on 18th August 1939, from order of Addl. Munsif, Berhampore, D/- 28th August 1937.

Specific Relief Act (1877), S. 9 — Decree cannot be passed in favour of person claiming undivided share in property from which he and his cosharers were ousted.

—The remedy by a possessory suit provided in S. 9 is a special remedy under the statute, the principle underlying it being that in a summary proceeding the order of which is not appealable the condition of possession before the inroad made upon a property without any process of law should be restored. A Court in a suit under S. 9 has no jurisdiction to pass a decree in favour of a plaintiff who claims an undivided share in a property from which he and his cosharers were ousted. Such a possession is not contemplated by S. 9: *A I R 1916 Mad 587 and A I R 1914 Cal 496 Foll.; A I R 1916 Cal 562, Disting.* [P 193 C 2 ; P 194 C 1]

P. C. Chatterji — *for Petitioner.*

H. Mahapatra and R. K. Ratho — *for Opposite Party.*

Mohamad Noor J. — This application in revision is directed against a decree of the learned Additional Munsif of Berhampore, decreeing a suit of the opposite party brought under S. 9, Specific Relief Act. The plaintiff's case was that he, his full brother defendant 2, and his half-brothers defendants 3 and 4, and their father, were in joint possession of a privy. On the death of the father, defendant 1, on the basis of a sale deed in his favour said to have been executed by the father, erected a partition wall dividing the privy into two parts and forcibly dispossessed them from half of the privy. The learned Munsif after recording the evidence decreed the suit. A question of law was raised before him that the plaintiff admittedly being in possession of an undivided portion of the privy was not entitled to maintain the suit, his prayer being that the principal defendant, that is defendant 1, should be dispossessed from half of the privy of which he had taken forcible possession. The defendant relied before the learned Munsif on a decision of the Madras High Court in 31 I C 720=29 M L J 760.[1] The learned Munsif declined to follow this case in the face of a decision of the Calcutta High Court in 19 C W N 1117[2] which according to him was in favour of the plaintiff. He held that the area being under the jurisdiction of the Patna High Court where the decisions of the Calcutta High Court are followed, that decision must be followed in preference to the decision of the Madras High Court. He, therefore, decreed the suit. Defendant 1 has filed this revision application.

Apart from the two decisions already referred to, which I shall discuss in a moment, Mr. Chatterji appearing on behalf of the petitioner has referred us to another decision of the Calcutta High Court in 19 C W N 120.[3] This decision and that of the Madras High Court which I have already referred to clearly lay down that a Court in a suit under S. 9, Specific Relief Act, has no jurisdiction to pass a decree in favour of a plaintiff who claims an undivided share in a property from which he and his cosharers were ousted. I am inclined to follow these two decisions. The remedy by a possessory suit provided in S. 9, Specific Relief Act, is a special remedy under the statute, the principle underlying it being that in a summary proceeding the order of which is

1. Para Koothan v. Para Kulla Vandu, (1916) 3 A I R Mad 587=31 I C 720=29 M L J 760.
2. Ajiman Bibi v. Sheikh Reasat, (1916) 3 A I R Cal 562=28 I C 570=19 C W N 1117.
3. Hari Nama Dass v. Sheikh Naji, (1914) 1 A I R Cal 496 = 23 I C 618 = 19 C W N 120 = 19 C L J 117.

not appealable the condition of possession before the inroad made upon a property without any process of law should be restored. The present case is exactly similar to the two cases above referred to. Here the plaintiff and his cosharers were dispossessed. The plaintiff asks for the restoration of his possession as well as of his brothers but his brothers do not claim possession. Defendant 2 filed a written statement in which he supported the plaintiff but did not join as a plaintiff nor did he bring his own separate suit for being put in possession of his undivided share. Defendants 3 and 4 have remained absent from the suit and there are indications that they are siding with the principal defendant 1. Whatever may be the position, a possession cannot be restored to a man who does not want to be put in possession. Another alternative is that the plaintiff be put in an undivided possession along with the principal defendant. I have no doubt that such a possession is not contemplated by S. 9, Specific Relief Act.

The learned Munsif has, as I have said, relied upon a Calcutta decision reported in 19 C W N 1117.[2] In my opinion the facts of that case have no application to the present case. There the plaintiff was dispossessed from his undivided share of a tank by his cosharers. A question arose whether he could maintain the suit for recovery of possession of that portion only from which he had been dispossessed. The Court after distinguishing that case from the case reported in 19 C W N 120[3] held that he was entitled to succeed. The difference between the Calcutta case reported in 19 C W N 120[3] and the Madras case on the one hand and the second Calcutta case reported in 19 C W N 1117,[2] on the other, is obvious. In the first two cases though the plaintiff and his cosharers were dispossessed from the entire property he was entitled to restoration of possession of a portion of it only. In the second Calcutta case the plaintiff wanted restoration of possession of the whole of the share from which he alone was dispossessed. I would allow this application in revision, set aside the decree of the learned Munsif and dismiss the plaintiff's suit with costs in the lower Court. The petitioner will be entitled to his costs in this Court which I would assess at one gold mohur.

Harries C. J. — I agree.

D.S./R.K. *Application allowed.*

A. I. R. 1940 Patna 194

FAZL ALI AND MANOHAR LALL JJ.

Sudhansu Mohan Sirkar — Petitioner.

v.

Harish Chandra Dutta —

Opposite Party.

Misc. Application No. 10 of 1938, Decided on 11th May 1939.

(a) Succession Act (1925), S. 302 — Discretion to decide disputed questions of title should not be exercised in favour of party not coming before Court with clear title.

Assuming that High Court is competent to decide even disputed questions of title, it would be exercising its discretion wisely if it refuses to give a direction in favour of a party who does not come before it with a clear title and where the title set up by him can be more appropriately decided in a civil suit : *A I R 1930 Cal 258, Ref.* [P 195 C 2]

(b) Succession Act (1925), S. 302 — Applicant claiming possession of property on ground that it was surrendered to him—Question whether surrender is valid and should be given effect to cannot be decided under S. 302.

Where the applicant under S. 302 claims possession of certain properties on the ground that they were surrendered to him, the question whether the surrender is valid and should be given effect to cannot properly be dealt with in a proceeding under S. 302 for the application virtually amounts to a suit in ejectment. [P 196 C 1, 2]

(c) Will—Construction—Will held conferred life estate governed by general law and not widow's estate governed by Hindu law.

The testator by a will gave the whole of his estate to his wife with the restrictions that she should enjoy the usufruct of the properties only and should not transfer the properties by sale or otherwise. The will however empowered the widow to adopt, but the adoptee was precluded from claiming to be malik during the widow's lifetime:

Held that the estate conferred upon the widow by the will was not a Hindu widow's estate but only an ordinary life estate which would be governed by the general law and not by Hindu law. Therefore the widow could not accelerate succession to it by surrendering it in favour of the next reversioner for such a surrender would run counter to the provisions of the will : *A I R 1937 Pat 163, Ref.* [P 196 C 1]

M. Subba Rao, K. Patnaik and R. K. Ghosh — *for Petitioner.*

B. K. Ray, Harihar Prasad Bhagat, B. N. Dutta and S. N. Sen Gupta — *for Opposite Party.*

Fazl Ali J. — This is an application by one Sudhansu Mohan Sirkar who claiming to be the adopted son of one Kali Krishna Sirkar has moved this Court under Ss. 301 and 302, Succession Act, to direct that the latter's estate, which is at present in the possession of Babu Harish Chandra Dutta, one of the executors appointed under his will, be made over to the petitioner. Kali Krishna Sirkar died on 11th December

1905, after executing a will on the same date. He left behind a widow Srimatya Chandan Bilasini Dasi, an old mother and some nephews. As he apprehended that his wife Srimatya Chandan Bilasini Dasi being young and inexperienced could not manage the estate, he appointed five executors under his will including his father-in-law Babu Dwarka Nath Bose and the opposite party Babu Harish Chandra Dutta, who is the sole surviving executor now. The will is a lengthy document with no less than twenty-one paragraphs, but the only provisions which are material for the purpose of this case are those to be found in paras. 10, 11, 13, 14 and 15. Para. 10 provides that subject to certain legacies and expenses referred to in the preceding paragraphs the whole estate

> will belong to my wife ..... She will take from the executors the usufruct of the properties which will be left after meeting the legal expenses of collection, etc., and she will maintain herself with and spend according to her will that amount but she will not be competent either to encumber the properties or transfer them in any way by sale or otherwise.

Paragraph 11 recites that Srimatya Chandan Bilasini Dasi shall be competent to adopt a son or sons after the death of the testator but in no case more than two children will be adopted. Para. 13 runs as follows:

> After the death of my wife my adopted son or sons together will be owners of all the properties of my wife; but so long as my wife is alive the adopted son or sons will not be competent to be malik with respect to any of the properties.

Paragraph 15 provides that if the executors apprehend that the properties might be wasted owing to the adopted son or sons being of unsound mind or otherwise "unfit," then after making suitable arrangements for the family deity the rest of the properties will be handed over to the Government by the executors on certain conditions. It appears that the petitioner was adopted by Srimatya Chandan Bilasini Dasi after the probate of the will had been taken out in 1906 and it is alleged that on 7th November 1933, Chandan Bilasini Dasi executed a deed surrendering the whole estate to him. The petitioner bases his whole case upon this document and contends that the surrender of the estate by the lady is tantamount to her civil death and so he is entitled to the immediate possession of the whole estate under para. 13 of the will. On the other hand, the case of the surviving executor and Srimatya Chandan Bilasini Dasi who was also represented before us by an advocate is that the deed of surrender was obtained by the petitioner from the latter by fraud and deceitful means and that Srimatya Chandan Bilasini Dasi fixed her thumb impression to it "as desired by the petitioner without knowing anything about the effect of the document."

Now, whatever may have been the circumstances under which the deed was executed, it appears that the petitioner did not claim possession of the estate in his own right after the alleged surrender but was satisfied with obtaining a registered power of attorney on 1st December 1933 from Babu Dwarka Nath Bose who according to both the parties was the managing executor at that time. This document authorized the petitioner merely to manage the estate on behalf of the said executor. The case of Babu Harish Chandra Dutta, opposite party No. 1, is that after the death of Dwarka Nath Bose on 9th May 1937 the power of attorney ceased to be operative and the estate was taken over by him from the petitioner. Now although the present application purports to have been made both under Ss. 301 and 302, Succession Act yet in the course of the argument before us only the latter Section was relied on by the learned advocate appearing for the petitioner. This Section provides that

> where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

In some cases it has been doubted whether the High Court is competent on an application under this Section to determine any disputed question of title inasmuch as the jurisdiction of the Court under it is confined merely to the issue of directions to the executor or administrator relating to the management and administration of the estate: *see* 56 Cal 979.[1] If this view is correct, then the present application cannot be entertained at all by this Court. But assuming that this Court is competent to decide even disputed questions of title, it would I think be exercising its discretion wisely if it refuses to give a direction in favour of a party who does not come before it with a clear title and where the title set up by him can be more appropriately decided in a civil suit. In my opinion, the petitioner has failed to make out even a prima facie

1. Provas Chandra Sinha v. Ashutosh Mukherji, (1930) 17 A I R Cal 258 = 122 I C 197 = 56 Cal 979.

case for an order under S. 302 and his application cannot, therefore, succeed in any event. The first difficulty in the petitioner's way is that the specific provision of the will on which he relies makes no reference to the so-called civil death which is death only by a fiction of law but it refers plainly to death in the ordinary acceptation of the term, that is to say natural death. The words "so long as my wife is alive, the aforesaid adopted son or sons will not be competent to be malik" confirm this view, when they are read with para. 10 of the will which provides that Chandan Bilasini Dasi shall not be competent to transfer the estate in any way by sale or otherwise. The estate conferred upon her by the will was not a Hindu widow's estate but only an ordinary life estate: *see* A I R 1937 Pat 163.[2] If it was a Hindu widow's estate she could accelerate succession to it by surrendering it in favour of the next reversioner, but if it is an ordinary life estate, the matter is governed not by the Hindu law but by the general law, and it appears to me that in such a case any relinquishment or surrender made by her must come within the prohibition contained in the latter part of para. 10 of the will, where it is specifically laid down that she will not be competent to transfer the estate by sale or otherwise. The expression "otherwise" is a comprehensive expression and must include any act by which the widow parts with or terminates her life estate in favour of another person. Again, the will provides that if the executors apprehend that the property might be wasted owing to the unfitness of the adopted son, they must deal with it in the particular manner set out in para. 15. In the present case the learned advocates appearing for the executor as well as for Chandan Bilasini Dasi informed us in the course of their arguments that if we decided to hear evidence in the case, they proposed to resist the present application on the ground of the unfitness of the applicant. These are, however, merely questions relating to the construction of the will and if the case involved no other question we might have perhaps decided them finally in dealing with this application; but apart from these questions, the parties are at issue on another question which goes to the very root of the petitioner's title. That question is whether the deed of surrender executed by Chandan Bilasini Dasi, who is admittedly a pardahnashin lady, is valid and should be given effect to. In my opinion, a question of this character cannot be properly dealt with in a proceeding under S. 302, Succession Act. It may also be stated here that the petitioner's case as set out in para. 8 of his application is that in pursuance of the deed of surrender he had obtained possession of the whole estate in his own right but he was dispossessed by the opposite party on 20th May 1937. Thus, on the petitioner's own case, the present application is in effect a suit for the recovery of an estate of which he alleged to have lost possession; in other words, it is virtually a suit in ejectment. For these reasons I am of opinion that the present application should be dismissed with costs.

Manohar Lall J.—The facts necessary for the determination of the question before us have been clearly stated in Order No. 9 dated 9th March 1939, by my learned brother Khaja Mohamad Noor and have also been stated exhaustively in the judgment just delivered by my learned brother and need not be repeated. It is sufficient to say that this is an application by a transferee from a Hindu widow, who was a legatee for life of the estate left by her husband, for a direction upon the executor to make over possession to him of the whole of the estate of the testator Kali Krishna Sirkar. The application is based upon the allegation that the widow Srimatya Chandan Bilasini Dasi executed a deed of surrender of the estate in favour of the applicant who was adopted by her in pursuance of the power given to her under the will within two years of the death of the testator and thereby committed her civil death. The lady repudiates the title claimed by the applicant and urges that she being inexperienced and not conversant with the ways of the world was made to sign this document by the applicant, that she never understood the terms thereof and, therefore, this is not binding upon her. The applicant, on the other hand, contends that the document has conferred full title upon him and he got into possession thereunder but has been dispossessed by the executor in collusion with the lady.

I agree with my learned brother that the interpretation of the various clauses of the will lead to the reasonable conclusion that the testator never authorised the widow to effect a transfer by causing her civil death and that he in terms was careful to restrict

2. Kali Prashad v. Ram Golam, (1937) 24 A I R Pat 163=167 I C 831=17 P L T 876.

the power of alienation of the widow for all purposes so long as she was alive. From the above narrative of facts it is obvious that there is a serious dispute between the parties as to whether the title in the properties still remains with the widow or has passed out to the applicant after the so called deed of surrender of 7th November 1933, by which the succession to the estate is supposed to have been accelerated in favour of the applicant. This Court is, therefore, asked to try out a complicated question of fact upon which the parties are seriously in dispute. In 9 C L J 19[3] a suit was brought by the widow of a testator to set aside an agreement made by the beneficiaries under the will and codicil of the testator. Woodroffe J. in the course of his judgment referred to the practice on the original side of the Calcutta High Court, in a case where probate is granted and terms of settlement are recorded in a schedule annexed to the decree and said that

such terms when they ordinarily are beyond the scope of the suit are not the subject-matter of the decree and if not carried out must be enforced by separate suit.

Their Lordships of the Judicial Committee in 63 I A 61[4] approved of this view but pointed out :

There is not however in this case any dispute as to the said agreement, and no suggestion has been made that the terms thereof should not be carried out. The application was for a direction that the Administrator-General, who was not a party to the agreement, but who had accepted probate of the will, should pay Parijat Debi her son's share of the residue in accordance with the terms of the agreement,

and held that the Court in its Probate and Administration jurisdiction ought to have decided the question whether it was necessary for Parijat Debi to produce a succession certificate in order to claim the share of her deceased son there being no dispute as to the agreement which everybody agreed should be carried out. In the present case far from being in agreement the parties are at variance as poles asunder and in my opinion this Court should not embark upon deciding the question of title and fact in such a complicated dispute which can only be settled to the satisfaction of all the parties in a properly constituted title suit. I, therefore, agree that the application should be dismissed with costs.

G.N./R.K. *Application dismissed.*

3. Kamal Kumari Devi v. Narendra Nath Mukherjee, (1909) 9 C L J 19=1 I C 573.
4. Secy. of State v. Parijat Debi, (1935) 22 A I R P C 203=159 I C 329=63 I A 61=63 Cal 677 (P C).

* A. I. R 1940 Patna 197

FAZL ALI J.

Badri Das and another — Petitioners.

v.

Behari Lall Kamani and another — Opposite Party.

Civil Review No. 29 of 1939, Decided on 22nd November 1939, arising out of S. A. No. 27 of 1937 (Cuttack), D/- 26th April 1939.

*** Civil P. C. (1908), O. 47, R. 1—Application for review on ground of discovery of new evidence does not lie against judgment in second appeal.—*(Obiter)*.**

An application for review does not lie against a judgment delivered in a second appeal on the ground that the applicant has since the decision of appeal discovered some new evidence : *32 All 71 ; 18 Mad 480 ; 16 W R 112 and 4 Beng L R 213, Foll.; A I R 1936 Pat 595, Expl.; Observation of Subrahmania Aiyar J., in 10 M L J 134, Approved but not foll.* [P 197 C 2; P 198 C 1]

Sir Sultan Ahmad and P. Misra — *for Petitioners.*

P. C. Manuk and Sarjoo Prasad — *for Opposite Party.*

Order. — This is an application asking me to review a judgment which I delivered in Second Appeal No. 27 of 1937 (Cuttack) on the 26th April 1939. The main ground on which the review is sought is that since the decision of that appeal the petitioners have discovered some new evidence which notwithstanding due diligence they could not discover earlier. Mr. Manuk, who appears for the opposite party, raises a preliminary objection that an application for review does not lie on the above ground against a judgment delivered in a second appeal and he cites the following decisions in support of his argument : 32 All 71,[1] 18 Mad 480,[2] 16 W R 112,[3] 4 Beng L R 213.[4] Sir Sultan Ahmad who appears for the petitioners has drawn my attention to the decision of this Court in 15 Pat 295,[5] in which a review was allowed on the ground of discovery of new evidence after a second appeal had been disposed of, but the question which has been raised by Mr. Manuk was neither raised nor expressly decided in that case. He also referred me to an observation made by Subrahmania Aiyar J.

1. Nand Kishore v. Anwar Hussain, (1910) 32 All 71=4 I C 809 = 6 A L J 979.
2. Raru Kutti v. Mamad, (1895) 18 Mad 480.
3. Bhyrub Nath v. Kally Chunder, (1871) 16 W R 112.
4. Panchanan Mookerjee v. Radha Nath, (1870) 4 Beng L R A C 213.
5. Rai Brindaban Prasad v. Rai Banku Bihari Mitra, (1936) 23 A I R Pat 595=166 I C 317 =15 Pat 295=17 P L T 575.

in 10 M L J 134[6] doubting the correctness of the view that it is not open to the High Court to entertain an application for review in a second appeal on the ground of discovery of material evidence. In that case however Davies J. expressed a contrary view and so the observation of Aiyar J. is to be treated as mere obiter dictum. The question is not free from difficulty and though I must admit that having regard to the fact that S. 114 as well as O. 47, R. 1 being general in their terms, must be held to be applicable to second appeals also, I share the doubt expressed by Subrahmania Aiyar J. yet as at present advised I am not prepared to dissent from the long line of authorities which have been cited on behalf of the opposite party. In any case the point need not be decided here as I am not prepared to grant the present application on its merits. The main ground urged in support of the application is that the petitioners were not able during the trial of the suit to procure a plan which had been sanctioned in 1918 under permit No. 97 and that they have now been able to trace that plan and other relevant papers which show that the construction of the plaintiff's house was sanctioned not in 1905 as alleged by him but in 1918. The present application was filed on 1st August 1939 and it appears that all that was stated in the affidavit which was filed on that day was as follows:

> That at the time of the trial your petitioners tried their level best to find out the plans and other documents submitted by the plaintiffs on which the said permit dated 20th March 1918 had been granted but owing to the mismanagement of the Cuttack Municipality your petitioners did not obtain any further documents.

The petitioners afterwards filed a supplementary affidavit on 5th September in which they stated that they had a private conversation with one Raj Kishore Misra, a witness examined on behalf of the plaintiff after he had been examined in Court on 19th November 1934 and in that conversation they asked him to search for the plan of 1918. Raj Kishore Misra being unable to trace the plan told them that it was not available and when the petitioners wanted to make a formal application for the search of the plan in the Municipality, Raj Kishore told them that it was futile to file any formal application for search when the papers searched for were not available. The petitioners have in support of their case filed an affidavit which purports to be sworn by Raj Kishore Misra on 14th September 1939.

Now, it appears to me that even if the statements contained in the affidavits before me are taken to be true, they do not show that the petitioners acted diligently in the matter. It is conceded on behalf of the petitioners that they did not make any formal application to the Municipality for the search of the plan of 1918 and other relevant papers, nor did they make any application in the trial Court or the lower Appellate Court to call for those papers from the Municipality. These courses were obviously open to them and in my opinion a diligent suitor should not have been satisfied merely with what Raj Kishore Misra told him in a private conversation. Thus one of the conditions necessary for granting the review is not established. The application is therefore rejected with costs. Hearing fee two gold mohurs.

D.S./R.K. *Application rejected.*

6. Gulam Mahade v. Ramakrishna Mudali, (1900) 10 M L J 134.

A. I. R. 1940 Patna 198

ROWLAND AND CHATTERJI JJ.

Deopujan Mahto — Petitioner.

v.

Kukur Ahir — Opposite Party.

Criminal Revn. No. 545 of 1939, Decided on 4th December 1939, from order of Sess. Judge, Shahabad, D/- 23rd September 1939.

(a) Criminal P. C. (1898), S. 517 — Order under S. 517 may be passed at conclusion of trial or at later date — Passing of order should not be unreasonably postponed — But lapse of time does not deprive Court of jurisdiction to pass order.

Section 517 cannot be read as requiring that the order for disposal of property must be passed simultaneously with the judgment of the case unless words that are not in the Section are read into it. The order may be passed at the time of the conclusion of the trial or at a later date. Although the passing of such order should not be unreasonably postponed, still the lapse of time does not relieve the Court of the duty and the corresponding jurisdiction to pass orders for the disposal of property which is in the Court's custody or under its control: *A I R 1924 Lah 75 and A I R 1926 Lah 9, Rel. on; A I R 1924 Lah 261, Dissent; 19 W R Cr 3, Explained.* [P 199 C 2; P 200 C 1]

(b) Criminal P. C. (1898), S. 517—Notice to other party is essential where final order under S. 517 is passed not simultaneously with judgment but after lapse of some time.

Where order under S. 517 is passed simultaneously with the judgment in the criminal case a separate notice to the parties to show cause why the order should not be made is not necessary. But where an application is made after some lapse of time it is only proper on general principles of law

that the party to be affected by the proposed order should have notice of the application: *A I R 1923 Mad 324, Rel. on.* [P 200 C 2]

S. K. Mazumdar — *for Petitioner.*

G. C. Das — *for Opposite Party.*

Rowland J. — This application in revision has been referred to a Division Bench by the Single Judge before whom it in the first instance came up for hearing. The facts leading up to the application are as follows: The petitioner Deopujan was the complainant in a case regarding theft of two buffaloes which were missing on 12th August 1937 from the bathan of Deopujan and his cousin. One she-buffalo was recovered shortly afterwards; but a buffalo-calf remained missing. In October 1938 Deopujan got the proceedings revived on giving information that his buffalo-calf was in the possession of Kukur Ahir. The police found the buffalo in Kukur's possession which Deopujan identified as his; whereas Kukur said that he got the animal from Suchit Ahir. On a prosecution of Kukur and Suchit, Kukur was acquitted but Suchit was convicted under S. 414, Penal Code. The conviction was set aside on appeal by the Sessions Judge on 13th March 1939. The principal ground of acquittal was that the proof of identity of the animal with Deopujan's missing animal was not sufficiently cogent. It does not appear that any order as to disposal of the buffalo was passed either by the trying Magistrate at the time when he convicted Suchit Ahir or by the learned Sessions Judge at the time when he acquitted that accused. On 24th April 1939, Suchit Ahir made an application before the Sub-divisional Officer for restoration of the buffalo to him. Of this application the Sub-divisional Officer gave notice to the opposite party and the present petitioner Deopujan put in a reply on 26th June 1939 stating that the buffalo was no longer in his possession having been already sold to Lakhi Koeri of Gobindpur. The Sub-divisional Officer directed the matter to be put up for hearing on 13th July 1939. In the meantime on 8th July 1939 a petition was presented by Kukur Ahir associating himself with Suchit Ahir's claim and praying that the buffalo might be made over to either of them. On 13th July 1939 however the Magistrate refused to pass any order. Kukur Ahir apparently allowed two months to elapse before taking any further steps and then he presented to the Sessions Judge on 19th September 1939 an original application in which he made no reference to the petitions of himself and of Suchit Ahir before the Sub-divisional Officer and to the orders passed on those petitions. The Sessions Judge called for the record from his record-room and without notice to any other party passed an order that the buffalo be made over to the petitioner Kukur Ahir "if she is in the custody or control of the lower Court or the police." Against this order Deopujan has moved this Court in revision and two points are taken: firstly, that the Sessions Judge had not jurisdiction to pass the order; and secondly, that such an order could not properly be passed without giving notice to the other side.

On the first point it is argued that an order under S. 517 ought to be passed at once on the disposal of the trial and that an order made some time later on a separate application by a claimant is without jurisdiction. For this contention reference is made to 4 Lah 460[1] a decision of a Single Judge of the Lahore High Court. With great respect the reasoning of the decision does not seem to be acceptable. The same Judge himself had taken a different view in 4 Lah 49[2] where the view was taken that there was no period of limitation for an application for an order under S. 517, Criminal P. C. And in A I R 1926 Lah 9[3] another Judge of the same High Court observed that an order under S. 517, Criminal P. C., is not to be passed until the case is concluded and may be passed at the time of pronouncing the final order in the case or at a later date. The decision in 4 Lah 460[1] was dissented from. I am of opinion, that S. 517 cannot be read as requiring that the order for disposal of property must be passed simultaneously with the judgment of the case unless we read into the Section words that are not there. In 19 W R Cr 3,[4] it was observed that an order for the disposal of property in a Criminal Court must be made at the time of passing judgment; but this observation as pointed out by Harrison J. in A I R 1926 Lah 9[3] is directly based on the words in S. 132 (a) Code of Criminal P. C. of 1861 as amended in 1869, the words being "the Court at the time of passing judgment may pass such order as

1. Abdul v. Ghulam Muhammad, (1924) 11 A I R Lah 261=76 I C 20=25 Cr L J 84=4 Lah 460.
2. Kanshi Ram v. Emperor, (1924) 11 A I R Lah 75=73 I C 937=24 Cr L J 713=4 Lah 49.
3. Kishen Chand v. Nanak Chand, (1926) 13 A I R Lah 9=89 I C 973=26 Cr L J 1453.
4. Rash Mohan v. Kali Nath, (1871) 19 W R Cr 3.

appears right for the disposal etc." If the Legislature had wished the powers conferred under the present S. 517 to be exercised subject to a time limit of this nature, there was no reason why a reference to time should not have been retained in the Section in the form in which it took in successive enactments of the Code of Criminal Procedure. One may, for the purposes of comparison, refer to S. 545 which deals with consequential orders for expenses or compensation. This Section declares that the "Court may when passing judgment, order etc." Again when power is given in S. 522 to direct restoration of immovable property to a person who has been dispossessed of it by force or criminal intimidation, the Section expressly enacts that the

> Court may if it thinks fit when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to possession.

Therefore on a reading of the Sections of law regulating consequential orders, I am of opinion that S. 517 gives jurisdiction to the court to pass necessary orders for the disposal of property either at the time of the conclusion of the trial or at a later date. It would be surprising if this were not so in relation to property in the custody of the Court, for, it is the duty of the Court to make some arrangement for its disposal and it must continue to be the Court's duty until the property is disposed of in some way or other either by destruction or by passing out of the hands of the Court. Mr. Mazumdar for the petitioner contended assuming the Court to have power to pass an order under S. 517 on an application presented after the disposal of the trial, such an order at least ought to be passed within a reasonable time. I am prepared to say that the passing of such orders should not be unreasonably postponed, but not that the lapse of time relieves the Court of the duty and the corresponding jurisdiction to pass orders for the disposal of property which is in the Court's custody or under its control. The question was raised whether the Sub-divisional Officer had jurisdiction to entertain the applications of Suchit and Kukur and if not whether the Sessions Judge had jurisdiction in appeal to interfere with his refusal of those applications. The question really does not arise because the Court of Session was moved as being the Court which had disposed of the criminal trial in appeal and was moved by means of an original application. The objections taken to the jurisdiction of the Court to entertain the application fail for the above reasons.

The next point taken that a final order should not have been passed without notice to the other side is in agreement with the broad general principle of procedure both in Criminal and Civil Courts that an order to the detriment of any party ought not to be passed without giving him notice and an opportunity of showing cause why it should not be made. It is true that the Section does not in terms require the issue of any such notice and if an order regarding disposal of property is passed simultaneously with the judgment in the criminal case, no one would contend that a separate notice to the parties to show cause in respect of the disposal of the property was necessary; but when an application is made after some lapse of time, I think it only proper on general principles of law that the party to be affected by the proposed order should have notice of the application. This view has been taken in the Madras High Court in 46 Mad 162.[5] It will be necessary therefore to discharge the order of the Sessions Judge and remit the case to him for disposal after hearing the opposite party that is to say the complainant of the criminal proceedings. I may point out that the order passed on 23rd September 1939 by the Sessions Judge has the disadvantage of leaving it open to a dispute between the parties as to whether the order actually affects the disposal the buffalo or not, for the buffalo was to be made over to Kukur Ahir "if she is in the custody or control of the lower Court or the police." It would be better for the Sessions Judge to ascertain whether the buffalo was at the date of the application in the custody or control of the lower Court or the police before passing an order so that the order eventually passed might be definite in its terms and certain in its application. I would therefore make the rule absolute, set aside the order passed and direct the Sessions Judge to dispose of the matter in accordance with law.

Chatterji J.—I entirely agree.

G.N./R.K. *Order set aside.*

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5. Arunachala Thevan v. Vellachami Thevan, (1923) 10 A I R Mad 324 = 71 I C 514 = 24 Cr L J 162=46 Mad 162=44 M L J 56.

A. I. R. 1940 Patna 201

FAZL ALI AND MEREDITH JJ.

Raja Singh and others — *Defendants* — Appellants.

v.

Chaichoo Singh — *Plaintiff* — Respondent.

Appeal No. 994 of 1938, Decided on 5th December 1939, from appellate decree of Sub-Judge, Patna, D/- 20th September 1938.

(a) Fraud—Inference—Fact that executant of document is illiterate does not justify inference that he was in fact deceived.

Where a person executes a document under the impression that it was a lease when in fact it was a deed of gift, the fact that the executant is illiterate can justify the inference that he could be defrauded but not that he was in fact defrauded.

[P 202 C 2]

(b) Fraud — Inference — Criterion applicable to circumstantial evidence—Circumstances must exclude every reasonable possibility.

It is well settled that where fraud is to be inferred from the circumstances and is not directly proved, those circumstances must be such as to exclude any other reasonable possibility. The criterion is similar to that which is applicable to circumstantial evidence in criminal cases.

[P 203 C 1]

(c) Civil P. C. (1908), S. 100 — Fraud — Circumstantial evidence — Inference — Finding based upon legal error can be interfered with in second appeal.

Where the evidence is direct, the finding of fraud may be a pure finding of fact but where there is no direct evidence but only an inference, then the finding involves the legal question as to whether the circumstances are such that the necessary inference can legally be derived. The criterion applicable to circumstantial evidence in order to draw an inference of fraud is that the circumstances must exclude every reasonable possibility except that of fraud. Where the lower Court errs in applying this criterion the second Appellate Court is entitled to interfere : *20 Cal 93, Rel. on.*

[P 203 C 1]

(d) Limitation Act (1908), Arts. 95 and 91—Applicability—Arts. 95 and 91 do not apply to deed which is void ab initio.

Where an old and illiterate person executes a document under the impression that it is a lease when in fact it was a deed of gift, there cannot be a real execution since his mind was directed to one thing whereas what he put his hand to was some thing of an altogether different character. Since his mind was not with his hand there was no real execution and the document must be deemed to be void and not merely voidable. The case does not fall within the purview of Articles 95 or 91 as the deed does not require to be set aside or cancelled : *A I R 1921 Cal 786; (1869) 4 C P 704 and A I R 1925 Pat 140, Rel. on; (1907) 1 Ch D 537, Expl.*

[P 203 C 2]

Dr. D. N. Mitter, B. N. Mitter and Ajit Kumar Mitra — *for Appellants.*

S. M. Mullick and K. N. Lal — *for Respondent.*

Meredith J.—This is an appeal by the defendants from a decision of Babu Anjani Kumar Sahay, Subordinate Judge at Patna, dated 20th September 1938, setting aside a decision of Babu Bhagwan Prasad, Munsif at Patna, dated 31st August 1937. The suit was originally instituted by one Titai Singh, as a pauper, for recovery of possession of certain properties, and for mesne profits, on a declaration that a deed of gift, said to have been executed by him on 18th June 1931 in respect thereof, was fraudulent and null and void. The suit was instituted on 3rd August 1935. Titai Singh died on 2nd September 1936, and an agnate of his, the present respondent, Chaichoo Singh, was substituted as plaintiff in his place on 12th October 1936. The substituted plaintiff paid full court-fees on the subject-matter of the suit. The suit was not heard, or evidence recorded, until 1937. Hence Titai Singh could not be examined as a witness.

The alleged facts upon which the action was brought, were that some ten years before the suit Titai Singh employed defendant 1 to look after his cultivation and his affairs generally, as he had become too old to manage them himself. After some time defendant 1 asked Titai to grant him a lease of his raiyati lands in order that he might have an incentive to look after Titai's affairs with greater zeal and care. Titai agreed, and in October 1928, purchased a stamp paper for the purpose and put his thumb mark thereon. In June 1931, defendant 1 asked Titai to get the lease registered, whereupon Titai came to Patna, where defendant 1 fraudulently induced Titai to execute a deed of gift in his favour under the impression that he was executing a lease. Shortly afterwards, defendant 1 left Titai uncared for, and went away with all the papers. Defendants 2 and 3 thereupon, finding Titai helpless dispossessed him from the suit land, representing themselves to be purchasers from defendant 1 as a donee of Titai. Titai thereupon got inquiries made and learnt of the fraud that had been practised upon him. Hence the plaintiff's suit for a declaration that the deed of gift was void and that the defendants had acquired no title to the lands.

The defence was that there was no fraud in execution of the deed of gift, that it was validly executed and was acted upon, that defendant 1 having acquired a good title thereunder made a bona fide sale of 4½

bighas of the land and the house to defendant 2 for a sum of Rs. 1,400 and 1 bigha odd to defendant 3 for a sum of Rs. 200 by registered sale deeds. Defendant 2 subsequently sold a portion of the land purchased by him by a registered sale deed to defendant 5. It was alleged that Chaichoo Singh and some others had wanted to purchase the properties themselves, and so had induced Titai Singh, who did not like the idea that defendant 1 should sell away the properties in his lifetime, to file this false suit. The learned Munsif found that there was no satisfactory evidence to substantiate the case of fraud. Fraud could only be established by cogent and convincing evidence, but no such evidence was produced. On the contrary, the scribe was examined, and stated that he had read over and explained the deed of gift to Titai Singh, who had instructed him to write it out. An attesting witness and one Ramdeo Singh, who purported to have signed the deed of gift for Titai, who was illiterate, gave evidence to the same effect. In this view he dismissed the suit with costs. The learned Subordinate Judge conceded that there was no direct evidence of fraud but was of opinion that fraud could be inferred from the circumstances on the record. He enumerated these circumstances as follows :

(1) That Titai Singh was old and illiterate; (2) that the stamp-vendor was not examined; (3) that the deed contained a false recital that defendant 1 was Titai's grandson whereas there was actually no evidence at all of any relationship; (4) that Titai was falsely described as being a resident of Chiraura, defendant 1's village, whereas actually he was a resident of village Hulaschak; (5) that defendant 1's name was not mutated in the landlords sarishta; and (6) that the attesting witnesses were all of Chiraura and none of Hulaschak. In this view he held that the plaintiff was entitled to a decree for possession and mesne profits, and hence, allowed the appeal and decreed the suit with costs. The points taken in appeal are: first, that there was no evidence in the case on which a finding of fraudulent misrepresentation could legally be based; secondly, that, even if executed upon a fradulent misrepresentation as to the contents, the deed is not void ab initio but merely voidable, and a suit to set it aside must be brought within three years of the date of knowledge; it being found that the present plaintiff knew from the time of its execution that it was a deed of gift, a suit to set it aside was barred by limitation at the time the present suit was instituted. Thirdly, that there has been no proper trial of the question of the bona fides of the purchase of the other defendants from defendant 1.

I am of opinion that the appeal must succeed upon the first point. I have enumerated the materials from which the lower Appellate Court infers fraud. It is necessary to specify clearly what this inference involves. In this case the fraud alleged is a misrepresentation to Titai that he was executing a lease whereas, in fact the document he was executing was a deed of gift. The fraud, if any, therefore consisted in a direct misrepresentation of fact. Of this there was no direct evidence, no one came forward to prove any misrepresentation, and Titai himself was dead. The only direct evidence in the case was the evidence of the scribe and the attesting witness that the document was read over to Titai and that he executed it knowing it to be a deed of gift. A finding of fraud could, therefore, be based only upon an examination of the circumstances; and it is obvious that upon none of the circumstances specified could any direct inference of misrepresentation be based. The finding of misrepresentation, if arrived at all, could only be from a consideration of the circumstances as a whole. Some of these circumstances were largely explained away; for example, the recital that defendant 1 was Titai's grandson, might have referred only to village or courtesy relationship, and as regards the question of residence, Titai in the document was actually described as a resident of Hulaschak, but it was mentioned that at that time he was residing in Chiraura, and it was not disproved that Titai had gone to reside in Chiraura as alleged, though that might have been upon the execution of the deed of gift and not prior to it. That circumstance would largely remove the justification for suspicion in the fact that the attesting witnesses were of Chiraura not Hulaschak. Again, the fact that Titai was old and illiterate, would justify the inference that he could be defrauded, but not that he was in fact defrauded. As for the fact that defendant 1's name was not mutated in the landlord's office, that was largely offset by the fact that canal parchas and chaukidari receipts were filed in his name. These however are circumstances which are, strictly speaking, irrelevant in second appeal; and the only question is whether upon the learned Subordinate Judge's valua-

tion of these circumstances, fraud was an inference which could legally be made. Now it is well-settled that where fraud is to be inferred from the circumstances, and is not directly proved, those circumstances must be such as to exclude any other reasonable possibility. In other words, the criterion is similar to that which is applicable to circumstantial evidence in criminal cases.

The learned Subordinate Judge has not applied this criterion to the circumstantial evidence. He has not proceeded on any finding of fact that the circumstances enumerated by him exclude every reasonable possibility other than that Titai was induced to execute the document upon a fraudulent misrepresentation with regard to its nature (and indeed he could hardly have done so); but he has proceeded rather upon a wrong legal view of the nature of the circumstantial evidence from which fraud can be inferred. In these circumstances, the finding is based upon a legal error and can be interfered with in second appeal, the case being of the nature in 20 Cal 93[1] where their Lordships of the Privy Council laid down that though a Court of second appeal is not competent to question the soundness of a finding of fact by the Court below, and the decision of the lower Court as to the effect of the evidence must stand final as to the fact, yet the soundness of the conclusions derived from the findings of fact may involve a matter of law and may therefore be questioned by a Court of second appeal. The legal error of the lower Appellate Court in the present case is with regard to the criterion applicable where fraud is attempted to be proved not by direct but by circumstantial evidence. This criterion as I have said, is that the circumstances must exclude evey reasonable possibility except that of fraud. Where there is direct evidence, the matter is otherwise that the finding of fraud may be a pure finding of fact, as has been laid down in A I R 1932 P C 89.[2] But where there is no direct evidence and only an inference, then the finding involves the legal question as to whether the circumstances are such that the necessary inference can legally be derived. In the present case, I am of opinion that it cannot be. There is no evidence in the case upon which a finding of fraud could legally be based.

As the appeal must succeed upon the first ground, the other questions argued do not really need determination. I may state, however, that upon these points I would not be prepared to accept the contentions of the learned advocate for the appellants. If Titai executed the document under the impression that it was a lease, when in fact it was a deed of gift, then I think there was no real execution since Titai's mind would have been directed to one thing whereas what he put his hand to was something of an altogether different character. The executant's mind was not with his hand. If there was no real execution, the document was wholly void and not merely voidable. That is what was laid down in 26 C W N 479,[3] the ruling relied upon by the learned Subordinate Judge. This ruling appears to me strictly applicable to the case. Therein it was held that where the plaintiff had prayed for a declaration that a deed of gift was void and inoperative since the donor signed it believing, owing to a fraudulent misrepresentation, that it was only a power of attorney, the three years' limitation provided by Arts. 95 and 91, Limitation Act, had no application, since the principle laid down in (1869) 4 C P 704[4] that the alleged deed was no deed, was applicable, and the deed being void ab initio, did not require to be set aside or cancelled. Richardson J. in that case observed that the Courts draw a distinction between void and voidable instruments, and held that Art. 91 did not apply to instruments which were void ab initio so as not to require setting aside, as would be the case when the plaintiff raises and establishes the plea known to English lawyers as *non est factum*.

The learned advocate for the appellants argued on the basis in (1907) 1 Ch D 537[5] that (1869) 4 C P 704[4] was no longer good law. But, in fact, what the later rulings really lay down is that a misrepresentation as to the contents of a document will make it voidable, and only a misrepresentation as to its character will make its execution absolutely void. And, moreover, this principle seems to have been

1. Ram Gopal v. Shamskhaton, (1893) 20 Cal 93 = 19 I A 228 = 6 Sar 247 (P C).
2. Satgur Prasad v. Har Narain Das, (1932) 19 A I R P C 89=136 I C 108= 7 Luck 64 = 59 A 147 (P C).
3. Sarat Chandra v. Kanai Lall, (1921) 8 A I R Cal 786 = 70 I C 525 = 26 C W N 479.
4. Foster v. Mackinnon, (1869) 4 C P 704 = 38 L J C P 310=20 L T 887=17 W R 1105.
5. Howatson v. Webb, (1907) 1 Ch D 537 = 76 L J Ch 346.

based to some extent upon the assumption that where a man is able to read the document before executing it but omits to do so he cannot afterwards in view of his own negligence be heard to say that he was induced to execute the document by a fraudulent misrepresentation. It has, I think, never been laid down that the principle in (1869) 4 C P 704[4] is not still applicable where the person executing the document is blind or illiterate. The law on the subject has been clearly and concisely laid down in A I R 1925 Pat 140[6] from which I would like to quote the following passage:

Whether the statement of law in (1869) 4 C P 704[4] would be wholly supported today is a matter of some doubt. A distinction has been drawn in the more modern cases between misrepresentation as to the character of a document and misrepresentation as to the contents of a document and it seems to be the modern view that when there is a misrepresentation as to the contents of a document but not as to the character of the document, the plea of non est factum is not available to the party deceived unless— and this is very important — he is blind or illiterate. So far as I understand the more modern decision in (1907) 1 Ch D 537[5] the rule does not apply to a man who can read but who forbears to read the document.

In the present case the finding is that Titai was a very old man and illiterate. Hence, in my opinion, if he signed the document upon a misrepresentation as to its contents, there will be no real execution, the plea of *non est factum* will succeed, and the document will be void ab initio. But apart from that, it seems to me that a representation that a document was a lease when it was in fact a deed of gift, would be a misrepresentation as to the nature of the document and not merely as to its contents. Obviously, the line of distinction might sometimes be a fine line. I can conceive cases where it might be very difficult to say whether the document signed and the document fraudulently represented actually differed in nature or merely in contents; but I feel no doubt that as between a lease and a deed of gift, there is a difference of nature and not merely a difference of content. Where the document is wholly void ab initio, any prayer to set it aside is unnecessary and redundant. That is enough to dispose of the questions of limitation and bona fides. The suit could not be barred by limitation, and defendants 2 to 5 could acquire no title, however bona fide their purchase from defendant 1 might have been. As, however, the appellants have succeeded upon the first point, I would allow the appeal and dismiss the suit. Having regard to the circumstances of the case we direct that the parties shall bear their own costs throughout.

Fazl Ali J.—I agree.

G.N./R.K. *Appeal dismissed.*

6. Hem Singh v. Bhagwat Singh, (1925) 12 AIR Pat 140=80 I C 67.

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* A. I. R. 1940 Patna 204

DHAVLE J.

On difference between

MOHAMAD NOOR AND MANOHAR LALL JJ.

Banwari Lal and others — *Defendants* — Appellants.

v.

Shaikh Shukrullah and others, Plaintiffs and another, Defendant — Respondents.

Letters Patent Appeals Nos. 59 and 60 of 1933, Decided on 15th September 1939, from decision of Wort J., D/- 21st March 1933.

*** (a) Civil P. C. (1908), S. 97 — Suit for dissolution of partnership and accounts — Court after passing of preliminary decree but before final decree ordering Commissioner to credit plaintiff with certain sum—Order is not supplementary preliminary decree but interlocutory order** (Per *Mohamad Noor and Manohar Lall JJ.*)

The orders passed for the guidance of the commissioner appointed for taking accounts or making partition or ascertaining mesne profits are not preliminary decrees. Where in a suit for dissolution of partnership and for accounts Court after passing preliminary decree for accounts but before final decree orders the Commissioner to credit the plaintiff with particular sum, the order is not a supplementary preliminary decree but an interlocutory order as it does not conclusively determine the right of the parties : *C. R. No. 458 of 1926, Expl. and Dissent.* [P 208 C 2]

(b) Partnership — Suit for dissolution and accounts — Court after preliminary decree can order that account should be taken on certain basis.

After passing the preliminary decree in a suit for dissolution of partnership and accounts Court has jurisdiction to order that account should be taken on a certain basis because such order is about the mode of taking account: *A I R 1924 Cal 160, Rel. on.* [P 209 C 2]

(c) Fraud—Party alleging fraud should place specific details.

A litigant who prefers the charges of fraud or other improper conduct should be compelled to place on record precise and specific details of those charges: *A I R 1937 P C 146, Rel. on.* [P 215 C 2]

(d) Partnership—Two persons in partnership —One mortgaging his share to other—Dominant character will be that of partnership (Per *Manohar Lall J.*)

If two persons are in partnership and one of them mortgages his share in the interest to the other the dominant character will be that of the partnership and not of the mortgageeship. [P 218 C 1]

(e) Decree—Relation of preliminary decree to final decree stated (Per *Dhavle J.*)

The function of the final decree is merely to restate and apply with precision what the preliminary decree has ordained, and final decree is not only based on but also controlled by preliminary decree and cannot travel beyond it : *A I R 1929 Cal 689 (F B), Rel. on.* [P 224 C 1]

(f) Res Judicata—Cause of action arising subsequent to suit — There is no res judicata *(*Per *Dhavle J.)*

There can be no res-judicata regarding "a cause of action" that arose subsequently to the suit. [P 227 C 1]

(g) Practice — Relief — Subsequent events—Court can take notice of, and grant relief on basis of altered conditions *(*Per *Dhavle J.)*

Though a suit is to be tried in all its stages on the cause of action as it existed at the date of its commencement, notice may be taken of events which have happened since the institution of the suit and relief afforded to the parties on the basis of the altered conditions, where it is necessary to do so in order to shorten litigation or to do complete justice between the parties: *A I R 1915 Cal 103 and A I R 1928 Pat 396, Rel. on.* [P 227 C 2]

(h) Partnership — Suit by one partner against another for damages for breach of covenant of partnership deed brought before dissolution is liable to be defeated *(*Per *Dhavle J.)*

A suit by one partner against another for damages for breach of a covenant of the partnership deed, brought before dissolution, is liable to be defeated on the ground that a suit between partners should be a suit for general accounts in which the defaulting partner could be debited with any loss that might have been caused by his action : *A I R 1927 Mad 650, Rel. on.* [P 228 C 2; P 229 C 1]

*** (i) Partnership — Breach of covenant in partnership deed subsequent to suit for dissolution and accounts—Claim for damages for breach advanced while accounts are being taken under preliminary decree—Aggrieved partner can get damages either by separate suit or by application in proceedings that lead to final decree—Damages how calculated stated** *(* Per *Dhavle and Mohamad Noor JJ.)*

A claim for damages for breach of covenant by a partner does not disappear when accounts are taken upon a dissolution or otherwise, though where the claim is advanced in the suit for dissolution or general accounts, it may be included in the decree under "just allowances" : *A I R 1927 Mad 650 and A I R 1921 P C 91, Rel. on.* [P 230 C 2]

If the breach is subsequent to the institution of the suit for dissolution and the claim is advanced while accounts are being taken under the preliminary decree, the aggrieved partner must get his damages or compensation, whether by a separate suit or (where the preliminary decree is in sufficiently wide terms) by an application in the proceedings that lead to the final decree. The damage or compensation for such a breach is rightly found by calculating the loss of profits that would have been earned but for the breach, i. e. by finding out what profit the partnership would have made if the partners guilty of breach of covenant had done their duty, because the general intention of the law is that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed: [P 230 C 2; P 231 C 1; P 232 C 1]

(j) Partnership—Culpable negligence or wilful default by partner in breach of his duty to partnership—He is liable to make compensation to partnership.

In the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership, whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect. The expression "wilful default" means some wilful misconduct, some failure to do one's duty purposely and wilfully. [P 231 C 1, 2]

(k) Partnership — Applicability of doctrine of laches.

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. A Court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success. This doctrine applies to cases where the plaintiff has by his conduct induced the defendant to suppose that the plaintiff had abandoned the common undertaking, usually in cases of a high speculative character. [P 237 C 2]

(l) Contract — Doctrine of frustration when applies stated.

The doctrine of frustration only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract; "interference leaving a considerable part capable of performance will not be an excuse." [P 238 C 2]

P. R. Das, A. K. Mitra, Damodar Das and Ramanugrah N. Sinha — *for Appellants.*

Dr. Sir S. Sultan Ahmed, Muhammad Hasan Jan, Syed Ali Khan and Syed Hasan — *for Respondents.*

Mohamad Noor J. — This and the analogous appeal (No. 60 of 1933) under Letters Patent are against a decree of a learned Judge of this Court in a suit for dissolution of partnership, for accounts and other incidental reliefs. The facts are as follows: The plaintiffs and defendant 6 who style themselves as Messrs. Nuri Mian & Co. are the owners of two sugar factories; one known as Nuri Sugar Factory is at Bhatni in the district of Gorakhpur in the United Provinces and the other named Deshi Sugar Factory is at Siwan in this province. The Bhatni factory is a composite one, that is to say, it manufactures sugar in the cane season directly from the cane and in other seasons by melting molasses, while the Siwan factory is a refinery and works with molasses only. In about the year 1927 the owners were involved in financial difficulties and the factories had been mortgaged with the Imperial Bank of India. They therefore approached defen-

dants 1 to 3 and father of defendants 4 and 5 for financial assistance. The negotiations culminated in two deeds, one a deed of partnership dated 15th October 1927, between the owners and defendants 1 to 3, and another an indenture between the owners on the one part and defendants 1 to 3 and father of defendants 4 and 5 on the other part and is dated 27th October 1925. It is not necessary to give here the detailed terms of these two deeds. So much of them as are relevant to the questions involved in this appeal will be stated at appropriate places. At present it is enough to state that defendants 1 to 3 and father of defendants 4 and 5 advanced to the plaintiffs and defendant 6 a sum of Rs. 5,75,000 at 9 per cent. per annum interest in order to enable them to pay up the dues of the Imperial Bank of India and other creditors. The owners mortgaged the factories to them. It was arranged that the capital for the working of the factories would be supplied by defendants 1 to 3 as partners of the owners and that both the factories would be worked to their fullest capacities. The entire control of the staff and management was given to defendants 1 to 3 by the deed of partnership. It was arranged that the parties would share profit and loss half and half and out of the share of the profits of the owners three-fourths would go towards the liquidation of the mortgage debt, namely Rs. 5,75,000 and its interest and the remaining one-fourth of it would be paid to the owners. It was also arranged that owners would keep agents who would supervise the accounts and works of the factories. The arrangement was to last for five years; but if by that time the mortgage money, namely Rs. 5,75,000 with interest, would not be satisfied it would continue till its satisfaction.

It appears that differences arose between the parties about the working of the factories, and on 6th October 1928, the plaintiffs instituted the present suit before the Subordinate Judge of Chapra. They alleged various acts of misconduct of the defendants and contended that in consequence of them which were in contravention of the agreement between the parties the partnership had come to an end and they asked for a declaration to that effect. In the alternative, they prayed that the partnership be dissolved. They also asked for accounts and claimed damages from the defendants for not working the Bhatni factory to its full capacity. They estimated that after taking the accounts it would be found that not only the mortgage debt of Rs. 5,75,000 and its interest had been satisfied but a sum of Rs. 6,00,000 was due to them and defendant 6 from the principal defendant. The learned Subordinate Judge passed a decree on 30th June 1930, which was partly preliminary and partly in my opinion final. He dissolved the partnership from that date, awarded the plaintiffs damages amounting to Rs. 24,750 for not working the Bhatni factory with molasses in the year 1925-26 and Rs. 6994-0-10 for not working it fully in the year 1927-28, in all Rs. 31,744-0-10. He ordered accounts to be taken and directed one Gurudayal Srivastava, who was the general manager of the factories under the defendants, to prepare accounts, and it seems clear that he appointed him receiver of the factories till the accounts are adjusted and also commissioner for taking accounts. I may mention here that Mr. Srivastava was the manager of the owners before they entered into partnership with the defendants. He was appointed as such with the approval of the Imperial Bank of India with whom the factories were mortgaged.

While the accounts were being prepared and adjusted, the plaintiffs filed an application before the successor of the learned Subordinate Judge, who had decreed the suit, claiming that the receiver be directed to credit the owners with a sum of Rupees 42,483 being the loss which accrued to them by the defendants' not working the Bhatni factory with molasses in the year 1928-29. An objection was raised on behalf of the defendants that as this claim related to the period subsequent to the institution of the suit and was not covered either by the plaint or the decree, it could not be gone into at that stage. The learned Subordinate Judge by his order dated 23rd May 1931, overruled this objection and proceeded to determine the claim on merits. The defendants came up to this Court in revision (Civil Revn. No. 332 of 1931) but the application was summarily rejected on 18th June 1931. The learned Subordinate Judge proceeded to hear the application and ultimately on 1st October 1931 directed that a sum of Rs. 42,483 as damages and Rupees 2000 as costs be credited in accounts on 1st November 1929, in favour of the owners. After this order was passed and while the account was still being adjusted, the case was called up by this Court to be heard in its extraordinary original civil jurisdiction.

and was heard by the learned Judge who has passed the final decree.

In the meantime the receiver had submitted the accounts and the possession of the mills was given to the plaintiffs after they had given security for satisfaction of any decree which might be passed in the suit. Objections to the accounts were raised by the parties which were disposed of by the learned Judge by several orders and on 21st March 1933, he ordered a final decree to be prepared according to the directions given. This was done and after giving credit of Rs. 2,80,000 paid by the plaintiffs to the principal defendants a decree was passed in their favour against the plaintiffs and defendant 6 for a sum of Rs. 19,975-9-2 of which a sum of Rs. 3683-4-6 was to bear interest at 9 per cent. per annum from 1st August 1933. It is against some parts of this decree that two appeals have been preferred, one by the defendants and the other by the plaintiffs. This appeal which is by the defendants is valued at Rs. 76,227-7-4 and is in respect of two items only. One is a sum of Rs. 31,744 which was ordered to be paid by the principal defendants to the plaintiffs in the decree passed on 30th June 1930, as I have already stated, as damages for not working the Bhatni Mill with molasses in 1925-26, and not working it fully in 1927-28. The second is Rs. 44,483-6-6 (damages and costs) which the successor of the learned Subordinate Judge who decreed the dissolution of partnership ordered to be entered in the accounts of 1st November 1939, in favour of the plaintiffs for not working the Bhatni Mill with molasses in the year 1928-29. Though therefore the appeal is nominally against a decree of a learned Judge of this Court in fact it is directed against two orders of the learned Subordinate Judge of Saran, one embodied in the preliminary decree and the other passed in the course of account taking.

It is obvious that in respect of the first item the appeal is not maintainable. A decree for it was passed on 30th June 1930. No appeal was preferred then and the question cannot be reopened now. The decree for this amount passed on 30th June 1930 was final. Even if it be treated as a preliminary one, S. 97, Civil P. C., is a bar to the present appeal. In fact, this part of the appeal was not pressed before us. The only item, therefore, involved in this appeal is Rs. 44,483 which was ordered after the passing of the preliminary decree, to be entered in the accounts in favour of the plaintiffs. I have said that when the learned Subordinate Judge proceeded to hear the plaintiffs' application for assessment of damages for not working the Bhatni factory with molasses in 1928-29 there was a revision application to this Court which was rejected on 18th June 1931. When the learned Subordinate Judge passed the order complained of on 1st October 1931, there was a second revision application to this Court (C. R. No. 33 of 1932). It was heard under the revisional jurisdiction of this Court by the same learned Judge who has passed the final decree in this case, and although he was of opinion that the order of the learned Subordinate Judge was without jurisdiction and wrong he declined to interfere in revision and rejected the application on 3rd February 1932. Later on, another attempt was made by the defendants before the learned Judge for recalling or reviewing the order of the learned Subordinate Judge; but he rejected the applications on 24th February 1932 (Misc. Judicial Case No. 144 of 1931). Though again he was of opinion that the order of the learned Subordinate Judge was wrong he declined to re-call it on the ground that it was an order of his predecessor in office and could not be re-called under S. 151, Civil P. C. A Letters Patent Appeal No. 43 of 1932[1] against this order was dismissed on 29th November 1932. Therefore Rs. 44,483 remained credited in the accounts in favour of the plaintiffs.

It was contended on behalf of the respondents of this appeal that the order of the learned Subordinate Judge was a supplementary preliminary decree and the plaintiffs ought to have appealed against it, and they not having done so are precluded under S. 97, Civil P. C., from appealing against it after the final decree. No doubt there can be more than one preliminary decree in a suit, but the order of the learned Subordinate Judge by which he directed that a sum of Rs. 44,483 be credited in favour of the plaintiffs in the accounts was an interlocutory order and not a decree.

The question whether a particular order is or is not a decree is sometimes difficult to decide. As has been pointed out by the Calcutta High Court in 27 C W N 989,[2] at one time the view of the Bombay High

1. *Reported in* (1933) 20 A I R Pat 139= 142 I C 455=12 Pat 202=14 P L T 1.
2. Peary Mohan Mookerjee v. Manohar Mookerjee, (1924) 11 A I R Cal 160 = 74 I C 373 = 27 C W N 989= 38 C L J 255.

Court was that a decision that a suit is not bad for misjoinder or that it is not barred by limitation and other such orders were decrees. This extreme view was not accepted by the Calcutta High Court in 19 C W N 755[3] and was disapproved in the Bombay High Court itself in the Full Bench decision in 39 Bom 339[4]. The difficulty is not in laying down the test but in applying it to a particular case. A useful test is whether the order conclusively determines the right of the parties with regard to any matter in controversy in the suit. It may be argued that an order that a certain sum be credited in favour of the plaintiffs in the adjustment of accounts conclusively determines the right of the plaintiffs in respect of that sum; but a closer examination of the position will show that it does not, because the right of the parties in controversy in the suit is as to how much one is entitled to get from the other. An order directing this to be determined is a preliminary decree and an order which finally determines this is a final decree. But an order in the course of determination of the liability is not a decree but an interlocutory order. Take a case in which the Court does not think it necessary to appoint a commissioner for taking accounts. There is nothing in law to prevent it from taking account itself. In the course of taking accounts from day to day it passes orders that a certain sum be placed on the credit side and certain other on the debit side of the account. Can it be said that these orders are preliminary decrees and the party against whom they are passed is to appeal against them at once? There will be in that case no end of appeals and the trial of the case will be indefinitely held up. Then take the case in which the Court thinks it necessary to give direction to a commissioner regarding the mode of partition after a preliminary decree for partition has been passed and partition is being effected by the commissioner, for instance, order fixing the value of different properties for the purposes of partition, etc. Can these orders, passed between the preliminary decree for partition and the final decree, be treated as supplementary preliminary decrees? If so, the partition itself will be held up for an indefinite period. In my opinion the orders passed for the guidance of the commissioner appointed for taking accounts or making partition or ascertaining mesne profits are not preliminary decrees. In this case what the Court did was to order the commissioner to credit the plaintiffs with a particular amount on a particular day in the accounts. This was an interlocutory order and did not conclusively determine the right of the parties.

Our attention has been drawn to an unreported decision of a learned Judge of this Court in C.R. No. 458 of 1926.[5] In that case in the course of the ascertainment of mesne profits the Munsif had held that the defendants first a fourth parties were jointly and severally liable for mesne profits. The learned Judge held that the order was a decree and ordered the Munsif to draw up a formal one. First of all, that case is distinguishable from the present one inasmuch as there the liability of a particular set of defendants was finally decided. But with all respect to the learned Judge, I beg to differ from his view, as, in my opinion, the order was in effect an interlocutory one. A preliminary decree had already been passed for mesne profits, and the liability of the defendants had already been determined. In the course of the ascertainment of mesne profits the Court had to find which among the defendants were liable and to what extent. At that time no sum was actually ascertained to be payable by the defendants. It might have been that after the accounts were gone into nothing was found due from these defendants and there was no need for them to appeal again. I am clearly of opinion that the order of the learned Subordinate Judge was not a supplementary preliminary decree nor a final decree.

The next question for consideration is whether the learned Subordinate Judge had jurisdiction to pass the order that Rs. 42,283-6-6 be credited in favour of plaintiffs and defendant 6 in the accounts as their share of loss for not working the Bhatni factory with molasses in 1928-29 together with Rs. 2000 for the cost of the inquiry. Mr. Das for the appellants has contended that he had no such jurisdiction and has adopted for his argument the reasons given by the learned Judge of this Court while rejecting on 13th February

3. Kamini Debi v. Promothanath Mukerjee, (1915) 2 A I R Cal 272=27 I C 317=20 C L J 476=19 C W N 755.

4. Chanmalswami v. Gangadharappa, (1914) 1 A I R Bom 149=26 I C 885=39 Bom 339=16 Bom L R 954 (F B).

5. Bankey Bihari Lal v. Mahant Ramprakash Das, C. R. No. 458 of 1926, Decided on 13th February 1928.

1932 the Civil Revision Application No. 33 of 1932. I have already said that the learned Judge was of opinion that the order was without jurisdiction and illegal. With my profoundest respect to his views, I regret I cannot agree with him. His first reason is that the claim for the aforesaid loss was not included in the plaint of the suit nor was it covered by the preliminary decree. The claim however refers to a period subsequent to the institution of the suit, and for obvious reasons could not have been included in the plaint. It is true, as the learned Judge has pointed out, that the plaintiffs could have amended the plaint by including a relief in respect of this loss, but in my opinion there was no necessity for him to do so, and the investigation of the claims for the loss was covered by the suit and the preliminary decree for accounts.

The plaintiff's suit was for dissolution of partnership and accounts. Their case was that the partnership had already come to an end. This position was not accepted by the defendants. Prior to the institution of the suit the plaintiffs gave to the defendants a notice intimating to them that the partnership had come to an end. The defendants in their reply which they sent through Mr. Iqbal Ahmad stated that according to them the partnership had not ended and insisted upon carrying on the work of the partnership. This was also their attitude in the suit. The Court by its decree dissolved the partnership not from the date of the suit but from the date of it, i. e. 30th June 1930. The decree has become final. Neither party appealed against it. We have therefore to give effect to it for better or for worse. The decree specifically ordered the accounts to be taken from 1st December 1926 till the date of the dissolution. The dissolution was decreed on the ground of misconduct of the defendants. If the misconduct continued during the pendency of the suit, I see no reason why the plaintiffs cannot get relief for it in the course of the adjustment of the accounts and why they should be forced to institute a separate suit. The misconduct was continuous and all losses to the partnership by the misconduct of the managing partner must be taken into account when the account is being taken for winding it up. Supposing the loss was caused at a time when there was no opportunity for the amendment of the plaint, can it be said that the plaintiffs are not entitled to relief and must institute a fresh suit after the final adjustment of the accounts ? I doubt if such a suit would have been maintainable.

In my opinion the order of the learned Subordinate Judge which is complained of, shorn of technicalities, was in substance an order that the accounts should be taken not only of what was actually received by the partnership but also of what was lost to it on account of the wilful neglect of the defendants who were the managing partners. Instead of directing the commissioner to prepare accounts on that basis, he himself determined the loss and directed it to be entered in the accounts. Whether or not there was wilful neglect by them and whether the plaintiffs are entitled to saddle them with the loss incurred to the partnership on account of not working the Bhatni Factory with molasses in 1928 and 1929 are quite different matters, and I shall deal with them later. At present I am concerned with the question whether the learned Subordinate Judge had after the passing of the preliminary decree, jurisdiction to order that the account should be taken on a certain basis. The order was about the mode of taking account, and such an order, in my opinion, can be passed after the passing of the preliminary decree. This was the view taken by the Calcutta High Court in 27 C W N 989.[2] In that case after the passing of the preliminary decree for accounts the Court passed a further order determining the period and the mode of accounting. The Calcutta High Court held that the Court had jurisdiction to do so. In that case the order was held to be a second preliminary decree in the suit. I have already held that in my opinion such an order is an interlocutory one and not a second preliminary decree. But if it be taken to be a second preliminary decree the position of the appellants will become worse. In that case they will be debarred from raising the question at this stage, not having appealed against it then. The learned Judge of this Court has expressed his dissent from the view taken by the Calcutta High Court in the case above referred to ; but with all respect to him I venture to say that, in my opinion, the case was correctly decided. Whether the order is justified on facts and law is a different matter and does not affect the question of jurisdiction.

Now the question arises whether in taking the accounts ordered by the preliminary decree the loss incurred during the pendency of the suit can be included if it be established that it was caused by the

wilful neglect of the defendants. The learned Judge of this Court was of opinion that it could not. Now if the account is to be adjusted up to the date of the dissolution of partnership it can only be done on the basis of the deed of partnership. There can be no other basis. That deed provided that the defendants as managing partners would work the factory up to its full capacity and provide capital for it. They had full control of the business. They admittedly did not work the Bhatni Factory with molasses in 1928-29. If they omitted to do so deliberately, they are liable for the loss of profit to the plaintiffs. No doubt a partner is not a trustee for another partner and ordinarily he is not liable for not working, and it may be contended that the accounting should be only of what has actually been received and not what was lost to the partnership on account of the neglect. But here the partnership was of a peculiar kind. Along with the partnership there was a mortgage. The two went together. Defendants themselves treated them as part of the same transaction. The partnership has been referred to in the mortgage deed. More than once it is mentioned that the mortgage is created under the pursuance of the partnership deed and in consideration of Rs. 5,75,000 to be paid by the mortgagees (the defendants and Kanhya Lal) to the plaintiffs and defendant 6. The partnership deed specified that out of the profits which would accrue to the plaintiffs three-fourths would go towards the liquidation of the mortgage debt. It is clear that the mortgagees agreed that the mortgage debt would be liquidated in a particular way, namely by working the factory from the capital to be advanced by the defendants alone. They also agreed that the factory would work to its fullest capacity. The working of the factories to their full capacities was provided for for the speedy satisfaction of the debt from the profits. The plaintiffs' case was that not only the mortgage debt has been satisfied but Rs. 6,00,000 would be found due to them.

The plaintiffs' contention was that the mortgage was a simple one, while the defendants contended that it was a usufructuary mortgage or that it was an anomalous mortgage. The contention of the plaintiffs prevailed and the learned Subordinate Judge held that it was a simple mortgage. In these circumstances, the best course would have been to take the account purely on the basis of partnership and to leave the defendants free to enforce their mortgage in Court and in that case it would have been open to the plaintiffs as defendants of the mortgage action to put forward a counterclaim that a certain amount which was lost to them through the default and wilful neglect of the mortgagees should be credited towards the satisfaction of the mortgage debt. But this was in fact not done. A simple money decree for the unsatisfied mortgage debt has been passed in favour of the defendants. Account was being taken not only for the winding up of the business but also for adjusting the mortgage-debt. It will therefore, be unjust and entirely inequitable to ignore the claim of the plaintiffs when the defendants have been allowed a decree to realise their mortgage money. If the rights and liabilities of the parties are being adjusted finally in this suit, the plaintiffs' claim for non-working of the factory according to the terms of the contract must be considered in the course of account taking.

It may be argued that cl. 3 of the partnership deed which is relied upon by the plaintiffs, became inoperative on account of the institution of the suit. I am, however, unable to agree to this proposition. As I have said before, the defendants never denied their position as partners according to the deed and went on working the factory during the pendency of the suit. If they asked and this Court granted them the relief of the realization of the mortgage money without the institution of a suit, they cannot now turn round and say that the relief for which the plaintiffs may be entitled to for not working the factory should not be considered. Furthermore, the plaintiffs never took the plea that they were not bound to carry on the partnership business. On the other hand, they took the plea that their action was bona fide and that they did not work the factory as they believed that there would be no profit. Then it cannot be said that a managing partner who has undertaken to supply the capital and work the business can never be liable for loss of profit due to his wilful neglect bearing in mind the fact that interest was running in their favour on the debt advanced by them to the defendants and the staff of the factory was being paid uselessly. The learned Subordinate Judge who passed the preliminary decree for account and allowed damages to the plaintiffs relied upon a passage in Lindley on Partnership (p. 459, Edn. 10).

Before the Partnership Act, 1890, was passed, if a partner was guilty of a breach of his duty to the firm, and loss resulted therefrom such loss fell on him alone. As was said by the Court in (1845) 1 Coll C C 589[6] at p. 604:

Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemify the partnership in this respect.

Here if the omission by the defendants to work the factory with molasses and supply capital for it was wilful and without any excuse it was a breach of a duty which the partnership imposed upon them and they must compensate the partnership for it. It was held by this Court in 53 I C 2[7] that if a partner is guilty of gross negligence or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby. S. 257 of the Contract Act, which was in force then, provided that partners are bound to carry on the business of the partnership for the greatest common advantage and to be just and faithful to each other. Therefore not supplying the capital as undertaken and not working the factory according to undertaking wilfully and without any excuse is not acting faithfully. Then the defendants were managing partners and as such were agents of the partnership and under S. 212, Contract Act, are liable to compensate the partnership in respect of direct consequences of their own neglect in not working the factory which they had undertaken to work.

Mr. Das has relied upon the decision in 87 I C 735[8] for the proposition that in a suit for account upon a dissolution of partnership one partner is not liable for the probable loss sustained by the firm owing to the neglect or failure of such partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business. The head-note is rather misleading. The wide proposition contended for cannot be deduced from the judgment of the Court. Their Lordships of the Madras High Court referred to the passage from Lindley on Partnership, which I have quoted above. But they disallowed the claim for loss on account of a partner not plying boat on hire as there was no proof of culpable negligence. They observed as follows: "But it cannot be said that the defendant has been guilty of fraud, culpable negligence or wilful default." It is clear therefore that the case was decided on the facts of its own and that wilful neglect was not proved in that case. The next case relied on by Mr. Das was (1842) 62 E R 889[9] at p. 891. In my opinion the ratio decidendi of the case helps the plaintiffs. In that case the partnership was dissolved. It was agreed that the defendant should undertake the business of winding up the affairs of the firm. He made delay in selling a certain quantity of cotton which caused loss to the firm. It was held that the loss could not be saddled on the defendant alone. The Vice-Chancellor (Sir J. L. Knight Bruce) said :

The plaintiff was, I conceive, entitled to have the cotton sold sooner than it was, and sold at a time when the loss would have been wholly or to a great extent obviated.

The case was decided on the basis that if the defendant defaulted the plaintiff could have himself taken steps to have the cotton sold; but this is not the case here. The defendants were in sole possession of the factories. They alone were to find the capital. The suit for dissolution was pending and though the plaintiffs alleged that the partnership had come to an end the matter was still sub judice. The defendants were working the factories and maintaining the position that the partnership continued. It was impossible for the plaintiffs to have worked the factory with gur. Then again there the default in the sale of the cotton was after the partnership had come to an end. But in this case the default of the defendants was at a time when according to the decree of the Court the partnership continued.

Mr. Das also relied upon the decision in 14 Pat 560.[10] It was held in this case that if a mortgagee takes possession of the mortgaged property as an agent of the mortgagor under a power of attorney this would not have the effect of making him a mortgagee in possession, and, therefore, he was not accountable on the footing of wilful default but on the basis of actual receipt by him. In the present case as I have said, the learned Subordinate Judge who passed the preliminary decree has held that the mort-

6. Bury v. Allen, (1845) 1 Coll C C 589=66 R R 200=63 E R 556.
7. Sasti Kenkar v. Man Gobinda, (1919) 6 A I R Pat 386=53 I C 2.
8. Mahadev Vithu v. Ganoo Changoo, (1925) 12 A I R Bom 324 = 87 I C 735 = 27 Bom L R 500.
9. Cragg v. Ford, (1842) 62 E R 889.
10. Janaki Nath Ray v. Asad Reza, (1936) 23 A I R Pat 211 = 158 I C 738=14 Pat 560 = 16 P L T 757.

gage of the factory in favour of defendants 1 to 3 and father of defendants 1 to 5 was a simple mortgage. It was, therefore, contended that the accounting could only be on the basis of what was actually received; but as I have said before the position of the defendant was not only that of a simple mortgagee but also of partners who had undertaken to work the factory with their own capital and realize the principal and interest of the mortgage by the profits of the business. A mortgagee who takes possession under a power of attorney is in a quite different position. The power of attorney can be cancelled any moment and the mortgagor may assume possession of the property. But in this case under the terms of the partnership deed and of the mortgage taken together it was not open to the plaintiffs to take possession of the mortgaged properties. The partnership was to continue till the mortgage was satisfied. In my opinion the principle laid down in the case above referred to cannot be applied to the facts of this case.

I now come to consider the question whether there was wilful neglect and misconduct on the part of the principal defendants in not working the Bhatni Factory with molasses in 1928 29. It was contended that the petition filed by the plaintiffs on 27th April 1931, asking the Court to award compensation for the loss incurred by the defendants for not working the factory in the year in question with molasses, does not disclose either fraud or misconduct. But the petition was filed in the suit itself and must be read along with the plaint in which there is a definite allegation of misconduct of the defendants in not working the same factory with gur in previous years. In para. 6 of the petition the plaintiffs stated that the non-working of the Bhatni Factory with molasses by the defendants in the year in question was deliberate and illegal and was in contravention of the express terms of the deed of partnership. No doubt the word "illegal" may mean anything but read along with the plaint, it clearly means that it was in contravention of the definite undertakings given by the defendants in the partnership deed. In my opinion, the pleadings (if the petition of the plaintiffs and the objection of the defendants may be called so) clearly raise the question of the misconduct. The plea of the defendants was that they acted in good faith as they honestly believed that the working of the factory with molasses would not be profitable. The learned Subordinate Judge was therefore perfectly entitled to enter into the question of the bona fides of the defendants. In fact, the learned Judge in the judgment of the civil revision case above referred to is also of the opinion that the defendants themselves having invited the Court to decide whether their omission to work the factory in the year in question was bona fide or otherwise the Court was justified in deciding it.

Now, the learned Subordinate Judge, after working the figures, has come to the conclusion that had the factory worked there would have been a profit of more than a lakh of rupees to the partnership and this was lost. It is true that we cannot decide, as the learned Judge has remarked, *ex post facto*. We must place ourselves in the position of the defendants in about November 1928 to February 1929 when molasses had to be purchased. The learned Subordinate Judge is perfectly right when he holds that the defendants must be judged with the standard of a prudent man of business and we have to see what such a man would have done taking into consideration the prospect of the price of sugar and the price of the molasses then prevailing. It is not correct to say that he has decided the case on the basis of what eventually happened, but on what a prudent man of business has done provided that the capital of about Rs. 6,00,000 was available. I shall deal with this aspect of the question when I come to the figures of the learned Subordinate Judge. But before I deal with it, I have to dispose of another objection of Mr. P. R. Das and that was that the defendants asked the advice of the plaintiffs which was withheld, and thereafter the defendants exercised their own discretion and the Court cannot question their discretion. But the Court must see whether the omission to work was in honest exercise of discretion or whether it was simply to avoid putting in the capital.

Exhibit A (1) is the letter of Mr. Gurdayal Srivastava to Messrs. Kishorilal Mukundlal in which the writer describes the conversation which he had with the plaintiffs' men in connexion with the working of the factory in 1929. Ex. A (3) is its office copy. Ex. A (2) is the letter which was sent by the defendants to the plaintiffs along with a copy of Mr. Srivastava's letter to them. It is dated 17th February 1929. This letter which was registered was not accepted by the plaintiffs and was received back by the defendants. It was produced unopened

in Court when it was opened and was exhibited without objection. In Ex. A (1) (copy of Ex. A (3)) dated 16th February 1929 Mr. Srivastava informs the defendants that in obedience to their order he saw the plaintiffs' men Shaikh Khuda Baksh once before (of which the date is not given) and again on 25th January 1929, in connexion with the working of the Bhatni Factory with gur. He says that he explained to him that the rates of Java sugar from the time up to January, February and March 1930 would be Rs. 9-4-0, Rs. 9-5-0 and Rs. 9-6-0 and that he inquired of him whether under the circumstances he wanted the factory to be worked. Khuda Baksh replied that as the suit was pending he was unable to give any definite answer. Srivastava however gathered from the conversation that the view of Khuda Baksh was that whether the work be continued with gur or not the result would be the same, because if the working with gur be stopped the staff of the mill would have to be retained all the same.

It is much better that loss should be suffered by working the factory than by paying the staff without work. Srivastava proceeds that thereafter he went to Siwan and met plaintiffs' men Muhammad Habib and others. The result was the same. They said that they would not give any reply privately because there was litigation. It was open to the defendants to get the matter adjudicated in Court. Otherwise they should do what they think fit. They added that though there was no hope of profit in making sugar from gur, yet if the work was to be done efficiently and economically the expenditure on the staff might be met, and if there was any rise in the price there was a chance of there being profit also. This letter of Srivastava was sent by the defendants along with their own letter Ex. A (2) under a registered cover which obviously was not accepted by them and was returned to the defendants and the envelope was produced unopened in Court. This letter also speaks of a previous letter having been sent to the plaintiffs by the defendants. This letter is No. 13/29 and is dated 26th January 1929. Habib for the plaintiffs denies having received either of the two letters. But the receipt of the January letter has been proved by the Dak book, though this letter has not been exhibited. I also believe that the plaintiffs received the registered letter but refused to accept the cover. We may therefore take it that the defendants made enquiries from the plaintiffs and they did not indicate definitely what they wanted the defendants to do and left the matter to their discretion. Therefore if the defendants exercised an honest discretion, the matter ends there, and the plaintiffs are not entitled to any compensation. But if, on the other hand, as I shall presently show, they did not work the factory simply to avoid putting any capital in it in spite of the fact that profit was expected and caused loss not only of the profit but also of the payment of the staff which admittedly was about Rs. 25,000 they are liable. Mr. Mitter on behalf of the appellants drew our attention to a passage in Lindley on Partnership, Edn. 10, at p. 560, which runs as follows :

> The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain ; and a Court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

This remark, in my opinion, has no application to the facts of the case. It is true, as I have held, that the plaintiff did not accept the registered letter of the defendants and did not reply to the letter of 26th January 1929, which I have held must have been received by them. But it is clear from the letter of Mr. Srivastava to the defendants Ex. A (1) and copy Ex. A (3) that though on account of the pending litigation Khoda Baksh or Habib did not give definite direction to the defendants they nevertheless clearly expressed their desire that the factory should be worked with gur. It cannot be said that the plaintiffs unfairly left the defendants to their resources. Cl. 3 of the partnership deed runs as follows :

> It will be binding upon the second party (i. e. the defendants) to run the two factories every year with the entire proceeds of the sugar cane and molasses season. If at any time owing to the unfavourable market the rate of molasses be such as may yield no profit in the manufacture of sugar from molasses, in that case the work of manufacturing sugar from molasses could be stopped in consultation with the parties. The said factories shall not be closed in any other case.

Therefore, working the factories with gur was the normal condition which can only be departed from with the consultation of the parties if no profit was expected. No doubt the plaintiffs, as I have found, withheld

their definite opinion from the defendants but nevertheless the second condition must be present, i. e. that profit should not be expected. If, as I shall presently show, the condition was such that enormous profit was expected the defendants had no option of stopping the work. I now come to consider what was the condition of price prevailing at the time when the decision had to be taken whether or not the factory should be worked with gur. The factors which are to be taken into consideration and which the learned Subordinate Judge has considered are the price of gur, manufacturing cost, out-turn of sugar, its price and the sale proceeds of by-product, the molasses. In this connexion Mr. Das has questioned only the price of gur and the price of sugar as held by the learned Subordinate Judge. The rest has been accepted. The cost of manufacture has been taken by the learned Judge to be Rs. 1-1-4 per maund, though the plaintiffs in their petition had themselves stated it to be Rs 1-2-0 per maund. This slight difference in the cost of working will not be material if the purchasing price of gur and the selling rate of sugar be proved according to the calculation of the Subordinate Judge. According to the calculation of the learned Subordinate Judge the net profit would have been Rs. 1,06,374-12-0 and the plaintiffs' share of it would be Rs. 53,187-6-0; but he has allowed them only Rs. 42,486-6-6 which was the amount claimed by them. So there is still a margin of about Rs. 11,000 in the plaintiff's share of profit and Rs. 22,000 in all and that will be more than enough to wipe out the slight difference in the working cost as mentioned by the plaintiffs and as found by the learned Subordinate Judge, and I will not deal with it at all. I shall, therefore consider whether the price of gur and the selling rate of the sugar as found by the learned Subordinate Judge to have prevailed when the decision has to be taken is correct.

The selling rate of sugar taken by the learned Subordinate Judge for the basis of decision is Rs. 9-10-6 per maund. Mr. Das questioned this figure. But in my opinion the conclusion of the learned Subordinate Judge is correct. It is the admitted case of both the parties that the price of Indian manufactured sugar depends upon the price of the Java sugar. The price of Java sugar at Calcutta is mentioned in Ex. H and is also mentioned in a cutting of "Amrita Bazar Patrika" dated 25th January 1929, which was enclosed in the defendants' letter No. 30-29 to the plaintiffs, dated 26th January 1929. The manufacture of sugar from gur at Bhatni was to commence some time in about May or June as till then the factory was working with cane. The cutting from the "Amrita Bazar Patrika" shows that the forward rate for July to September was Rs. 9-7-0. Ex. H also supports this where the price is mentioned as Rs. 9-5-0 for July and September and Rs. 9-6-0 for October and December. In Srivastava's letter to the defendants also the price mentioned is from Rs. 9-4-0 to Rs. 9-6-0 up to January, February and March 1930. Therefore, in my opinion the learned Subordinate Judge is not wrong when he has taken the price of Java Sugar at Calcutta at Rs. 9-6-0.

Now it is the admitted case of the parties that the price to be taken into consideration is of Cawnpore. The railway freight from Calcutta to Cawnpore being Re. 1-4-0 per maund, the learned Subordinate Judge has rightly taken the price of Java sugar at Cawnpore at Rs. 10-13-0 adding three annas per maund for the middleman's profit. It is also the admitted case of the parties that the Indian sugar must be offered at 8 annas per maund less than the price of the Java sugar. Therefore, the price of Indian sugar must be taken to be Rs. 10-5-0. The freight from Bhatni to Cawnpore being 8 or 9 annas per maund must be deducted from it. Therefore, the price at Bhatni comes to Rs. 9-12-0 or Rs. 9-13-0 per maund. In fact, the Siwan sugar was sold at the factory at Rs. 9-12-6 per maund. The learned Subordinate Judge if he has erred at all has erred in favour of the defendants when he has taken the rate at Rs. 9-10-6. Nothing has been urged to show that he is wrong.

I now come to the price of gur. The learned Subordinate Judge has taken it to be Rs. 4-2-3 per maund. Mr. Das contended that the price ought to have been taken at Rs. 4-3-3. He referred to Ex. D (cash book of Siwan) which shows the price at which gur was purchased there. The rates varied from Rs. 4-7-0 to Rs. 4-2-6. But it is clear from the entries on the left hand side that for some reason or other the sellers were not being paid full price. Some deductions were made from the price which was entered on the credit side. We have, however, got definite evidence of the defendants' witness, Mr. Srivastava that in fact at Bhatni 17,696 maunds of gur was purchased for that mill

for Rs. 72,364-7-0, which was ultimately transferred to Siwan. The average rate comes to a little less than Rs. 4-2-0 per maund. Therefore, when the learned Subordinate Judge has fixed it at Rs. 4-2-3 he has been overcautious. The plaintiffs' figure was Rs. 4-1-3 per maund. On the whole, I am satisfied that the basis of the calculation of the learned Subordinate Judge is correct, and these facts must have been obvious to the defendants at a time when they had to take a decision.

It may, however, be argued that if such a large profit was expected why the defendants did not work the factory with gur. The reason is obvious. The defendants had several other businesses and a capital of about Rs. 6,00,000 was needed to work the Bhatni Factory with molasses. They were not willing to put in this capital. It appears that for this reason they did not work this factory with molasses in the year 1925-26 and did not work it fully in 1927-28 for which the learned Subordinate Judge who passed the preliminary decree awarded compensation to the plaintiffs. The defendants did work the factory with molasses in 1926-27 when there was loss. But the judgment of the learned Subordinate Judge shows that this loss was due to bad work. In Exs. 3a (8a) (not printed), dated 29th April 1928, the plaintiffs definitely accused the defendants of not putting sufficient capital in the business. They say :

> But in reality you did not want to stock gur nor do you want to lay out proper amount of money in this business. These matters are wholly against the ekarnama dated 15th January 1925 and you are responsible for all our past and future losses which are due to your manner of working.

A few lines before the plaintiffs further said :

> Besides in working with gur it is necessary to have full stock in which it is necessary to spend sums of money and you do not want to lay out enough money.

In working with cane the capital is not locked up. The factory goes on buying cane and simultaneously manufacturing sugar and selling it. But while in working with molasses it had to purchase during the cane crushing season which is from November till April and stock it for several months. The money is locked up and the manufacture commences in June and then the sugar is sold. Therefore, it seems that throughout this unhappy partnership the defendants all along tried to avoid working with gur. Of course, they did work at Siwan with gur, because it was simply a refinery and could not be worked with cane. On the whole, in my opinion the order of the learned Subordinate Judge is correct and I would dismiss this appeal with costs.

Manohar Lall J. — (After stating the facts, his Lordship proceeded further.) It is now necessary to state that circumstances which are relied upon by the plaintiffs in order to claim the relief which they have fixed at Rs. 42,483-6-6 as damages for non-working of the gur after the institution of the suit. The plaintiffs, as stated already, rest their case upon

> the deliberate and illegal non-working by the defendants of the Bhatni Factory with gur in contravention of the express terms of the deed of partnership and without the consent and approval of the members of Noori Mian & Co. as laid down in the deed (see para. 6 of the petition of 27th April 1931.)

In the absence of any other details given in this petition or in the rejoinder petition filed on the 9th May 1931 it is clear to my mind that the plaintiffs seek relief by reason of their allegation that the defendants have contravened the express terms of the deed of partnership (undoubtedly referring to cl. 3). No case of fraud or dishonesty could be allowed to be gone into upon this pleading because of, as pointed out by their Lordships of the Judicial Committee in the recent case in 41 C W N 746[11]

> the great difficulty which is occasioned both to persons charged with fraud or other improper conduct, and to the tribunals which are called upon to decide such issues, if the litigant who prefers the charges is not compelled to place on record precise and specific details of those charges. In the present case the petitioner ought not to have been allowed to proceed with his petition and seek to prove fraud, unless and until he had, upon such terms as the Court thought fit to impose, amended his petition by including therein full particulars of the allegations which he intended to prove:

Their Lordships also observed that

> such cases as the present will be much simplified if this practice is strictly observed and insisted upon by the Court, even if, as in the present case, no objection is taken on behalf of the parties who are interested in disproving the accusations.

In the case before us the learned Subordinate Judge put the question to him at page 21 of the judgment in this form :

> Now the question is whether in deciding not to work with gur the defendant acted bona fide under the impression of unfavourable market or whether as the plaintiffs' case is that they did not work because they did not want to invest a large amount of money in purchase of gur from January to April.

The learned Subordinate Judge framed this question in this form not on the plead-

11. Bharat Dharma Syndicate Ltd. v. Harish Chandra, (1937) 24 A I R P C 146=168 I C 620 =64 I A 143=I L R (1937) All 566=31 S L R 306=41 C W N 746 (P C).

ings but apparently upon the statement of witness No. 11 for the plaintiffs at page 11 where he stated:

> The reason why the defendants did not want to work with gur at Bhatni was that it required a large outlay in the purchase of gur and they preferred to lay out that money on interest.

This statement receives corroboration from a letter Ex. 3a (8a) dated 29th April 1928 which was addressed by the plaintiffs to the defendants in which it was asserted that the defendants were intentionally refusing to work gur because

> in working with gur it is necessary to have full stock in which it is necessary to spend large amount of money and you do not want to lay out enough money (or in lump sum) in this business, so you adopt such procedure by which you may avoid working with gur .... But in reality you did not want to stock gur, nor do you want to lay out proper amount of money in this business. These matters are wholly against the ekrarnama dated 15th January 1925.

It may therefore be taken as established that the plaintiffs were under the impression that the defendants were not working the Bhatni Factory with gur because they found it more profitable to lay out their money on interest, but this assumes that the defendants were in full possession of funds and negatives the suggestion made by Sir Sultan Ahmad appearing on behalf of the plaintiffs, that the defendants were in difficulty in bringing forth such large sums as would be required to purchase the stock of gur. The evidence upon the record and the surrounding circumstances disclose the undoubted fact that the defendants are very big financiers who have a number of sugar mills and other business on large scales and that if they so chose they could easily invest the capital required for working the mill with gur in the season in question.

The question which falls then to be determined is whether the defendants in refusing to carry out the terms embodied in para. 3 of the partnership are liable to be mulcted in damages in favour of the plaintiffs. It will be convenient here to ascertain whether the plaintiffs can in law claim damages against a co-partner who refuses to carry out the terms of the partnership. The obvious remedy of such a partner is to apply to the Court for dissolution as provided in S. 254, Contract Act (now S. 44, Partnership Act of 1932). But the question is whether in addition to this remedy a partner can also claim damages against his partner who wilfully breaks the terms of the partnership. I am aware of no case where damages have been allowed to a partner in an action for dissolution of the firm with reference to the very facts which constitute the cause of action for the dissolution of the partnership unless loss has actually been occasioned to the partnership for any fraudulent and dishonest conduct of the partner concerned. In my opinion a claim for damages of the kind which is now under consideration does not lie against a partner at the instance of the partner who is asking for dissolution on the ground that the defendant-partners refused to carry out the terms of the partnership. The case in (1878) 8 Ch D 345[12] appears to suggest that "you cannot extend the cases with regard to a share in the profits to a case in which as between the parties there really was nothing but a breach of covenant" and that the question as to whether a breach of covenant has resulted in a loss to the partnership "would have been a matter for an action for damages if it could have been alleged or shown here." In my opinion where the defendant has committed a breach of the partnership articles after the institution of the suit for dissolution of the partnership based upon earlier breaches of the partnership Articles, the remedy of the plaintiff for being indemnified in resulting loss to the partnership lies if at all in bringing an action for damages. Upon this ground also I hold that the plaintiffs have no right to claim a relief so far as it concerns the damages or loss assuming it was sustained by him after the institution of the suit. In 53 I C 2[7] it is to be noticed that the Court expressly decided that where

> a partner is guilty of gross negligence, unskilfulness, fraud or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby.

In other words actual loss must be established by evidence and not a possible loss; the question which arose in that case was whether the defendant was liable to indemnify the plaintiffs for the loss which had actually accrued. There are some observations to be found in (1845) 63 E R 556[6] which appear to support the contention that where the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership, is established and where the partnership has been dissolved this matter must form the

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12. Dean v. Macdowell, (1878) 8 Ch D 345 = 47 L J Ch 537=38 L T 862=26 W R 486.

item in the accounts to be taken. To my mind this case again contemplates actual damage having been caused to the partnership. But, in the present case, no actual loss has been proved to have accrued. The claim is that if gur had been worked by the Bhatni Factory the working would have resulted in profit and this is based upon *a priori* reasons on the *ex post facto* principles. In the numerous cases which I have examined the question always arose whether a partner is liable for actual loss which has accrued and not for the share of the probable profits which may have been made for instance, the case in (1842) 62 E R 889[9] where the claim was made that certain bales of cotton were deliberately and fraudulently not sold by the managing partner at a proper time and that when sold later resulted in actual loss which was measureable. The Court held that the partner in the exercise of his honest judgment did not think it prudent to make the sale at the time when it was suggested the bales should have been sold. It is to be noticed that in this case the claim was that the actual loss which had accrued should fall on the guilty partner. It was not a case of contemplated loss or a contemplated profit.

But it is argued that in the present case the learned Subordinate Judge who passed the preliminary decree dated 30th June 1930 has awarded damages to the plaintiffs for the non-working of gur in the Bhatni Factory for the period antecedent to the date of the suit or in other words in respect of facts which gave rise to the cause of action for the suit for dissolution and that no appeal having been preferred against this decree it is not open to the defendants to resist the claim of the plaintiffs which is now under consideration. In my opinion this argument is unsound. The learned Subordinate Judge did not make any declaration in the judgment dated 30th June 1930 making the defendants liable for the damages which are said to have accrued after the date of the suit. When the trial opened before the learned Subordinate Judge the plaintiffs were aware that the mills had not worked pendente lite and it was open to them to have asked for an amendment of the plaint and if they had done so this matter could easily have been investigated and decided by the Court. The plaintiffs having failed to adopt the obvious course their claim for damages for the period subsequent to the date of the suit must be decided independently of any view expressed by the learned Subordinate Judge in his order dated 30th June 1930.

It was then suggested that the present case was much complicated in view of the fact that the defendants are not only partners but mortgagees in possession and, therefore, by the operation of S. 76, T. P. Act, they are liable for damages to the plaintiffs upon the footing of wilful default. In my opinion, the defendants are not mortgagees in possession. As I have already pointed out the plaintiffs by their amendment petition of the plaint distinctly asserted that the defendants are simple mortgagees. In the mortgage bond dated 27th October 1925, para. 2 distinctly mentions that the mortgaged property is the interest of the mortgagors in the business of manufacturing sugar and molasses carried on by them under the deed of partnership dated 15th October 1925, along with the buildings machinery and appurtenances. In the deed of partnership it was distinctly mentioned that the milkiat right in the properties and the machinery of the mills remained with the mortgagors and not with the partnership. Upon these facts it is clear that the position which the plaintiffs took in the amended plaint was a correct one, namely that the defendants are simple mortgagees. The learned Subordinate Judge in his judgment dated 30th June 1930 has also come to the same conclusion. Who then was in possession of the mortgaged properties and the business of running the factories? The answer is obvious. It was the partnership who was in possession of the business which was to result in a profit in a sufficient quantity to discharge or reduce the burden of the mortgage executed by the plaintiffs. The manner of division of the profits of the concern or its destination is immaterial and irrelevant for the purpose of deciding as to who was in possession of the mortgaged premises. In my opinion, therefore, the question is not at all complicated by the assertion that the defendants are also mortgagees in possession. This assertion is not borne out by the evidence. But assuming that the defendants are mortgagees in possession they can only be in possession as such of the machinery and the buildings and not of the partnership business which ex hypothesi must be in possession of the partnership. Such being the case if the mortgagors come to complain of mismanagement the first thing that requires consideration is what has the mortgagee of the machinery and the buildings done or what

omission on his part can be called mismanagement. Is such a mortgagee expected to put the capital at a large scale and run the business? Can he be required to risk his own fortune in speculation and to incur hazard in an adventure that is ultimately to redound to the benefit of the mortgagor and even if such a mortgagee in possession of the buildings and machinery be required to risk his fortune in speculation on the chance of the adventure turning out profitable, would he be allowed to do so by the persons in possession who are the partners? In my opinion such a claim by the plaintiffs must be ruled out as extravagant and unreasonable. The true view seems to be that if two persons are in partnership and one of them mortgages his share in the interest to the other, the dominant character will be that of the partnership and not of the mortgageeship. As to whether the defendants can be made liable on the footing of wilful default in the circumstances of this case I may refer to the case in (1867) 2 H L C 1[13] where it was pointed out that

> a mortgagee who takes possession of the mortgaged estate is, on a bill for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default; but where persons, who though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subject to that special liability

and that

> their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established.

Some argument was advanced before us as to the applicability of that elusive phrase "wilful default" to the case of the defendants in the present case. The cases which attempt to define "wilful neglect or default" have been summarized in (1925) Ch D 407.[14] In my opinion the defendants are not liable even on the foot of wilful default assuming it to have been established in the case, which I do not think has been established. It was contended by Mr. P. R. Das on behalf of the defendants that it was open to the defendants in the peculiar circumstances of the case (the peculiarity arising from the fact that the plaintiffs had instituted a suit for dissolution and were refusing to give the defendants the benefit of their advice when asked to do so) in the honest exercise of their discretion to refuse to work gur in the Bhatni Mill which would in these circumstances undoubtedly have been an undue hazard and risk by the defendants because (it was contended) in case the adventure resulted in a loss it might have been open to the plaintiffs to take up the position that they were not liable to share in the loss which was the result of an adventure taken by the defendants on their own risk, and if, so it is argued, the defendants in such a peculiar situation did not think it proper to work gur, their refusal to work cannot be made the foundation of any claim for damages. It was also pointed out on behalf of the defendants that they had been working sugar cane to the fullest capacity in the period in question and this resulted in profits which have been shared by the plaintiffs (as had been found by the learned Subordinate Judge) and that it must consequently be assumed that if the adventure was profitable there was no reason why the defendants who were to have share in the profits half and half would not have begun and carried through the work of converting gur into sugar in the Bhatni Mill. Reliance is placed very strongly upon the finding of the learned Subordinate Judge at p. 21

> that the plaintiffs' refusal to give an unequivocal reply to the defendants' query whether the mill should be worked with gur or not in 1929 entitled the defendants to use their own discretion in the matter.

Mr. Das, relying upon this finding, adopts the view taken of the position of the defendants in similar cases reported in (1842) 62 E R 889[9] that the defendants in the honest exercise of their judgment did not think it proper to work the Bhatni Mill with gur. The question then which I have to consider is whether there are any materials upon the record of reliable character which would coerce me to come to the conclusion that the exercise of judgment by the defendants was dishonest and unbusinesslike.

It is useful to recall here the surrounding circumstances which existed at the period in question when it is said that the defendants with a view to defraud the plaintiffs of their just profit decided not to work the Bhatni Mill with gur. The plaintiffs had instituted a suit for dissolution of partnership on 6th October 1928. It is common ground that the decision as to whether the gur should be worked in the Bhatni Factory must be made in the four months of December, January, February and March. The case of the defendants is

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13. Catherine Parkinson v. Robert Hanbury, (1867) 2 H L C 1=36 L J Ch 292=139 R R 178.

14. In re City Equitable Fire Insurance Co. Ltd., (1925) Ch D 407=94 L J Ch 445=133 L T 520 =40 T L R 853=1925 B & C R 109=19 Ll L Rep 225.

that in January 1929, they sent their general manager, Gur Dayal Srivastava, D. W. 5 in the present proceedings, to the plaintiffs to inform them of the prevailing rate of Java sugar and molasses and to obtain consent of the plaintiffs for not working the Bhatni Mill with gur in that year. The manager embodied the result of his conversation with the plaintiffs in a report which was submitted to the defendants. A copy of this report is Ex. A at page 37 and refers to the interviews which the manager had with the plaintiffs on two occasions apparently both in January 1929. The plaintiffs are stated in that report to have taken up the natural attitude

that as a suit on behalf of Messrs. Nuri Mian and Co., against us (the defendants) was pending disposal in Court, it was not quite proper for him to give any opinion and that therefore he did not like to give any opinion verbally and added that if we wanted to make any enquiry about, we should make enquiry in writing from Messrs. Nuri Mian and Co., and then a suitable reply would be given in consultation with all the partners of Messrs. Nuri Mian and Co., and the pleaders.

The report of the manager adds that Messrs. Nuri Mian and Co., were of opinion that it was immaterial whether the work continued with gur or not because if all the staff of the mill had to be retained as before resulting in the same amount of expenditure of the partnership it was better that Messrs. Nuri Mian and Co., should further lose by continuing the work. It appears that in consequence of this report a letter was sent in writing to the plaintiffs on 27th January 1929 which is the date of dispatch of the letter No. 13/29 dated 26th January 1929. The receipt of this letter is evidenced by the entry in the peon book bearing the signature of Md. Habib, Ex. G (1) at page 36. The manager was again requested to obtain a proper reply by conversation with the plaintiffs upon this important question because no reply had been received till the middle of February 1929 and the defendants could not come to a final conclusion and the matter was urgent. The report Ex. A (1) states that on 16th February 1929 the manager went to the plaintiffs to obtain a reply to the letter of 26th January 1929 when he was informed by Wahid Mian, one of the partners, that no oral talk on this point was desirable and that a written reply would be sent to this letter in a few days. Thereupon the manager went to Siwan on that very day and met other partners in order to make a pressing demand for a reply to the letter of 26th January 1929 and the reply which they gave, as stated in the report, is as follows :

We shall not give any reply to the said letter or any opinion privately in case of litigation. If Messrs. Kishori Lal Makundi Lal (the defendants) think it necessary they may get this matter adjudicated upon by Court. Otherwise they may do as they think fit. We have beforehand submitted a petition in Court making mention about gur, with a view to safeguard against loss to us. It would be better if the matter is decided there so that whatever decision may be arrived at will be clear. Otherwise as to the opinion given privately firstly law points as regards the accrual of cause of action are a hindrance to our giving a definite reply, Secondly in spite of the fact that in view of the present selling rate of gur there is no hope of profit from making sugar from gur, yet if the work be done very efficiently and economically, the expenditure on the staff may of course be met and if there be an occasion of a rise in the price there may be profit also; otherwise, in the present circumstances there is at present surely an apprehension of loss of interest on the capital invested. Still (?) in view of the consequences of verbal conversation for the most part during the period prior to making claim we know that nothing can be settled by oral and private conversation when we deny the present partnership of Messrs. Kishori Lal Makundi Lal on the basis of the claim. Such being the case we are not bound to give any opinion and we will not give any out of Court.

It is unnecessary to give any further quotation from this report. It is sufficient to say that I accept the finding of the learned Subordinate Judge on this matter when he holds (1) that

what this conversation really amounted to was that the plaintiffs declined to give any private reply in view of the suit pending between the parties, wanted the defendants to get the matter cleared up through the Court and finally expressed an opinion that even if the prospects were not very bright, the pay of the staff at least could be secured by a careful and economical non-working while there was a chance of profit if the market improved;

and (2) that the plaintiffs refused to give any unequivocal reply to the defendant's query whether the mill should be worked with gur or not in 1929. The defendants thereupon sent the letter, Ex. A (2), dated 17th February 1929, to the plaintiffs in which they made mention of the report which they had received from their manager and complained that no reply was received by them to their letter of 26th January 1929, mentioning that "still out of foresight we have purchased about 20,000 maunds of gur for making sugar at Bhatni Mill" and drawing attention to the fact that the time of purchasing gur was coming to an end. At line 25, page 41 in that letter, Ex. A (2), they stated:

If in view of the market rate of gur and the rates of sugar, present and future, up to March 1930 we make sugar from gur, there is an apprehension of loss in case the market tends to be against us,

you will blame us on that occasion; and if for any earthly and heavenly causes there be rise in price, then you would blame us that in case sugar would have been prepared from goor, it would have brought profit,

and they pointed out that in the circumstances agreeing with the personal opinion of the manager they had decided that

in view of the present circumstances we also think it proper to do work at one place only instead of preparing sugar from goor both at Siwan and Bhatni. As sugar is prepared from goor only at Siwan Factory, sugar should be prepared there only and after the sugarcane season is over, the mill at Bhatni should be closed.

In my opinion, the defendants were placed in a very serious predicament and if under the circumstances they did not think it proper to work the goor at Bhatni in view of the attitude taken by the plaintiffs it is impossible for any Court to say that they were not justified in so doing. If the plaintiffs were desirous that the mill should be worked it was open to them in view of the strained relations between the parties — the matter was actually pending in Court— to send a registered notice through their pleader to the defendants or to the defendants' pleader insisting that the defendants should work sugar in the composite factory; but instead of doing this they adopted an attitude that if there was a loss they would not be responsible and if there was a profit they would be entitled to share in it. This attitude of the plaintiffs is well put in "Lindley on Partnership" at page 560, 10th Edn. in these words:

The doctrine of laches is of great importance where the persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a Court will not aid those who could be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

I am therefore of opinion that it was not open to the learned Subordinate Judge to embark upon a speculation by working out the figures that if the defendants had worked sugar at Bhatni Mill in the season of 1929, the result would have been actual and not contemplated profit and having arrived at that conclusion to calculate the profits which would have accrued on a hypothetical working of 1,50,000 maunds of sugar and then to give the plaintiffs a decree for half of that amount. If the learned Subordinate Judge had placed himself in the position of the defendants at the time in question, namely in the months of January and February 1929 and considered their situation that they were the defendants in a suit in which the plaintiffs had asserted that the partnership was at an end while the defendants were asserting that the partnership could not be dissolved at the mere sweet will of the plaintiffs, that the plaintiffs were giving no answers at all or only equivocal answers to the request of the defendants that the plaintiffs should agree that there should be no working of the goor in view of the prevailing market rate and that the defendants were on the horns of a dilemma that if there was a loss the plaintiffs would undoubtedly repudiate the working if started by the defendants and this matter would be subject-matter of a lengthy proceeding in Court (10 years have gone by since this partnership action was instituted and still the final decree is under discussion before us) and if there was a profit the plaintiffs would undoubtedly have come forward to have their share, I think he would have arrived at the conclusion that the defendants were justified in taking the steps they did, namely that they chose not to work this factory. I do not find that the learned Subordinate Judge has taken the slightest notice of the peculiar situation in which these defendants were placed. Sir Sultan Ahmed contended that all these discussions were irrelevant because in his submission para. 3 of the deed of partnership makes it incumbent upon the defendants to work in all cases except those which are specifically provided therein. His argument is that even if the market rate of molasses was unfavourable and no profit was capable of being yielded, still the work of manufacturing sugar from molasses must be carried on unless the plaintiff agreed to its stoppage and he argued that the other contingencies, namely celestial and terrestrial calamities, etc. had not arisen. In my opinion, this argument is wholly fallacious. Para. 3 of the deed of partnership contemplates cases of a normal state of affairs where the partnership is going on smoothly and the parties are on terms of businesslike amity. It has no application where an abnormal situation has arisen, for instance where the partners are not even on speaking terms and are bitterly opposed to each other, and where one partner has actually filed a suit in a Court alleging that the partnership has been dissolved. In such a state of affairs it is impossible to have any con-

sultation with the parties. The plaintiffs refused to be consulted. They declined to give any advice or opinion and therefore there cannot be a mutual consultation or "Mashwara Farikain." In such circumstances the situation which arose is covered even by the express words of para. 3 because it is impossible to have "any consultation with the parties" and even if it does not fall strictly within the express words thereof a Court of justice will be slow to fasten an inequitable and impossible position and liability on the parties in the peculiar circumstances that prevailed at that time. The defendants therefore were in the situation that they could work if they liked at their own risk and peril and they, after attempting to consult the plaintiffs seriously, decided not to run any risk in this highly risky working of the composite factory, but they took a lesser risk in working the sugar in the other factory and in other seasons which did not involve so much risk and the working whereof resulted in actual profit which has been shared by the plaintiffs.

I do not wish to devote any time in examining the figures which have been worked out by the learned Subordinate Judge as to the contemplated expenditure and receipts for 100 maunds of goor in these months. His calculation is at p. 26 of the judgment and although he may have over-estimated the value of the receipts or under-estimated the expenditure to a small extent here and there, upon the whole I agree with the conclusion of the learned Subordinate Judge that if 100 maunds of goor had been worked there would have been a contemplated prospect of profit of about Rs. 21 per 100 maunds. As indicated above, in my opinion, even if this is so, this cannot be made the foundation of giving the plaintiffs any decree for half the profits in what has not actually accrued but would have accrued if the calculation made by the learned Subordinate Judge in the four months of December, January, February and March had actually stood the test of time. The question whether these figures would work out to be exactly the same figures after the lapse of time is immaterial because we cannot allow ourselves to be guided *ex post facto*; but we can only decide upon the principle as to whether a prudent businessman ought to have embarked upon the speculation and risk in January and February keeping in view the attendant circumstances which actually existed between the parties at that time. In my view, the answer is emphatically in the negative and I would exonerate the defendants completely.

I agree with my learned brother that the defendant-appellants are not entitled to challenge the decree so far as the sum of Rs. 31,744-0-10 was awarded by the preliminary decree of 18th August 1930 by reason of their failure to prefer an appeal against that judgment and decree. The result is that in my opinion the appeal must be allowed in part and the liability of the defendants reduced by Rs. 42,483-6-6. In the circumstances I would order the parties to bear their own costs of this appeal.

[On difference of opinion between Mohamad Noor and Manohar Lall JJ., the case was referred to Dhavle J. who delivered the following judgment.]

Dhavle J.—This matter arises out of a partnership action and has been referred to me under Cl. 28 of our Letters Patent on a difference of opinion between Mohamad Noor J. and Manohar Lall J. The plaintiffs and defendant 6 were carrying on a business of manufacturing sugar under the style of Messrs. Noori Mian & Co. They owned the Desi Sugar Factory at Siwan, a refinery where sugar was manufactured from gur (molasses), and the Noori Sugar Works at Bhatni, a composite factory where sugar was manufactured as well from cane as from gur, the cane season being about November to May when sugarcane is available as raw material while gur had to be purchased and stored from the middle of December to the middle of April for being refined into sugar from June to October. On account of financial embarrassments the owners entered into a partnership with defendants 1 to 3 under a deed of 15th October 1925 (Ex. 1). This partnership was confined to the business carried on at the factories (referred to as 'mills' in the deed). The entire management was to be in the hands of the new partners who were to provide all the working capital without any interest, the owners on their part being entitled to nothing on account of the depreciation of the machinery. The partnership was for an expressed term of five years. Reference was made in the deed of partnership to a mortgage deed to be executed by the owners in favour of the new partners mortgaging the factories as security for Rs. 5,75,000 the amount of debts owing from the owners and to be paid off by the new partners. On this amount the owners were to be charged interest at the rate of 9 per

cent. per annum. The profits of the sugar business were to be divided equally between the parties, but out of the owners' moiety three-quarters was to be paid to the new partners on account of the mortgage and one quarter only was to be actually paid to the owners. Under cl. 3 of the partnership deed (which will have to be dealt with in detail later on) the new partners bound themselves to run both the mills throughout the season every year with sugarcane and gur, and apart from circumstances beyond their control, such as celestial and terrestrial calamities and strikes, they were entitled to stop the manufacture of sugar on consultation (if not by agreement) between the parties

if at any time, on account of dullness of the market the rate of gur be such that there be no hope of profit in manufacturing sugar from gur.

Exhibit 2, the mortgage bond, followed on 27th October 1925. This included among the mortgagees not the managing partners (defendants 1 to 3) only, but also their uncle Babu Kanhaiya Lal, the since deceased father of defendants 4 and 5. It was executed

in pursuance of the said deed of partnership and in consideration of the advance of Rs. 5,75,000, carrying interest at 9 per cent. per annum for a term of five years, and in case of default the mortgagees shall be entitled to enforce their right for sale of the mortgaged property.

Under cl. 5 of this bond it was agreed that notwithstanding the term of five years fixed in the partnership deed, the mortgagees were, until the full discharge of the money due to them, entitled

to retain under the terms of the aforesaid deed of partnership the enjoyment and possession of the properties (mortgaged) . . . to use and dispose of it in and for the purpose of the said business . . . .

Not long afterwards disputes broke out between the owners and the managing partners about making sugar from gur; the profits from this particular branch of the business were comparatively small, but the plaintiffs asked "when there is profit, why do you want to evade working with gur?" There were other disputes also; and on 27th August 1928, the plaintiffs gave a notice to defendants 1 to 5 through a pleader, charging them with breach of "practically each and every term and condition of the partnership" and saying that from that day the partnership stood dissolved, adding that it had stood "legally dissolved" on the death of Babu Kanhaiya Lal, an event of 14th January 1928. On 11th September 1928 the managing partners sent a reply denying that Babu Kanhaiya Lal was a partner, and asserting that even if he were to be considered to have been a partner, the partnership was continued by the parties with full knowledge of the death of Babu Kanhaiya Lal. They further denied the breaches alleged by the plaintiffs and claimed in the event of dissolution of the partnership to remain in possession as usufructuary mortgagees.

On 6th October 1928, plaintiffs brought their suit for a declaration that the partnership "has been dissolved on the grounds mentioned in the plaint" (the notice of August besides the death of Babu Kanhaiya Lal) or for a decree for dissolution. The plaint also asked for accounts, besides recovery of possession or management of the two factories and further, for a decree for Rs. 6,00,000 as profits (said in para. 7 of the plaint to be)

calculated according to the true terms of the partnership deed including the damages which the plaintiffs have suffered owing to the gross misconduct and negligence of the defendants.

The gross misconduct charged included, without being mainly constituted by, the failure of the defendants in breach of the term in the partnership deed to work the factories with gur for the full season. One of the prayers made in the plaint as it stood originally was for

removal of the defendants from the management and possession of the factories as partners or mortgagees on such terms as the Court considers proper.

By their written statement defendants denied that the partnership stood dissolved and also denied any breaches of the terms of the partnership deed. They further claimed to be in occupation of the two factories under what they called the usufructuary mortgage deed as well as the deed of partnership, and urged that the plaintiffs' prayer for the defendants' removal "as partners or mortgagees" was not maintainable unless plaintiffs sought redemption of the usufructuary mortgage on payment of further court-fees. Upon this the plaintiffs had their plaint amended by the omission of the words "or mortgagees" from the prayer in question, stating that the words were redundant since it was only as partners that possession had been delivered to them and the mortgage was only a simple mortgage and had been discharged. This was done long after the issues had been framed and while the plaintiffs' case was being opened and the question of court-fees discussed.

On 30th June 1930, the Subordinate Judge delivered an elaborate judgment in the case, ordering that a preliminary decree

be passed for dissolution of the partnership as from that date with accounts as from 1st December 1926, including Rs. 31,744 awarded to the plaintiffs as compensation for their half share of the profits that would have accrued to the partnership if the managing partners had properly worked gur at Bhatni in 1925-26 and 1927-28. Babu Gurdayal Srivastava, the General Manager of the business, was appointed Receiver and directed to wind up the business and prepare the accounts. While the Receiver was doing this work, the plaintiffs filed an application on 27th April 1931, before the successor of the Subordinate Judge who had passed the preliminary decree. In this application compensation was claimed for the failure of the defendants to work the Bhatni factory with gur in (May to October) 1929. Plaintiffs said that this failure of the defendants

was deliberately and illegally done by them in contravention of the express terms of the deed of partnership and without the consent or approval of the members of Noori Mian & Co. as laid down in the partnership deed.

This failure was subsequent to the filing of the suit,

and as the trial had begun before the end of this period, so the only remedy of the plaintiffs is to ask for the assessment and getting of the compensation at this stage and before the preparation of the final decree.

It was further pointed out in the application that the judgment of 30th June 1930, had ordered "that accounts are to be taken up to dissolution." The plaintiffs claimed Rs. 42,483-6-6 on this account as their moiety of the estimated profits. In reply the contesting defendants said that the application was not legally maintainable during the course of the winding up proceedings, that the application did not disclose any cause of action for the damages claimed, that the defendants as managing partners had acted bona fide in view of the prevailing market rates of gur, that the plaintiffs had been informed of the position and were themselves of opinion that working with gur was not profitable, and that if the Bhatni factory had been worked with gur, heavy losses would have resulted as in 1927-28. Plaintiffs put in a rejoinder, and after a regular trial the Subordinate Judge allowed the application of the plaintiffs on 1st October 1931, and directed that the amount claimed by them together with Rs. 2000 as the costs of this proceeding be shown "on their credit side in the final accounts as on 1st November 1929." In November 1931, the defendants applied for a transfer of the proceedings to this Court in the exercise of its extraordinary original jurisdiction, and the case was transferred by consent accordingly and placed before Wort J. On 18th January 1932, the defendants moved this Court in revision (Civil Revision No. 33 of 1932) against the order passed by the Subordinate Judge on 1st October 1931. This application was disposed of by Wort J. in the revisional jurisdiction of this Court on 13th February 1932. The learned Judge declined to interfere in revision on the ground that the defendants had a right of appeal. He also made certain observations on this occasion as regards the jurisdiction of the Subordinate Judge, and I shall have to refer later on to some of them so far as the appellants have relied on them.

Sitting on the extraordinary original side Wort J. was later on moved by the defendants under S. 151, Civil P. C., to vacate the judgment of the Subordinate Judge regarding the Rs. 42,483. The learned Judge held that, sitting as he was, his powers were no greater than those of the Subordinate Judge and that S. 151 was inapplicable. An appeal was filed under the Letters Patent against this refusal and was held to be inadmissible. By an order of 10th February 1933, the learned Judge gave effect to the order of the Subordinate Judge in the final accounts. On 21st March 1933, the learned Judge passed his last order in the account matter; and against the judgment constituted by this order the defendants appealed under Cl. 10 of our Letters Patent. This appeal was confined to the two sums of Rs. 31,744-0-10 and Rs. 44,483-6-6 awarded by the Subordinate Judges to the plaintiffs by way of compensation or damages. It was heard by Khaja Mohamad Noor J. and Manohar Lall J. who were agreed that in respect of the sum of Rupees 31,744-0-10 the appeal was barred by S. 97, Civil P. C., this part of the appeal being in fact not pressed. As regards the other item of "damages" the learned Judges were agreed that the amount was correct, but they differed as regards the liability of the appellants to pay anything in the nature of damages for omitting to work the Bhatni Factory with gur in 1929; and this is the point which has been referred to me under Cl. 28 of the Letters Patent. Khaja Mohamad Noor and Manohar Lall JJ. overruled the contention of the plaintiffs-respondents that no appeal lay against the order awarding them this sum of Rs. 44,483-6-6. These

respondents have not repeated their contention before me but have accepted the position that an appeal does lie.

Mr. P. R. Das for the appellants has urged in limine that the preliminary decree was a decree for accounts in common form only, and that therefore the lower Court had no jurisdiction, for the purpose of those accounts, to award damages for a breach which was not covered by the suit and decree. It is said that assuming that the breach, which is dated 1929, will support a decree for damages, it was an independent cause of action which had nothing to do with the suit as brought and the account as decreed, and that no notice should have been taken of it in working out the final decree—indeed no notice could have been taken even before the preliminary decree : (1897) 2 Q B 135.[15] Learned counsel adopted as his argument the observations of Wort J. in Civil Revn. No. 33 of 1932 that assuming that one partner can claim damages against another for such breach of duty as would entitle the objecting party to a dissolution, such a right has nothing to do with an account and that the Subordinate Judge had no jurisdiction to pass "a sort of supplementary preliminary decree" "on a cause of action which did not arise in the pleadings and on which no evidence was given and consequently he was functus officio."

The relation of a preliminary to final decree was considered by Rankin C. J. in the Full Bench case in 57 Cal 1013,[16] and it may be taken that the function of the latter is merely to re-state and apply with precision what the preliminary decree has ordained, and that the final decree is not only based on but is also controlled by the preliminary decree and cannot travel beyond it. In order to determine how this principle is to be applied to the present case, it is necessary to look somewhat closely into the nature of the suit and of the decree. Manohar Lall, J. has remarked that

> the suit stood, when the trial began, as a mere suit for dissolution of partnership and rendition of accounts

in which the decree also awarded to the plaintiffs "certain sums in the nature of damages for non-working or short working of gur in the factories." This makes it all the more necessary to look closely into the nature of the partnership and of the suit and preliminary decree. The partnership was complicated by a mortgage in favour of the managing partners and Kanhaiya Lal, and by the managing partners being required to apply three-quarters of the owners' moiety of the profits in discharge of the mortgage dues and to work the factories with gur to their full capacity. The preamble of the mortgage deed spoke of the mortgagees, undertaking to carry on as partners of the mortgagors the business of the two mills or factories, and cl. (5) of the mortgage bond, which I have already quoted, in effect provided for an extension, if necessary, of the term of five years fixed in the partnership deed until the mortgagees were paid off either from the fixed proportion of the owners' share of the profits or otherwise. The mortgage was thus so linked up with the partnership arrangements that Wort J. even spoke of the defendants being mortgagees in possession. The defendants also claimed throughout the suit to be usufructuary mortgagees or mortgagees entitled to retain possession even after the dissolution of the partnership until the redemption of the mortgage. The plaint as it originally stood sought the removal of the defendants from the management and possession of the factories as "partners or mortgagees." As I have already stated, the words "or mortgagees" were afterwards omitted when the defendants raised the question of court-fees. But in spite of the omission of those words defendants 4 and 5, the heirs of Babu Kanhaiya Lal, remained on the record, though they were not partners ; and this actually enabled the parties—after the restoration of the factories to the plaintiff—in substance to settle the mortgage claim by a personal decree against the mortgagors, as will be seen from Wort J.'s final order of 21st March 1933. It is obvious that the learned Judge would never have allowed this if the suit had been no more than a mere partnership action plus a claim for damages for two specific breaches of the covenant to work with gur.

The plaintiffs had claimed immediate possession of the factories besides a sum of six lakhs of rupees on the ground that their share of the profits of the partnership business "including the damages which they have suffered owing to the gross misconduct and negligence of the defendants" was "sufficient to wipe out the advance on

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15. Ruys v. Royal Exchange Assurance Corporation, (1897) 2 Q B 135=66 L J Q B 534=77 L T 23=8 Asp M C 294.

16. Taleb Ali v. Abdul Aziz, (1929) 16 A I R Cal 689=123 I C 305=57 Cal 1013=50 C L J 566 =34 C W N 66 (F B).

the security of the mortgage" and leave them with the credit stated. Though the plaint uses the word 'damages' in more than one place, the accounts annexed to the plaint to show how the sum of six lakhs was arrived at make no mention of damages but proceed on the profit that would have been earned if the factories had been worked as the plaintiffs claimed they ought to have been worked. There was an issue framed in the suit (issue 2) about

> whether the defendants worked the factories for the full season and to their full capacity and are guilty of various other acts of commission and omission complained of in the plaint.

But, as Mr. P. R. Das himself points out, there was no issue framed about whether the plaintiffs were entitled to damages for any of the large number of acts of commission or omission referred to in issue 2. The suit was brought on the footing that the partnership had already been dissolved by the death of Kanhaiya Lal, and, again by the notice of dissolution given by the plaintiffs in August 1928. Alternatively, the plaintiffs claimed to be entitled to get the partnership dissolved on account of the gross misconduct of the financiers, the breaches committed by them in the observance of the terms of the agreement, etc. The Court held that Babu Kanhaiya Lal had never been a member of the partnership, but that the plaintiffs were entitled to dissolution and accounts. No less than thirty acts of commission or omission were established against the defendants, and the learned Subordinate Judge found more than one broad ground for decreeing dissolution besides "breach of terms of partnership deed which are not trivial and persistently made": *see* pp. 499-502 of Parts I and II of the paper book of Letters Patent Appeal No. 60 of 1933. Accounts were ordered from 1st December 1926 to 30th June 1930. The latter was the date of the judgment and was fixed as the date of the dissolution, the former was the date of an adjustment of accounts which, as far as it went, was held by the Court to be binding on the parties. This adjustment was however found to have left out compensation to the plaintiffs for the managing partners' failure to work with gur at Bhatni in 1926 (1925-26) and compensation on this account and compensation also for the failure of the managing partners to work the Bhatni Factory with gur to its full capacity in the season of 1927-28, calculated on the basis of (the plaintiffs' share of) the profits that would have been earned, was also awarded to the plaintiffs to be "set off against the mortgage dues": *see* p. 505 ibid. It was also remarked under the issue relating to court-fees and relief that "there is no separate claim for damages which is not really covered by normal profits" (p. 508 ibid); and the question of compensation was merely dealt with as part of "the question of taking accounts and on what terms they are to be taken and for what period" (p. 502 ibid). The accounts decreed were thus not the ordinary accounts in an ordinary partnership action. They were not confined to the assets and liabilities of the partnership, but were to include "compensation" for the two branches prior to the suit "to be set off against the mortgage dues." It is even more significant that the compensation was awarded not because the plaint was taken to have claimed any damages separately from the claim for accounts but because the compensation represented the plaintiffs' share of "normal profits" as part of the proper accounting in the case. It seems clear that the learned Subordinate Judge proceeded to his preliminary decree not on the footing of an ordinary partnership action (with accounts in common form) plus damages for two specific breaches of covenant, but as if he had to settle all claims between the parties (including defendants 4 and 5 who were no partners), and that he held the managing partners liable not merely for profits actually made but also for profits that would have been made if they had observed their covenant as regards the full working of the Bhatni mill down to the institution of the suit. And according to the decree the receiver was not to be discharged "unless full accounts are taken of the dues and liabilities of the firm and the share of profits or losses of the parties."

Such was the preliminary decree which had to be worked out in the case. It was of course based on causes of action prior to the institution of the suit, and it ordered accounts up to 30th June 1930, the date of dissolution (a little under two years after the institution of the suit). The partner defendants had meanwhile continued to carry on the partnership business in assertion of their right to do so. The accounts ordered were to include "the share of profits or losses of the parties," and what the Court meant by "profits" was indicated clearly enough by its treatment of the breaches by the managing partners of the covenant to work with gur in two years

prior to the institution of the suit. The profits or compensation on accouut of these breaches had been worked out on the basis of "normal profits," and plaintiffs' share was to be set off against the mortgage dues. I am only repeating this in order to emphasize the peculiar character of the preliminary decree. No breach subsequent to the institution of the suit was before the Court which passed the preliminary decree, but (as already observed) the account ordered to be taken was, it would seem, intended to settle all claims between the parties including defendants 4 and 5 though it was declared that they were not partners. These defendants are among our appellants.

Plaintiffs' petition of 27th April 1931, which I have already set out and which in substance asked for compensation for 1929 on the same lines as for 1926 and 1928, was obviously meant as part of the proceedings in the suit consequent on the preliminary decree with its date of dissolution and its compensation for breaches prior to the suit : *see* paras. 4, 5 and 7 to 9 of the petition. It was also regarded in this light by the Subordinate Judge who negatived the defendants' contentions: (1) that the plaintiffs' had treated the question of damages "as a separate claim from the claim of dissolution," and (2) that the trial Court had "kept the claim of dissolution based on misconduct apart from the claim for damages arising from that misconduct." It was for these reasons that by an order of 16th May 1931, (*see* pp. 276-9 of the paper book already referred to) he held that the plaintiffs' application of April 1931 must be enquired into as a part of the proceedings consequent on the preliminary decree. Defendants applied to this Court in revision against this order, but the application, Civil Revision No. 332 of 1931, was rejected by Wort and Khaja Mohamad Noor JJ. on 18th June 1931 : the learned Judges were apparently not satisfied that any question of jurisdiction was involved—an important circumstance which ought to be borne in mind before allowing this appeal on the ground that the application of April 1931 was incompetent and that the plaintiffs' remedy, if any, was by suit. The Subordinate Judge then investigated the matter and passed his final order on the 1st of October 1931 and when defendants again came up in revision before Wort J. in Civil Revision No. 33 of 1932, the application was dismissed on the ground that they had a right of appeal, the learned Judge adding that he could not in his discretion exercise his revisional jurisdiction because

the High Court should not interfere in interlocutory matters by way of revision when the same relief can be obtained in another way.

The order fixing the compensation for 1929 thus seems to have been regarded by Wort J. in this context as an interlocutory matter, though he had also observed that the Subordinate Judge was functus officio and had no jurisdiction to pass a supplementary preliminary judgment or decree. The defendants, who were aggrieved by the order of the 1st October 1931, did not apparently consider that they were entitled to appeal against it before the final decree. They would have been entitled indeed if they wished to appeal at all, bound to do so without waiting for the final decree, if the order of the Subordinate Judge had really been a supplementary preliminary decree. But, as I have already said, the plaintiffs respondents do not now dispute the right of the defendants to maintain an appeal at the present stage against the sum awarded by that order of the Subordinate Judge, though they did dispute it before Mohamad Noor and Manohar Lall JJ. It cannot therefore be said to be absolutely necessary now to determine whether the order was merely an interlocutory order or whether it really amounted to a supplementary preliminary decree.

What I have said about the peculiar character of the preliminary decree is sufficient to dispose of the appellants' contention that it was a decree for accounts in common form. The alleged breach of 1929 was not, in fact, brought forward as "a cause of action" for another preliminary decree, and I have already said enough to show why it cannot be held to have nothing to do with the suit as brought and the account as decreed. This alleged breach did mean a fresh investigation, only because it arose long after the institution of the suit ; if the claim succeeded, however, its disposal was, in my opinion, determined by the preliminary decree for accounts of "the share of profits" and would have followed exactly the same lines as for 1926 and 1928. When the defendants objected that the application of the 27th April 1931, did not disclose a cause of action, the plaintiffs' rejoinder was that the "cause of action" accrued on the 30th November 1929 and the final order of the Subordinate Judge directed that the amount claimed by the plaintiffs be shown "on their credit side in the final accounts as on

1st November 1929." These dates rather militate against the contention (accepted by Wort J. and Manohar Lall J.) that the plaintiffs could have amended their plaint so as to include this breach of 1929; for the trial of the suit had already begun (on the 18th September 1929.) So far, moreover, as dissolution of the partnership (with an order for accounts as a matter of course) was concerned, the plaintiffs had a complete cause of action in 1928 independently of any breaches of the covenant to work with gur. The principle that the rights of the parties must be ascertained as at the date of the action brought, in support of which Mr. Das cited (1897) 2 Q B 135,[15] does not seem to have any application to a case like the present; if it did, the contention that the plaintiffs ought to have amended the plaint so as to include the breach of 1929 would itself be wholly untenable. The breach of 1929 did not affect the plaintiffs' right to a dissolution of partnership, nor their right to an account as already decreed. What it did do was to add precision to the account of the "profits" of 1929 and possibly lend to a determination of the "mode" in which the account of that year (within the meaning of our O. 20, R. 17) was to be taken on grounds which were not and could not be before the learned Subordinate Judge when he passed his preliminary decree. The position seems to be somewhat similar to the "just allowances" that are allowed in England, a point with which I propose to deal later on. If the suit had been an ordinary suit for dissolution and accounts, the breach of 1929 might perhaps have been an independent cause of action if advanced as a ground for damages; but as it was, a careful reading of the plaint, judgment and decree, as shown above, leads to the conclusion, reached by Khaja Mohamad Noor J. that "the investigation of the claim for the loss (of 1929) was covered by the suit and the preliminary decree for accounts." For, as the Subordinate Judge has shown, the failure of the managing partners properly to work with gur recurred year after year, though a loss was incurred in 1926-27 and no compensation was claimed for that year.

I take it that the contention that the plaintiffs should have amended their plaint so as to include the breach of 1929 is not intended to convey that the failure was absolutely fatal and left them without any remedy at all. There could be no res judicata regarding "a cause of action" that arose subsequently to the suit. It would, therefore follow that if the breach of 1929 were, as the appellants say, an independent cause of action, the plaintiffs should have proceeded not by an application in the proceedings after the preliminary decree but by suit. But supposing that it was open to the plaintiffs during the account proceedings to bring such a suit (a point by no means free from doubt) and that they had done so, the suit would, on account of its connexion with the partnership, have presumably been tried by the same Subordinate Judge (and the proceedings relating to the accounts stayed meanwhile). When asked to point out in what material respect the appellants would have been better off if the plaintiffs had filed such a suit instead of the application of April 1931. Mr. Das frankly admitted his inability to do so. The application was dealt with in all material respects exactly like a suit. It is true that it was not stamped as a plaint, but this is explained by the treatment of the question of court-fees on the plaint of October 1928. (*see* Issue No. 6 at pp. 507 to 510 of Parts I and II of the Paper Book in Letters Patent Appeal No. 60 of 1933); and the absence of court-fees can furnish no real grievance to the appellants as in the result they would have had to bear the cost, and they have had their mortgage claims settled in this suit without the payment of court-fees by either side. And the rule laid down in 20 C L J 107[17] has been repeatedly followed in this Court, that though a suit is to be tried in all its stages on the cause of action as it existed at the date of its commencement, notice may be taken of events which have happened since the institution of the suit and relief afforded to the parties on the basis of the altered conditions, where it is necessary to do so "in order to shorten litigation or to do complete justice between the parties." *See* for example A I R 1928 Pat 396.[18]

The facts that I have stated in some detail show how the proceedings were at point after point unlike the proceedings in an ordinary partnership action with accounts in common form. It is no doubt possible to take a stricter view of the pleadings and orders, but if that is so, will it be right now to hold that because the plaintiffs did not amend their plaint in res-

17. Rai Charan Mandal v. Biswa Nath Mandal, (1915) 2 A I R Cal 103 = 26 I C 410 = 20 C L J 107.

18. Kuldip Mahto v. Muhammad Hashim, (1928) 15 A I R Pat 396=113 I C 585.

pect of the breach of 1929 and were therefore left without any express direction in respect of it in the preliminary decree, therefore they could only obtain "compensation" for this breach by bringing a separate suit? To do so would be to defeat a just claim (an assumption which must be made in the present context) for purely technical reasons, since a suit would now be time-barred. This result must, in my opinion, be avoided if possible within the limits of the law. In 27 C W N 989[2] their Lordships of the Judicial Committee had affirmed a decision of the Calcutta High Court and added that "an account should be directed showing what, if anything, is due from the first appellant (the shebait) to the estate;" and upon the basis of this order the Subordinate Judge made an order defining the extent and character of the liability of the shebait to render an account and specifying the mode, the period and the properties. Mookerji and Rankin JJ., held that the Subordinate Judge had jurisdiction to pass the order. Mr. Das has endeavoured to distinguish the case in question as a case against a trustee, while a partner is not a trustee. The point of such a distinction if any, would be that a trustee cannot avail himself of a plea of limitation against the cestui que trust and may further be liable to account on a footing of wilful default. But no question of limitation arises in the present case, nor am I at present concerned with whether the managing partners were liable to be held responsible for profits that were not but would have been earned; it will presently appear that they were. The fact remains that in the case cited jurisdiction was found for the Subordinate Judge to define something which was left undefined in the order for an account. The learned Judges actually held that the Subordinate Judge's order was a supplementary preliminary decree but as I have already shown, it is immaterial in the present case whether the Subordinate Judge's order was of that character or was merely an interlocutory order, though I am inclined to agree with Mohamad Noor J., that it was an interlocutory order.

A still more illuminating illustration of what a Court may do is furnished by 11 Pat 22[19] a case of a suit for recovery of the plaintiffs' milkiat share, for joint possession over the khudkasht lands to the extent of their share therein and for mesne profits. This was decreed, but on appeal there was a remand. A fresh trial followed, and then another appeal, which ended in a compromise decree entitling the plaintiffs not to joint possession over the khudkasht lands and mesne profits, but to compensation. The question thus arose whether the plaintiffs were entitled to compensation for the period (of about 15 years) subsequent to the institution of the suit the defendants still being in possession. Had the decree that was ultimately passed awarded mesne profits, the plaintiffs would have been entitled to a decision in their favour under O. 20, R. 12. But the decree was for compensation, and this Court held that the matter was governed, not by the rule in 18 Cal 10,[20] but by the general rule that the Court has no jurisdiction to give plaintiffs a decree in respect of a cause of action that had not accrued to them at the date of the institution of their suit. On appeal to the Privy Council, Lord Blanesburg observed:

> Their Lordships do not question the correctness of the general proposition with which the learned Judges commence, and its cogency was enforced by Mr. Pringle's able argument before the Board. But the learned Judges have failed to appreciate the importance and breadth of the decision of the Board in 18 Cal 10.[20] Their Lordships can see no indication in the report of that case that the period for payment there fixed was so fixed by consent, or by any other considerations than those of justice, equity and good conscience, which instructed the decision regardless of considerations purely technical in character. It is a precedent which completely justifies, in point even of principle, the view of the order of 4th February 1919, taken by the learned Subordinate Judge.

Thus it was held, in substance that notwithstanding the general rule that a claim cannot be decreed that had not accrued at the date of institution of a suit, the Court had power in the circumstances of the case to decree compensation for a period subsequent to such date. In the present case the plaintiffs apparently did not anticipate dissolution from the date of judgment only, and their failure to amend the plaint before the preliminary decree so as to include the breach of 1929 cannot from any point of view be taken to bar that claim altogether. They were entitled to, and had obtained, an order for dissolution and accounts irrespective of this breach. A suit by one partner against another for damages for breach of a covenant of the partnership deed, brought

19. Raghubans Narain Singh v. Khub Lal Singh, (1931) 18 A I R P C 209 = 133 I C 730 = 11 Pat 22 = 58 I A 299 (PC).

20. Robert Watson v. Ramchand Dutt, (1891) 18 Cal 10 = 17 I A 110 = 5 Sar 535 (PC).

before dissolution, is liable to be defeated on the ground that a suit between partners should be a suit for general accounts in which the defaulting partner could be debited with any loss that might have been caused by his action: A I R 1927 Mad 650.[21] But here there was at the time of the plaintiffs' application of 1931 already a decree for dissolution and general accounts. If instead of making that application plaintiffs had proceeded by suit, I take it (as I have already said) that the accounts that were proceeding under the preliminary decree would have been held up, for, it is not to be supposed that the defendants who maintained that much money was due to them from the partnership would have agreed to accept a liability to the plaintiffs irrespective of the general accounts in progress. I have also already shown that such a suit, if one lay at all during the pendency of the accounts, would have been triable by the same Subordinate Judge (no less than an amendment of the plaint before the preliminary decree, suggested by Wort J. and also by Manohar Lall J.). Further, while "compensation" for breaches was in fact not dissociated from the general accounts of the partnership business, the claim for 1929 was not res judicata. If a fresh suit had to be brought, the plaint would have contained nothing that is not to be found in the petition of April 1931, read with the plaint of 1928, and the actual proceeding before the Subordinate Judge in substance went on like a suit, the right of appeal being now conceded to the appellants by the other side. It seems to me, that in these circumstances the question raised by the appellants refers less to jurisdiction properly so called—the authority of the Court to deal with the subject-matter — than to technicalities of procedure. In my opinion, the order awarding the sum in question to the respondents, even if it might appear irregular from some points of view, cannot now be properly interfered with on the ground that the Subordinate Judge had no "jurisdiction" to make it; to do so would be to sacrifice considerations of justice, equity and good conscience to considerations which in 11 Pat 22[19] their Lordships of the Judicial Committee overruled as purely technical in character. O. 33. R. 8, of the Rules of the Supreme Court in England provides that

> in taking any account directed by any judgment or order, all just allowances shall be made without any direction for that purpose ;

and when a partnership account is ordered it is not usual for the Court to determine beforehand what are, and what are not, just allowances. Wilful inattention to business, which is discussed at page 469 of Lindley on Partnership (10th Edn.) in the Section relating to "Compensation for Trouble" is thus apparently dealt with by the Master in the first instance, proceeding on the articles of partnership and the settled rules and principles. We have no specific provision in India corresponding to this O. 33, R. 8 though under O. 20, R. 15 of our Code the Court is, by its preliminary decree, to direct such accounts to be taken as it thinks fit, while R. 17 of the same Order, which Mohamad Noor J. apparently had in mind, enables the Court by any subsequent order to give any special directions with regard to the mode in which the account is to be taken. The model form of decree, Form No. 21, given in Sch. 1, App. D, to our Code of Civil Procedure does not speak of "the share of profits or losses of the parties" (the expression found in our preliminary decree); and conceding that the receiver appointed to take ordinary accounts in an ordinary partnership action could not have gone into the question of "profits" in the sense intended by the learned Subordinate Judge, that does not seem to me sufficient to negative the power of the Subordinate Judge himself to look into the question on an application by the plaintiffs in the proceedings that followed upon his preliminary decree. The appellants' objection on the score of want of jurisdiction must therefore be overruled.

I now turn to the question whether in law a claim for compensation in the sense used by the Subordinate Judge, i.e., a claim for the plaintiffs' share of the profits that would have been earned for the partnership if the managing partners had observed their covenant to work with gur—lies against partner. In his observations in Civil Revision No. 33 of 1932, Wort J. called it a moot question, in the absence of any authority to the contrary, whether one partner can claim damages against another for such breach of duty as would entitle the objecting party to a dissolution. But dissolution and accounts had already been decreed in the present case irrespective of the alleged breach of 1929, and the preliminary decree awarding what was called compensation for the breaches of 1926 and 1928 had not been

21. Santhanakrishna Naidu v. Chellappa Aiyar, (1927) 14 A I R Mad 650=101 I C 390.

appealed against, though these breaches were among the many matters on which dissolution was decreed. The breach of 1929 could no longer be used for obtaining a decree for dissolution or accounts, and I do not suppose that the learned Judge really meant to imply that the plaintiffs were left without any remedy at all.

Manohar Lall J. however after pointing out that the obvious remedy of a partner against a co-partner who refuses to carry out the terms of the partnership is to apply for dissolution under S. 254, Contract Act, takes the view that the aggrieved partner cannot "also claim damages against his partner who wilfully breaks the terms of the partnership." But, it is by no means clear whether the learned Judge meant that no compensation could be claimed for the breach of 1929 even though the plaintiffs had already obtained a decree for dissolution and accounts; and the case he next proceeds to refer to, (1878) 8 Ch D 345[12] seems to show that such a claim does lie. For, that was a case in which, after the expiry of the terms of a partnership, the plaintiffs discovered that during the partnership the defendant had, in spite of a covenant "not to engage, directly or indirectly, in any business except upon the account and for the benefit of the partnership," been engaged in another business in which he had made profits. They then filed a bill to compel the defendant to account to the partnership for such profits and also brought a supplemental action claiming that the defendant's interest in the other business formed part of the partnership assets. Both were dismissed by Jessel M. R. who said that it did not appear that the defendant had damaged the partnership at all; and in upholding his decision, James L. J. endorsed the observation of the Master of the Rolls that you cannot extend the cases with regard to a share in the profits to a case in which as between the parties there really was nothing but a breach of covenant which could not have resulted in the slightest loss to the partnership, and added that if it could have been shown that the breach led to the covenant or neglecting the business of the partnership, "that would have been a matter for an action for damages if it could have been alleged or shown here." This is sufficient to show that dissolution is not the only remedy available for a breach of covenant by a partner, if that is what Manohar Lall J. really meant to hold, especially regarding the breach of 1929. But if the learned Judge meant no more than that there should have been a suit for damages for this breach, I have already shown, as regards this question of procedure, how in the circumstances of this case the application of April 1931 was not insufficient.

What Wort J. and Manohar Lall J. probably had in mind was the rule strikingly illustrated in a case already referred to by me, A I R 1927 Mad 650,[21] in which a suit was brought by one partner against another for damages for breach of certain covenants in the partnership deed. This was dismissed on the ground that the proper course was to bring a suit for general accounts and debit the defaulting partner with any loss that might have been incurred by his action, in the general accounts; and the reason given was that if (except in certain special cases) a suit for damages alone regarding one item is allowed to be maintained then it might be that a partner may be decreed to pay a sum of money, whereas when the general accounts are taken and the whole profits ascertained, payment may be due to him. The present suit was not of the character disallowed in the Madras case; and the plaintiffs' claim for compensation for 1926 and 1928 is in any event res judicata. But the Madras ruling makes it clear that a claim for damages for breach of covenant by a partner does not disappear when accounts are taken (upon a dissolution or otherwise), though where the claim is advanced in the suit for (dissolution or) general accounts, it may be included in the decree under "just allowances," as was done by Lord Buckmaster in 25 C W N 314.[22]

If the breach is subsequent to the institution of the suit for dissolution and the claim is advanced while accounts are being taken under the preliminary decree, the aggrieved partner must, in my opinion, get his damages or compensation, whether by a separate suit or (where as is the case here the preliminary decree is in sufficiently wide terms) by an application in the proceedings that lead to the final decree.

The question next arises whether the damage or compensation for such a breach is rightly found by calculating the loss of profits that would have been earned but for the breach, a mode of calculation conveniently referred to as accounting on the footing of wilful default, and commonly

22. Krishnamachariar v. Sankara, (1921) 8 A I R P C 91=57 I C 713=25 C W N 314 (P C).

adopted in cases against trustees and usufructuary mortgagees. Mr. P. R. Das contends that even if the managing partners be liable in damages for breach of covenant as regards their failure to work with gur in 1929, they are not liable to account for profits on the footing of wilful default, since they were not trustees, and even as usufructuary mortgagees or mortgagees in possession they did not render themselves liable to account on such a footing. There is no dispute that the partners were not trustees; and notwithstanding cl. 5 of the mortgage bond, it seems to me, that the mortgagees were not in possession as mortgagees of the partnership business, which was confided to the managing partners only. But this does not, by any means, dispose of the matter. "Losses attributable to one partner's misconduct or negligence," (to quote the last marginal note at p. 459 of Edn. 10 of Lindley on Partnership) are governed by the rule in (1845) 1 Coll C C 589[6] at page 604 :

> Suppose the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of this duty to the partnership; whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect.

This is indisputable law. Mr. P. R. Das has argued that the plaintiffs' case about the breach of 1929 was a case of fraud. But neither in the plaint nor in their application of 27th April 1931 did the plaintiffs charge the managing partners with fraud. The plaint spoke of the gross misconduct and negligence of the financiers and of the damages which the plaintiffs had suffered owing to such gross misconduct and negligence. We have already seen that the actual claim in the plaint was not one really for damages apart from dissolution and accounts, but for the plaintiffs' share of the profits that would have been earned if the managing partners had worked with gur according to their covenant. In their application of April 1931 plaintiffs said that even after the institution of the suit the defendants did not work the Bhatni factory with gur in 1929 and that this non-working was deliberately and illegally done by them in contravention of the express terms of the deed of partnership and without the consent or approval of the members of Noori Mian & Co. as laid down in the partnership deed.

In their answer the defendants claimed that as managing partners they had "acted bona fide in view of the prevailing market rates of gur in not working the Bhatni Factory with gur." These pleadings do not raise any question of fraud at all, though Mr. Das has argued that the absence of bona fides is the same as fraud, in order not indeed to show that the application of April 1931 should have been thrown out, as Manohar Lall J. was apparently inclined to hold, on the ground that it did not (by itself) give any particulars of the fraud, but to establish that the managing partners who might in case of fraud have been liable to account for profits that were not made were free from such liability because they acted bona fide. But the pleadings do raise a question of wilful default by the managing partners to the damage of the interests of the partnership in breach of their duty to the partnership, and it seems clear that if this is established, the managing partners were in the words of Knight Bruce V. C., compellable to compensate or indemnify the partnership for the damage caused by their wilful default. (1845) 1 Coll C C 589[6] was decided in 1845, and when Knight Bruce V. C. spoke of 'wilful default' in that case, it is not to be supposed that he used the words in any very technical sense such as may since have become associated with them; he also spoke of culpable negligence, and I take the expression 'wilful default' in the context to mean some wilful misconduct, some failure to do one's duty purposely and wilfully. Supposing such wilful default is established (a point which will be dealt with later on), how is the liability of the managing partners (who made the default) to compensate or indemnify the partnership to be worked out? The lower Court did this (as had been done for 1926 and 1928) by finding out what profit the partnership would have made if the managing partners had done their duty and worked with gur; and the appellants have not been able to suggest any other possible method in a case of wilful default.

Manohar Lall J. seems to have thought that this method did not give "actual" damage but involved a hypothetical element for which there is no warrant in law. But even in (1842) 1 Y & C C C 280,[23] referred to by the learned Judge, there was a hypothetical element—the amount of £1202 5s. 9d. which the 47 bales would have produced if the defendant had sold them on 16th December 1818 (instead of waiting till 1827); and what the defendant would

23. Cragg v. Ford, (1842) 1 Y & C C C 280 = 57 R R 320.

have been charged with was the excess of this hypothetical amount over the actual sale proceeds, £123 3s. 11d., if he had been shown to have done anything which would throw all the consequences of the delayed sale on him alone. What Lord Atkinson called a ruling principle and a just principle in (1911) A C 301[24] is the general intention of the law that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. It seems to me that this necessarily involves a hypothetical element except in the few cases where the breach relates to ascertained sums of money. In 53 I C 2,[7] referred to by Manohar Lall J. the damage could be called actual because it related to specific sums of money which ought to have been but were not recovered for the partnership. But in the majority of cases, where loss results from non-performance, one can only estimate its extent and the consequent compensation by considering what would have happened if the contract had been performed, and with the utmost respect for Manohar Lall J., I conceive that such claims cannot be rejected merely on the ground that the loss is not actual in the sense in which that learned Judge seems to have used the word. Another objection to the method adopted by the lower Court is that, as observed by Wort J. the Subordinate Judge has proceeded *ex post facto* and condemned the defendants for not working gur because as it turned out, sugar could have been manufactured from gur profitably,

although when the season commenced in November 1928 it was the opinion of the defendants in consultation with the plaintiffs that sugar could not be manufactured from gur at a profit. It seems that the plaintiffs to a very large extent acquiesced, in the sense at any rate that they were not prepared to give any definite instructions to the defendants.

The opinion of the defendants and the plaintiffs' acquiescence are questions of fact that will be dealt with later. As to damage *ex post facto*—or as Manohar Lall J. puts it, "upon *a priori* reasons on the *ex post facto* principles"—the loss caused to the partnership has been taken to be equal to the profits that would have been earned if Bhatni had been worked with gur in June-October 1929; but this has been done after first ascertaining that on the figures available to the managing partners in the cold weather of 1928-29 when the requisite gur was to be purchased and stored, they had reason not really to apprehend any loss but to expect a profit, though only a comparatively small profit of Rs. 21-11-0 per hundred maunds of gur which would have cost over Rs. 500 for purchase and manufacture. The managing partners were under an obligation to work with gur unless the condition of the market held out no hope of profit. For deciding whether to work in the coming June-October, the relevant time was the previous cold weather when gur was to be purchased and stocked for use in the working season. Though the decision was to be made in the preceding cold weather, the loss of profit to the partnership could properly be, and has in fact been, calculated, not from the forward figures then available but from the rates actually prevailing in the working season. No liability to pay compensation would, of course, have arisen, if the cold weather rates had shown no prospect of profit; and even if any arose on those figures, it was liable to be nullified by an actual fall of the sugar market. For, had the actual prices of the products-sugar, refined molasses etc.—in the working season June-October been so low as to leave no profit, there would, of course, have been no basis for a claim for a share of the profits or equivalent compensation for non-working. But I am unable to see why this last consideration should, when the forward rates in the cold weather have first been found not to be such as to hold out no prospect of profit, lead to our withholding compensation to an extent determined on the basis of the actual prices of the products in the working season and an assumed working of the mill to its full capacity. The expressions *ex post facto* and *a priori* do not, by themselves and apart from the view that the learned Judges apparently took of the facts, seem to me to provide any reason for condemning the only method that anybody has yet suggested of working out the compensation in this case.

Mr. P. R. Das has also argued that plaintiffs are not under S. 73, Contract Act, entitled to compensation on the basis of loss of those profits which might have been earned, because such loss could not have been in the contemplation of the parties when they made the contract and cannot be said to have naturally arisen in the usual course of things from the managing partners' breach of the covenant to work

24. Wertheim v. Chicoutimi Pulp Co., (1911) A C 301 = 80 L J P C 91.

with gur. He cited in support 21 Mad 172,[25] a case which corresponds very closely with Illustration (q) to the Section, though the latter deals with a case against a supplier instead of a carrier of goods. But it is impossible to imagine—nor do the appellants suggest—what damage—in case of a breach of the covenant in question—other than the loss of profits that might have been earned could have been in the contemplation of the parties when they made the contract, or what damage, if not the loss of profits, would have naturally arisen from the breach. Ours is (unlike Illustration (q) referred to above) not a case of any special circumstances, known to one party to the contract and not communicated by him to the other, and thus leading to remote damage as it is often called, i. e. damage which could not have been in the contemplation of the latter in case of a breach. Nor has Mr. Mitra, who replied for the appellants, been able to suggest how the compensation to which the plaintiffs might be entitled by reason of the managing partners' breach of covenant can possibly be calculated except by working out the loss of profits. Where no profits were actually made, they must (as I have already shown) be estimated, and I am unable to see why this principle should not apply merely because this was a partnership action. The wilful default spoken of in (1845) 1 Coll C C 589[6] may, in some cases, result in actual damage; but it will at least as often lead to damage which can only be estimated because it arises from the failure to do work which ought to have been done. If this involves what has been called accounting on the footing of wilful default, there can be nothing to take exception to it if it should be by reason of their wilful default that the managing partners are held liable. In my opinion, therefore, compensation for 1929 on the lines adopted below was permissible as a matter of law.

Turning now to the question whether there was wilful default on the part of the managing partners in their failure to work with gur in 1929, it is necessary to refer first to a small controversy before me about the meaning of one expression in the third clause of the partnership deed. I have had the whole clause translated by an official translator of this Court at the instance of the parties, and this translation, which the parties have substantially accepted, runs as follows :

> It shall be incumbent upon the second party to run both the mills throughout the season every year with sugarcane and molasses. If at any time, on account of dullness of the market, the rate of molasses be such that there be no hope of profit in manufacturing sugar with molasses, then in that case manufacture of sugar with molasses may be stopped by consultation among (with the consent of) the parties. In any other case, the said mills shall not be closed. Of course, if such circumstances arise, as for instance celestial and terrestrial calamities and strikes in railways, and mills etc., which may be beyond the control of the second party and on account of which the work of the said mills cannot be carried on, in that case also the work can be stopped.

As regards the words "(with the consent of)" in the above translation, the official translator notes "There are no words in the vernacular for the words within the brackets. But such is the implication." The last sentence of the clause regarding celestial and terrestrial calamities requires no consideration. The first sentence imposes upon the second party a positive obligation to run both the mills throughout the season with (in particular) gur : and the third sentence makes this emphatic by providing that in any event other than that dealt with in the second sentence "the said mills shall not be closed." The second sentence provides for the stoppage of manufacture with gur "by consultation among (with the consent of) the parties." But this is subject to the condition given at the beginning of the sentence

> if at any time, on account of dullness of the market, the rate of molasses be such that there be no hope of profit in manufacturing sugar with molasses.

It has been contended on behalf of the appellants that "consultation (*mashwara*, in the original) among the parties" does not import agreement among them, and that the sentence only requires the appellants to consult the owners but does not oblige them to obtain their consent. It does not seem to me, that this is a very reasonable construction of the sentence, for there could be little point in requiring the appellants merely to consult the owners in the contingency specified. It is true that the appellants were themselves interested in earning profits, but it must not be forgotten that the owners were even more interested in the matter because not only was their mortgage debt (which carried interest at nine per cent. per annum) to be paid off from three-quarters of their moiety of the profits but the partnership was also to continue until the mortgage debt was paid off.

25. Madras Railway Co. v. Govind Rau, (1898) 21 Mad 172.

The official translator says that the implication of the word "mashwara" in the context is consent of the parties. I find no reason to doubt this, but I feel, at the same time, that if the parties meant consent as distinguished from consultation, it would have been better if they had used the former word. I propose therefore to take it (as urged by the appellants) that they were required not to obtain the consent of the owners but merely to consult them. Even so, however, it must be borne in mind that the authority given to the managing partners to stop the manufacture of gur by consultation was subject to the condition precedent that the rate of molasses for the time being "be such that there be no hope of profit in manufacturing sugar with molasses."

It appears that the decision to work that Bhatni Factory with gur in 1929 had to be made in the cold weather of 1928-29 when the gur was to be purchased and stored. It may be observed in passing that this meant the locking up of capital until the time came to work the gur. Some time in January 1929, the managing partners sent the General Manager, Gurdayal Srivastava, to one of the partners of Noori Mian & Co., Shaikh Khuda Baksh, plaintiff 2, to draw attention to the then rate of gur and the present and future rates of sugar, and to consult him as regards the manufacture of sugar with gur because the forward rates for Java sugar up to the next cold weather appeared (so they said) to hold out no prospect of profit but an apprehension of loss. Gurdayal understood from Khuda Baksh that the latter did not think it quite proper to express an opinion in view of the partnership action that was pending, but that whether the work be continued with gur or not, the result was the same for Messrs. Noori Mian & Co., because even if the work (of preparing sugar) from gur be stopped and all the staff of the mill be retained as before, when no reduction in expenditure was made even in case of no work with gur being done in spite of the promise, it was better for Messrs. Noori Mian & Co., to suffer loss by doing work, if loss had to be borne, instead of suffering loss by incurring expenditure for nothing.

This does seem a little vague, but it is plain enough that Khuda Baksh was referring to an unfulfilled promise of reduction of staff (which staff would be paid whether or not Bhatni was worked with gur) and that he thought that the expenditure on the staff at least would be met by working with gur: there was no thought of loss, apart from the establishment cost, if gur were worked. The managing partners then wrote a letter No. 13/29 of 26th January 1929, to Noori Mian & Co., enclosing a cutting from the Amrita Bazar Patrika which gave forward quotations for white Java sugar, drawing attention to cl. (3) of the partnership deed, and enquiring whether gur should be further purchased or not. I agree with Mohamad Noor and Manohar Lall JJ., that Noori Mian & Co., did receive this letter, though they do not admit it; and though it is not formally in evidence, I have looked into it at the instance of the appellants in view of Ex. A 2 and the appellants' petition of 17th September 1931 below (printed at page 34, while the letter itself is at page 33, of Parts I and II of the paper book in Letters Patent Appeal 59 of 1933). The plaintiffs sent no reply to this letter, and Gurdayal was asked to go again and try to obtain a proper reply by conversation with the owners. He thus saw four of the owners or their representatives, and learnt from them as follows:

> We shall not give any reply to the said letter or any information privately in case of litigation. If Messrs. Kishorilal Makundilal think it necessary they may get this matter adjudicated upon by Court. Otherwise they may do as they think (fit). We have beforehand submitted a petition in Court making mention about gur, with a view to safeguard against loss to us. It would be better that the matter be decided there so that whatever decision may be arrived at may be clear. Otherwise as to the opinion given privately, firstly law points as regards the accrual of cause of action are a hindrance to our giving a definite reply; secondly, in spite of the fact that in view of the present selling rate of gur there is no hope of profit for making sugar from gur, yet if the work be done very efficiently and economically, the expenditure on the staff may of course be met, and if there be an occasion of a rise in the price, there may be profit also; otherwise in present circumstances there is at present surely an apprehension of loss of interest on the capital involved. Still, in view of the consequences of verbal conversation for the most part during the period prior to making claim, we know that nothing can be settled by oral and private conversation, when we deny the present partnership of Messrs. Kishorilal and Makundilal on the basis of the claim. Such being the case we are not bound to give any opinion and we will not give any out of Court. Still even if there would have been no litigation, in view of the fact that the expenditure would be the same whether the work with gur be done or not, it is better for Messrs. Noori Mian & Company, in view of the fact that there will be no saving in expenditure even if sugar be not made from gur and they would, on the other hand, have to bear the burden of expenditure, to bear loss by doing work instead of making expenditure for nothing, because if there be loss, they would incur loss of Rs. 1 lakh only when Messrs. Kishorilal Makundilal would bear a loss of Rs. 2 lakhs in view of the capital invested in the gur business.

I have quoted this from Ex. A1, Gurdayal's letter of 16th February 1929, to

Messrs. Kishorilal Makundilal, the appellants, of which a copy, I am satisfied, was sent on by the latter to Noori Mian & Co. the next day with another letter of theirs, Ex. A2. This last letter was sent by registered post, and it is proved that the plaintiffs refused to receive it. In this letter Messrs. Kishorilal Makundilal complained that they had not been favoured with a reply to their letter of 26th January 1929 and said that:

> still out of foresight we have purchased about 20,000 maunds of gur for making sugar at Bhatni Mill.

They also said that they were ready to say in writing what they had given the plaintiffs to understand orally through Gurdayal, namely, that if the plaintiffs replied to the appellants' letter of the 26th January "no legal benefit would be drawn (e. g.) of establishing partnership between us and you." (I must observe at once that this invitation to a reply without prejudice is not supported by Gurdayal's letter to his employers). Appellants further wrote that if they made sugar from gur, there was an apprehension, in view of the rates, of loss in case the market tended to be against them and that then the plaintiffs would blame them, but if "for any earthly and heavenly causes" there be a rise in price, plaintiffs would blame them

> that in case sugar would have been prepared from gur, it would have brought profit. Such being the case, we have no other alternative but to act according to your opinion, expressed before the said manager, and which has been referred to in his report, a copy of which is being enclosed. Moreover, the personal opinion of the manager is also the same as that of yours.

The opinion of the manager is found towards the end of his letter of the 16th February:

> Without any regard being had to litigation between you and Messrs. Noori Mian & Co., I can say that it would be better for you not to work with gur in the Bhatni Mill after the sugarcane season is over, *if you can hereafter retrench the expenditure on all the staff of the mill and all the other servants excepting very necessary persons.*

The *italics* are mine and show what was really at the bottom of the trouble. Gurdayal also wrote about the "inner thoughts" of the plaintiffs that if business relations had been fair between the parties

> the plaintiffs would not in the circumstances have liked to work with gur without any hope of profit if they would have been sure of saving expenditure.

The learned Subordinate Judge states the result of this consultation with the plaintiffs as follows:

> It cannot be said for a moment that the conversation to which Srivastava had referred in his report meant that the plaintiffs agreed that the defendants should not work the Bhatni Factory with gur as there was no chance of profits. What this conversation really amounted to was that the plaintiffs declined to give any private reply in view of the suit pending between the parties, wanted the defendants to get the matter cleared up through the Court, and finally expressed an opinion that even if the prospects were not very bright, the pay of the staff at least could be secured by a careful and economical working, while there was a chance of profit if the market improved, and that if there had been no suit between them, Noori Mian & Co., should have given the advice, that the mill should be worked with gur.
>
> This by no stretch of language can be said to mean that the plaintiffs agreed that the mill should not be worked with gur in that year as it would not be profitable to do so.

Manohar Lall J. seems to have accepted much of this, and in my opinion, the learned Subordinate Judge has stated the result quite correctly in the above passage. When the managing partners thus attempted to consult the owners, the latter, it is clear, declined to give a formal reply because their case was that the partnership was already at an end, a position which receives some support from the fact that it was on the acts and omissions of the managing partners prior to the institution of the suit that the partnership was actually dissolved by the Court. But the dissolution took effect from the date of judgment, namely 30th June 1930. Defendants had therefore a right to carry the partnership on during the pendency of the suit, and they did so. The plaintiffs, when consulted, did not admit the right of the managing partners to obtain their opinion, but nevertheless indicated pretty clearly that the Bhatni Factory should be worked with gur if only to meet the cost of establishment. The long extract given above from Gurdayal's letter, if carefully read, show that the plaintiffs did not say anything to indicate that in their opinion working with gur might lead to loss and might not go to meet the costs of the establishment. They were for working if only to meet this cost, and I hold with the learned Subordinate Judge that they did not agree that there was no prospect of any profit from working with gur.

The learned Subordinate Judge accepted the appellants' contention that the plaintiffs' refusal to give an unequivocal reply to the defendants' query whether the factory should be worked with gur in 1929, entitled the defendants to use their own discretion in the matter. But he only accepted it *sub modo*, accepted it in the sense that it did not make it "less incumbent upon the defendants to decide the question with such prudence and care as they pos-

sessed." He then examined the materials available to the defendant at the time the decision whether or not to work with gur had to be made, and his conclusion was that " there was a prospect of profit of Rs. 21-11-0 per hundred maunds of gur, " and that

> there was absolutely no reason having regard to the positions of the sugar and gur markets, why the defendants should have decided not to work Bhatni with gur in 1929.

It has not been suggested before me that there is any mistake in the Subordinate Judge's calculations from the figures available to the defendants in the early part of 1929. But it has been argued that the Subordinate Judge paid no attention to such evidence as the admission of Gurdayal in cross-examination that Panchrokhi and 8 or 10 other named composite factories did not work with gur in 1928-29 and that the Gugli composite factory worked with gur at a loss. Gurdayal, however, who was examined as a witness for the defendants, had further to admit that there might be reasons, with which he was not acquainted, which led those factories not to work with gur in the 1929 season; and as to Gugli, Syed Hossain, a witness for the plaintiffs, said that he had come to know from Gugli Mian that the factory worked with gur in 1928-29 at a profit. It has been urged that Syed Hossain's statement is not supported by the evidence of any other witness. But it must be remembered that Gurdayal himself did not claim to have personal knowledge of the Gugli factory working at a loss that year. Gurdayal also said that the general impression was that composite factories did not work with gur as there was no likelihood of profit. But this "general impression" is not supported by any details. I am not therefore prepared to accept the appellants' contention that even though calculation on the materials then available shows a profit of Rs. 21-11-0 per hundred maunds of gur, the defendants honestly believed that working with gur would be attended with loss. The history of gur-working at Bhatni during the partnership, which has been briefly referred to by the Subordinate Judge and which will be found in detail in the judgment of 30th June 1930, at pages 433-53, see especially page 444; also page 505 of parts I and II of paper book of Letters Patent Appeal No. 60 of 1933) goes far to indicate 'that the managing partners would not work with gur because the profits were small rather than that they really believed on the figures then available that the factory would suffer actual loss on the working of sugar with gur in the coming season. Much has been made of the fact that if there had been a real prospect of profit from working with gur, the whole profit would not have gone to the plaintiffs. But as I have already shown, the plaintiffs had good reason to take what profit they could get, while the appellants are drawing 9 per cent. per annum on their mortgage money, so that they would not be too ready to lock up any capital in gur unless they expected a larger profit than 9 per cent. from such expenditure.

It has been contended that the appellants were not required to embark upon a risky speculation and hazard their money in gur and that they are not liable to pay compensation for non-working if they honestly believed that working with gur would be attended with loss. Apart from the fact that as the Subordinate Judge has (in effect) found, they could have had no such honest belief—a finding which I accept—it must not be overlooked that the managing partners had not only undertaken to finance the partnership business but had also bound themselves to work Bhatni with gur unless a fall in the market held out no hope of profit, etc. There was no such fall, and even an honest belief to the contrary, if any, would, in my opinion, have been little justification for breach of the covenant. Mr. P. R. Das has cited 87 I C 735,[8] as a case in which a defendant in a suit for accounts upon a dissolution of partnership was not held liable for the probable loss sustained by the firm owing to his neglect or failure to ply a boat for hire in accordance with the partnership agreement. But this was because it could not be said in the case "that the defendant has been guilty of fraud, culpable neglect or wilful default." In the present case, however the lower Court has in substance found repeated, wilful default, and not mere negligence. In his somewhat confused language (at any rate as it reads in the translation in the paper-book at p. 37 of Part III in Letters Patent Appeal No. 59 of 1933) Gurdayal was told by the plaintiffs:

> If Messrs. Kishorilal Makundiram think it necessary they may get this matter adjudicated upon by the Court; otherwise they may do as they think (fit).

This seems to mean that if the defendants were to stop working with gur, they

would be doing so at their own risk and would have to take the consequences. It clearly does not mean that the plaintiffs left the matter to the discretion of the managing partners in the sense of agreeing to be bound by it. The contention that the plaintiffs' refusal to give an unequivocal reply entitled the defendants to use their own discretion in the matter is not, in my opinion, altogether correct. Though the defendants undoubtedly did attempt to consult the plaintiffs, consultation by itself was not sufficient to justify the decision to refrain from working with gur, for, as I have already pointed out, when dealing with cl. 3 of the partnership deed, it was a condition precedent to the stoppage of working with gur by consultation that on account of the dullness of the market the rate of molasses for the time being should "be such that there be no hope of profit in such manufacture." What happened was that the prospects were not "very bright" in the sense of profits that the defendants considered sufficiently attractive. But this did not, whether the plaintiffs did or did not give an unequivocal reply, entitle them under cl. 3 of the partnership deed to stop the manufacture from gur. In my opinion, moreover the plaintiffs, reluctant as they were (not altogether without reason) to admit that the partnership was still in existence, indicated an unmistakable preference for working with gur if only to meet the establishment cost.

It has been argued that the plaintiffs ought to have insisted on Bhatni being worked with gur and that as they did not do so, they are entitled to no compensation because if loss had resulted from actual working, they would have been free to repudiate it. Manohar Lall J. accepted this and held that plaintiffs had placed the defendants on the horns of a dilemma. But with all respect, it does not seem to me that on cl. 3 of the partnership deed plaintiffs could have escaped their liability for a half of the loss if the defendants had worked with gur and the work had resulted in loss. The clause laid a positive obligation on the managing partners to work with gur, and barring the excepted contingencies said that "the said mills shall not be closed" and the exceptions did not leave it open to the plaintiffs to repudiate their proportionate liability in case of loss from actual working. The plaintiffs' failure clearly to say 'no' to the proposal of the managing partners that the factory should not be worked with gur cannot be construed into an acceptance, nor has it been contended on behalf of the appellants that it should be so construed. But Mr. P. R. Das has urged that the plaintiffs were guilty of laches and that this saves the managing partners from their liability to work with gur. Reference has been made to a passage from Lindley at page 560:

> The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it . . . a Court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

But this doctrine seems to apply to cases where the plaintiff has by his conduct induced the defendant to suppose that the plaintiff had abandoned the common undertaking, usually in cases of a highly speculative character. In the present case, the plaintiffs did say and had even sued on the footing that the partnership was already at an end and they were so far right that the Court decreed dissolution or grounds (necessarily) prior to the institution of their suit. Defendants however insisted on carrying on the partnership and never supposed that the plaintiffs were no longer partners; and on the deed of partnership there was no question of plaintiffs leaving the defendants unfairly to do all the work and then, when there was a profit, coming forward to claim a share. Wort J.'s observation that "the plaintiffs to a very large extent acquiesced, in the sense at any rate that they were not prepared to give any definite instructions to the defendants" does not (speaking with all respect) allow for the fact that under cl. 3 the managing partners had bound themselves to work with gur irrespective of any instructions from the plaintiffs; and I have accepted the appellants' own contention that they were entitled to stop working with gur after consulting the plaintiffs, even without their consent, provided the condition of the market held out no hope of profit. On this footing the plaintiffs had no right to give any instructions at all. Appellants have referred to the following passage from Lindley (page 380):

> As observed by Lord Eldon in (1847) 2 Ph 266,[26] 'a partner who complains that the other partners do not do their duty towards him must be

26. Const v. Harris or Dale v. Hamilton, (1847) 2 Ph 266=16 L J Ex 397=11 Jur 574=71 R R 127.

ready at all times and offer himself to do his duty towards them.' But if a partner has been set at defiance by his co-partners; if they have denied that he is a partner, and that he has any right to interfere in the partnership, they can derive no advantage from the circumstance that he has not performed his duty to them.

The case before us, however, is quite unlike (1847) 2 Ph 266[26] at p. 276, cited in Lindley. The plaintiffs, having already brought a suit on the footing that the partnership was at an end, could not very well offer a formal opinion on the proposal of the managing partners not to work with gur in 1929. Their suit was justified, not indeed on the footing that the partnership had been dissolved by the death of Babu Kanhaiya Lal, but on various grounds afforded by the conduct of the managing partners. If they had accepted the proposal not to work with gur, they could not, of course, in spite of cl. 3, have claimed compensation for non-working. But there was nothing in the partnership deed to oblige them to accept it. The entire financing and working of the business was in the hands of the managing partners, and according to the case of the appellants themselves, which I have accepted, even if the plaintiffs had unequivocally rejected the proposal of the managing partners not to work with gur, this would have been immaterial, for their right to refrain from working with gur depended not on the consent of the plaintiffs but on a mere consultation with them. The appellants contend that the plaintiffs were bound to allow themselves to be consulted but in effect refused. As a matter of fact, the plaintiffs did in my view express an opinion against the stoppage of work with gur, though in a somewhat non-committal manner, because of the suit instituted by them. But supposing the plaintiffs refused to be consulted, the appellants would be no better off than if plaintiffs had been consulted, and the liability of the managing partners for breach of covenant would still turn on whether the condition precedent in the second sentence of cl. 3 was fulfilled, and if it was not, on whether the failure to work with gur constituted wilful default within the rule laid down in (1845) 1 Coll C C 589.[6]

It has also been argued that the plaintiffs' failure to give an unequivocal reply to the query of the managing partners makes the doctrine of frustration of contract applicable to the case: as Manohar Lall J. said, cl. 3 contemplates a normal state of affairs when the parties are on terms of businesslike amity and the partnership is going on smoothly, and the clause had no application when an abnormal situation arose on the institution of the plaintiffs' suit rendering consultation between the parties impossible. But the doctrine of frustration only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract; "interference leaving a considerable part capable of performance will not be an excuse" (Pollock on Contract, Edn. 10, p. 305). Reference has also been made to para. 298 at p. 220 of the Hailsham Edition of Halsbury's Laws of England, Vol. 7. But this again deals with the release of the promisor from his obligation to perform his promise. "Where the conduct of the promisee has rendered performance impossible," and "impossibility arising from the promisor's own act or default is not in any case an excuse for non-performance of his contract." Now, what was the obligation from which it is claimed the managing partners were released by reason of the plaintiffs' failure definitely to say "no" to their proposal not to work with gur? Surely, it cannot be the covenant of the managing partners to work with gur. There is nothing in cl. 3 of the partnership deed which makes it possible for the plaintiffs to prevent the managing partners from working with gur, and I have already shown that while according to the appellants, themselves the managing partners were not bound to obtain the consent of the plaintiffs to a stoppage of work with gur, mere consultation with the plaintiffs was not sufficient to justify giving up manufacture with gur as there was the condition precedent about the dullness of the market, etc. According to the managing partners themselves the partnership was still continuing, and in the correspondence of 1929 they took up the position that clause 3 of the partnership deed was still applicable. The situation, such as it was, was moreover brought about by the managing partners themselves, as is shown by the fact that it was on their acts and omissions before the institution of the suit that the partnership was dissolved. The failure of the plaintiffs to give a formal, unequivocal reply to the query of the managing partners—and this is the utmost that can be properly said against the plaintiffs—did not affect the working of the mills; the managing partners claimed to be entitled to work them under the partnership deed and went on doing so. I am

therefore unable to hold that the doctrine of frustration has any application to the circumstances of the case.

Reference was also made to S. 56, Contract Act, but the covenant to work with gur had by no means become impossible of performance by reason of the failure of the plaintiffs to say "no" definitely to the proposal of the managing partners. Mr. Mitra, who replied for the appellants, also referred to S. 54 of the Act, but the obligation undertaken by the managing partners to work with gur does not seem to me to have been a matter of reciprocal promises at all within the meaning of that Section. It is not as if the plaintiffs were not entitled to claim performance until they themselves gave an unequivocal answer when consulted in the excepted contingency, nor was the exception itself applicable since (as has been already shown) the condition of the market was not such as to hold out no hope of profit from the manufacture of sugar with gur. My conclusion on this part of the case is that the appellants cannot escape from the consequences of their wilful default merely because the plaintiffs did not insist on Bhatni being worked with gur in 1929. The wilful default itself has been clearly established, and the appellants' objection on the score of jurisdiction and the measure of damages have all been found untenable. The appeal therefore fails and must be dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 239

FAZL ALI AND MANOHAR LALL JJ.

Commissioner of Income-tax, Bihar and Orissa.

v.

Jug Sah Muni Lal Sah — Assessee.

Misc. J. C. No. 23 of 1938, Decided on 24th August 1939, by Commissioner of Income-tax, Bihar and Orissa, forwarded on 7th April 1938.

Income-tax Act (11 of 1922), S. 13—Income-tax authorities cannot change mode of assessment once adopted by them — Income-tax Officer to consider general method of accounting employed by assessee with respect to loans disclosed and not system to be employed by him in respect of particular loan.

It is open to the Income-tax authorities in order to determine the assessable income either to adopt the cash system or the accrual basis. But having once elected to adopt a particular mode of taxation, they cannot be allowed to change their ground and adopt a different mode whenever it suits them to do so. [P 241 C 1]

What the law requires the Income-tax Officer to see is not a system of account to be kept by the assessee in respect of a particular loan which may have been omitted in that account, but the system of accounting which the assessee regularly employs for his own purposes with respect to all the loans which he discloses. If any loans are deliberately left out from the account kept regularly by the assessee, then it is open to the Income-tax Department to disbelieve the accounts and proceed in any way they choose by acting under the proviso to Sec. 13 but on exercising a judicial discretion : *A I R 1938 P C 1, Rel. on.* [P 241 C 2; P 242 C 1]

S. M. Gupta — *for Income-tax Department.*

Sir Sultan Ahmed, Vishnudeva Narayan and Prem Lall — *for Assessee.*

Manohar Lall J. — This is a reference by the Commissioner of Income-tax of Bihar asking for the opinion of this Court on the questions which have been printed at p. 24. These questions are :

(i) Whether on a proper construction of S. 13, the sum of Rs. 90,000 being part of the interest in respect of the three loans to Raja Muhammad Yakub of Parsauni included in the amount realized under the decree executed in the accounting year 1340 Fasli could legally be assessed in 1934-35.

(ii) Whether the interest of Rs. 90,000 referred to escaped assessment in 1934-35 within the meaning of Sec. 34 and could be assessed under that Section.

The questions as framed are somewhat confused. The real question which arises in the present case is whether the sum of Rs. 90,000 or part thereof can be assessed as being the income of the previous year under the provisions of S. 34, Income-tax Act. The facts which have been stated by the Commissioner to determine these two questions are these : On 10th September 1915, the Raja of Parsauni executed a mortgage bond for Rs. 87,500 in favour of the assessee. The annual interest payable under the terms of the bond was Rs. 8750. On 5th August 1919, the assessee took another mortgage from the Raja of Parsauni for a sum of Rs. 10,000. Finally on 14th April 1921, the assessee advanced a sum of Rs. 2500 on the security of a mortgage executed by the Raja of Parsauni, the rate of interest being the same. The assessee was being assessed on his money-lending transactions from some time before the year 1921-22, but the records of these years are not available. It is however clear that the interests on these three loans, which I have just mentioned, were never included in any of the assessments made prior to 1924-25. In the year 1924, the Income-tax Officer discovered for the first time the existence of the first loan of Rs. 87,500, that is, the loan on the mortgage bond of September

1915. Having come to know of the existence of that loan, he must have known that no interest on this loan had ever been received by the assessee as this is the common case of the parties before us.

The Income-tax Officer however from the year 1924 onwards proceeded to add to the assessable income of the assessee a sum of Rs. 8750 every year calculating this amount not on the basis of what the assessee actually received but on the basis of the amount of the interest accruing to the assessee from the year 1924 onwards. The assessment was persisted in this way for a period of eleven years, namely up to 1935, with the result that the assessee was actually taxed on a sum of Rs. 96,250 which was the calculation made on the accrued basis for the years 1924-35. In the year 1935 a fresh discovery was made by the Income-tax Officer in this way: The assessee instituted a suit some time before 1929 to recover his dues on all the three mortgages of 1915, 1919 and 1921. On 5th April 1929, a preliminary decree was passed in favour of the assessee for a reduced amount of Rs. 3,71,000 consolidating his aggregate dues, i. e., principal and interest on all the three documents. The final decree was passed some time later for a sum of Rs. 4,00,000 odd. In execution of this decree, the property of the mortgagors was put to sale, the sale was confirmed on 16th December 1932, which falls within the previous years of the assessee, that is, 1340 Fasli. The assessee thus realized in the shape of property a sum of Rs. 3,06,590. It will be seen that even the amount due on the first bond which we are told had swelled up to Rs. 3,40,000 on the date of the suit was not realized in full. It may be open to argument whether the amount realized should be spread over the three bonds of 1915, 1919 and 1921 in the proportion of the liabilities under those bonds, but that question has not been agitated either before the Income-tax Officers or before us.

It is assumed, to answer the questions raised, that the amount realized in 1340 Fasli went to pay in part the amount due under the first bond of 1915. The Income-tax Officer had assessed the assessee for the previous year 1340 on the earlier basis adopted by him for 11 years, namely by including in the assessable income a sum of Rs. 8750 in entire ignorance of the fact that in that year the total amount due on the bond of 1915 had been realized almost in full. This assessment was made on 30th January 1935, in the financial year ending 31st March 1935. Within one year of the end of that year, namely on 10th June 1936, the Income-tax Officer started proceedings under S. 34, Income-tax Act to recover the income which had escaped assessment, namely the portion of the interest which in the view of the Income-tax Officer had escaped assessment on 30th January 1935. The Income-tax Officer overruled the contention of the assessee and held that he was liable to be taxed upon the total interest which had accrued due on the bond of 1915 and been realized in 1340 Fasli, namely Rs. 1,91,000 after subtracting from it the amount of Rs. 96,250 which had already suffered taxation during the 11 years. In other words, he assessed the assessee on this escaped income at a figure of Rs. 95,750. The matter was taken up in appeal before the Assistant Commissioner of Income-tax who by his order dated 21st December 1936, reduced the assessable income on this head by a sum of about Rs. 5000, which we are told was in the nature of additional law expenses which were allowed by the appellate authority, thereby fixing the assessable figure at a sum of Rs. 90,345. The questions formulated before us invite a decision of the contention raised that the assessee is not liable to be taxed upon this amount at all.

As I stated above, the questions have been framed in a somewhat confused manner. The real question which arises for decision is whether any income has escaped assessment so that the assessee can be caught by the provisions of S. 34, Income-tax Act; and if so, how much. It is agreed before us, and indeed it is obvious, that some income by way of interest has escaped assessment. The Income-tax Officer never knew of the existence of the situation that the assessee had realized interest by the sale of the properties on 16th December 1932 and that therefore the assessee was liable to be taxed upon a higher figure than that adopted by him on the old accrued basis, namely a sum of Rs. 8750. In the circumstances whether the view taken by the Lahore High Court in 8 I T C 413[1] or by the Rangoon High Court in 9 I T C 313[2]

1. Madan Mohan Lal v. Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, (1935) 22 A I R Lah 742 = 158 I C 718=16 Lah 937=38 P L R 52=8 I T C 413 (F B).
2. Dey Brothers v. Commissioner of Income-tax, Burma, (1936) 23 A I R Rang 219=165 I C 3 =14 Rang 228=9 I T C 313 (S B).

is correct, it is clear to my mind that some income has escaped assessment within the meaning of the language of S. 34.

The question, which really falls to be determined, is whether the income which escaped assessment was Rs. 90,345 as taken finally by the Income-tax Officers or a lesser sum and also when did it or a part thereof escape assessment. Sir Sultan Ahmed appearing on behalf of the assessee strongly contends that no income escaped assessment in the year in which it was sought to be assessed by the Income-tax authorities, but that whatever income escaped, escaped assessment earlier than 1924. Mr. Gupta on behalf of the Income-tax Department on the other hand contends that as the assessee has not adopted any system whatsoever which may be said to be a system regularly employed in respect of his accounts, it was open to the Income-tax Department to consider the whole amount, which was admittedly received by the assessee, as being assessable on the cash basis because he argues that under S. 13, Income-tax Act, it is open to the Income-tax authorities to adopt any basis which they may choose under the proviso to that Section in order to determine the assessable income. In my opinion S. 13 has no application whatsoever to the facts of the present case. The Income-tax Department has agreed that so far as the loan of 1915 is concerned, the assessee will be taxed always on the accrued system.

In 1924 when the assessable income was computed by making an addition of Rs. 8750 on the accrued basis income escaped assessment for the years prior to 1924. It was open to the department in that year either to adopt the cash system by which they could not have been able to tax any portion of the income from 1924 to 1935 or to have adopted, as they did, the accrual basis; but having adopted the first system or the second, they cannot be allowed to change their ground whenever it suits them to do so. It seems to me, therefore, that upon the facts which have been sent up by the Commissioner of Income-tax the conclusion which follows in law is that the assessee is liable to be taxed upon the sum of Rs. 90,345 after deducting from it the amount upon which he ought to have paid the tax for the years anterior to 1924 either in 1924 or within one year of the end of that financial year. This statement of the case has not worked out the figures on the accrual basis for the period from September 1915 to 1924, the year when the Income-tax Department first assessed the assessee for the sum of Rs. 8750. That figure will be worked out by the Commissioner on receiving a copy of our order and the assessment will be reduced accordingly. The Commissioner will give a refund to the assessee of that overpaid amount so determined together with interest at such rate as he may think fit to allow under the proviso to S. 66 (7). I wish to say a few words as to the argument of the learned standing counsel that no system has been regularly employed by the assessee. The Commissioner of Income-tax in para. 5 says at one place that it is clear that no method of accounting was employed by the assessee in respect of the three loans referred to. At page 25 he again says that when

> the Income-tax Officer went to make the reassessment for 1934-35, he found that no method of accounting had been regularly employed by the assessee in respect of the interest on the three loans referred to.

In my opinion the learned Commissioner was entirely in error in approaching the case in the way he did. What the law requires the Income-tax Officer to see is not a system of account to be kept by the assessee in respect of a particular loan which may have been omitted in that account, but the system of accounting which the assessee regularly employs for his own purposes with respect to all the loans which he discloses. If any loans are deliberately left out from the account kept regularly by the assessee, then it is open to the Income-tax Department to disbelieve the accounts and to proceed in any way they choose by acting under the proviso but on exercising a judicial discretion. This matter has been recently dealt with by their Lordships of the Judicial Committee of the Privy Council in 65 I A 1[3] which now authoritatively decides how the terms of S. 13 are to be employed by the Income-tax Department. For these reasons I answer the questions proposed in the following way : The first question does not arise for our decision as I have held that S. 13 has no application whatsoever to the facts of the present case. The second question is answered thus — Such portion only of the interest of Rupees 90,345 can be assessed now as escaped assessment within the meaning of S. 34 as

3. Commissioner of Income-tax, Bombay v. Sarangpur Cotton Manufacturing Co. Ltd., of Ahmedabad, (1938) 25 AIR P C 1=172 I C 1= 65 I A 1= I L R (1938) Bom 239 = 32 S L R 225 (PC).

remains after making a deduction for the amount of interest calculated on accrued basis from September 1915 to 1924, as has been pointed out in the course of the observations made by me above. In the circumstances, there will be no order for costs in this Court.

Fazl Ali J. — It is common ground that though in the year 1924-25 the assessee did not receive any interest on the mortgage bond for Rs. 87,500, yet the Income-tax authorities proceeded to tax them as if they had actually received a sum of Rs. 8750, that being the yearly interest payable by the mortgagor under the bond. The question is whether the Income-tax authorities having once elected to adopt this mode of taxation, which was undoubtedly open to them, can now turn round and adopt a totally different mode. In my opinion, they cannot do so and the whole matter can be tested in this way. Let us assume that the assessee's suit on the basis of the mortgage bond had not succeeded but failed either on the ground that the mortgage bond had not been duly executed or on the ground that it had not been properly attested, or that a decree had been passed for a smaller sum than that for which it was actually passed. The Income-tax authorities could not then be made to refund either the whole or any part of the amount which they had realized during the last eleven years. Can they now, in spite of the fact that they have taxed the assessee so far, on what they call mercantile basis, turn round and tax him now on the basis of the income actually accrued especially as the interest which the assessees have now recovered includes interest prior to 1924-25. The Income-tax authorities have already recovered taxed interest which was payable to the assessees between 1924-25 and the date of the decree. What they are now taxing is the interest which was due to them prior to 1924-25. In my opinion the clear implication of the step taken by them when they taxed for the year 1924-25 is that the so-called escaped income had already escaped prior to 1924-25. As their case is that the assessees had concealed their mortgage bond until they discovered it at the time of assessing them for 1924-25, they might have proceeded under S. 34 at that time and recovered from them whatever they could recover. S. 34 is quite clear and does not enable the department to tax escaped income more than a year after it ought to have been taxed. For these reasons I am of the same opinion as my learned brother and concur in the answer proposed by him to the reference.

G.N./R.K. *Reference answered.*

A. I. R. 1940 Patna 242

HARRIES C. J.

Bathulu Bhagirathi — Petitioner.

v.

Bathulu Lakshmi Devi—Opposite Party.

Criminal Revn. No. 9 of 1938, Decided on 13th December 1938, from order of Joint Magistrate, Berhampur, D/- 30th October 1937.

(a) Criminal P. C. (1898), S. 488—Court can award maintenance on wife's uncorroborated evidence.

In the case of an application for maintenance by wife under S. 488, the Court is entitled to act, if it thinks fit, upon the evidence of the wife. The law does not require corroboration in cases of this kind, though, such corroboration is always desirable.

[P 243 C 1]

(b) Criminal P. C. (1898), S. 488 — Wife is entitled to live apart on ground that ill-treatment is likely to continue if she returns to her husband — It is no defence for husband to say that he is prepared to take his wife back.

In a claim for maintenance by wife it is no defence for a husband to say that he is prepared to take his wife back if the facts show that the wife has reasonable cause for fearing to return to the husband's home. If a wife has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband. In such a case, the husband who is the guilty party, must maintain his wife. Causing a wife to leave the protection of the husband by ill-treatment is tantamount to driving the wife deliberately from home.

[P 243 C 1]

H. Mahapatra — *for Petitioner.*

P. C. Chatterji — *for Opposite Party.*

Order. — This is a petition for revision of an order passed by the learned Joint Magistrate of Berhampore granting the opposite party a monthly maintenance of Rs. 8. The petitioner and the opposite party are husband and wife. According to the opposite party, the petitioner has for a long period of time ill-treated her: consequently, she has been forced to leave her husband's house and leave apart from him. She alleges that her husband has refused to maintain her and accordingly she made an application to the learned Magistrate for her maintenance. The defence was that the husband had not ill-treated his wife and that he had always been and was ready and willing to take his wife back to his house. That there had been friction between husband and wife is clear, because on a previous occasion proceedings for maintenance had been brought. Those proceedings were not pressed, because

the husband took his wife back. However, five or six days after that the wife alleges that she was compelled to leave the house by reason of ill-treatment.

The only evidence of ill-treatment was the evidence of the wife herself. The learned Magistrate has accepted this evidence and in my view rightly. The learned Magistrate has considered the surrounding circumstances and has come to the conclusion that the probabilities are all in favour of the version given by the wife. The wife unfortunately suffers from fits and it is clear that the husband wishes to marry a second wife. This, however, he will not do without the consent of the opposite party, and it is clear that she will not give her consent. In such circumstances, it is clear that considerable ill-feeling must have existed between the petitioner and his wife. The wife also stated that after the previous proceedings had been amicably settled and she had returned home with her husband, the latter demanded his wife's gold ornaments. This he had no right to do, and the wife says that she refused to give them. There appears to be no doubt that such a demand was made, and I can well believe that upon the wife's refusal the relations between the parties became more strained. In those circumstances the wife's evidence is far more likely to be true than the evidence of the husband. In any event the trial Court was entitled to act if it thought fit upon the evidence of the wife. The law does not require corroboration in cases of this kind, though, of course, such corroboration is always desirable. In the present case the circumstances strongly support the wife's testimony and in my view the learned Magistrate was right in accepting it.

In a claim for maintenance it is no defence for a husband to say that he is prepared to take his wife back if the facts show that the wife has reasonable cause for fearing to return to the husband's home. If a wife has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband. In such a case the husband, who is the guilty party, must maintain his wife. Causing a wife to leave the protection of the husband by ill-treatment is tantamount to driving the wife deliberately from the home. In the present case the wife was, in my opinion, justified in refusing to return to her husband. It has been further argued that the amount of maintenance is excessive. The wife stated that her husband's income was Rs. 20 or more, whereas the husband stated that it was Rs. 10. The learned Magistrate was entitled to act upon the wife's evidence and to assess the maintenance of herself and that of her child at Rs. 8. If the financial circumstances of the husband alter for better or for worse, the amount of maintenance can be increased or decreased by application to the Court. For these reasons I see no ground for interfering with the order passed and consequently this petition fails and is dismissed. The petitioner must pay the costs of the opposite party, which I assess at one gold mohur.

G.N./R.K. *Petition dismissed.*

A. I. R. 1940 Patna 243

HARRIES C. J. AND ROWLAND J.

Mahani Chinera — *Auction-purchaser* — Appellant.

v.

Mir Ramjan Ali, Petitioner and others — Respondents.

Appeal No. 9 of 1936, Decided on 6th December 1938, from appellate order of Dist. Judge, Cuttack, D/- 31st December 1935.

Landlord and Tenant — Rent decree against recorded tenants—Representatives of deceased tenant not impleaded—Decree against deceased tenant being nullity cannot be executed against his legal representatives.

Where the landlord obtains a decree for rent against the recorded tenants one of whom is dead and fails to implead the legal representatives of the tenant who was dead at the time of the institution of the suit, the decree being against a dead person is a nullity and therefore cannot be executed against his legal representatives : *AIR 1926 Pat 504 and A I R 1927 Pat 426, Rel. on; A I R 1924 Pat 339, Expl. and Disting.* [P 244 C 1, 2 ; P 245 C 1]

B. Mahapatra — *for Appellant.*

L. Mahanty — *for Respondents.*

Harries C. J.—This is a second appeal from an order passed by the learned District Judge of Cuttack declaring that the right, title and interest of the present respondent was not affected by a sale which had taken place in execution of a rent decree. The present appellant obtained a decree for rent against a large number of persons who held a mokadami tenure under him. This decree was obtained on 8th February 1934 and amongst the array of judgment-debtors appeared Kasiman Bibi, the mother of the present respondent. It is an admitted fact that this woman died in 1931 and there can be no doubt that the present respondent is her successor-in-title. The present

respondent preferred an objection contending that his interest in the property could not be sold in execution of the rent decree as he had not been impleaded as a defendant. On behalf of the landlord, it was contended that as he had no notice of the death of Kasiman Bibi he was not bound to implead the respondent. In short, the landlord's contention was that as he had impleaded all the recorded tenants, the decree which he had obtained could be validly executed against the interests of every one concerned in the tenure. The learned Deputy Collector, overruled the present respondent's objection and held that the sale in execution of the decree passed the interest of all the tenure-holders to the purchaser. On appeal the learned District Judge came to a contrary conclusion. He held that the sale did not affect the right, title and interest of the present respondent as he had not been made a party to the proceedings.

In my view the case is concluded by authority of this Court which is binding upon us. In 94 I C 28[1] a Bench of this Court held that a decree passed against a dead person is a nullity. But the question whether the whole decree is a nullity depended upon the question whether the failure on the part of the plaintiff to bring the representatives-in-interest of the deceased on the record affected his right to proceed with the suit. Applying these principles they held that as a suit for rent against some of several joint tenants was maintainable, a decree for rent so obtained was a nullity only against the dead defendants or their representatives but was not a nullity against the living joint defendants. They however held that such a decree could not be executed as a decree for rent but only as a simple money decree. Therefore at an execution sale the entire holding did not pass and the interests of the defendants who were dead at the institution of the suit, remained unaffected. The facts of this case are very similar to the facts in the case now before the Court, and it appears to me that the reasoning of the Bench in that case applies with equal force to the facts of the present case. The case to which I have referred was followed by another Bench of this Court in 7 Pat 353[2] in which it was held that a suit for rent against some only of the whole body of recorded tenants was maintainable and that the landlord could obtain a money decree for the whole amount of rent against one or more of such joint tenants whose liability for rent was joint and several. In this case the position which arises in the present case was considered and it was clearly laid down that if a suit is instituted against the recorded tenants some of whom were dead a decree in the nature of a money decree could be obtained for the whole of the rent against the surviving tenants. In execution of such a decree the interest of the representatives of the deceased tenants could not be affected. In my view these two cases conclude the matter. In the present case the decree against Kasiman Bibi is a complete nullity.

It has been contended that as her name was still recorded as a tenant the decree must be regarded as a decree which can be executed with respect to the interest held by her representatives. In my view, however as the lady was dead the decree has no effect whatsoever upon the interest which she held. Reliance however was placed upon a decision of this Court, namely A I R 1924 Pat 339.[3] At first sight this case appears to support the present contention of the appellant; but upon closer examination it is clear that it has no application whatsoever to the facts of the present case. In that case proceedings for rent had been brought against a number of tenants, two of whom were dead at the date of the institution of the suit. A decree was obtained and the property was put up for sale. No objection was made on behalf of the representatives of the two deceased tenants; but an objection was preferred on behalf of one of the tenants who was living. This Court held that he could not object to the sale of his interest in the property, and it is clear from the judgment that the Court was not considering the question as to whether or not the representatives of the deceased tenants could have objected. In fact, there are indications in the judgment that the Court would have come to a different conclusion had the objections been made not by one of the judgment-debtors but by one of the representatives of the deceased tenants. The case in A I R 1924 Pat 339[3] must be confined to its particular facts and in my view does not in any way conflict with the

1. Kesho Prasad Singh v. Shamanandan Rai, (1926) 13 A I R Pat 504 = 94 I C 28 = 5 Pat 233=7 P L T 628.
2. Raghunath Das v. Baleswar Prasad, (1927) 14 A I R Pat 426=105 I C 484=9 P L T 137=7 Pat 353.
3. Jagdeo Nath Saha Deo v. Pratap Udainath Sahi Deo, (1924) 11 AIR Pat 339=75 IC 321.

two decisions to which I have previously referred.

The decisions of this Court to which reference has been made are supported by decisions of the Calcutta High Court; but in my view as we are bound by these two previous decisions, it is unnecessary to consider decisions of any other Court. For the reasons which I have given I hold that the learned Judge was right in holding that the interest of the present respondent was not affected in any way by the sale which took place in execution of the decree. I would therefore dismiss this appeal with costs.

Rowland J. — I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 245

MOHAMAD NOOR AND DHAVLE JJ.

Chaudhuri Janardan Parida and others — *Plaintiffs* — Appellants.

v.

Prandhan Das — *Defendant* — Respondent.

Appeal No. 153 of 1937, Decided on 20th February 1939, from appellate decree of Dist. Judge, Cuttack, D/- 21st August 1937.

(a) Second appeal — Finding of fact — Fact that document was tampered with is finding of fact.

The fact that a document was tampered with is a finding of fact and is binding in second appeal. [P 246 C 1]

(b) Evidence Act (1872), S. 91 — Terms of contract reduced to writing at same time when it was made — Oral evidence is not admissible to prove contract.

Where the terms of the contract were reduced to writing at the same time when it was made, the document only, or if permissible, a secondary evidence of its contents, can be the only evidence available to the parties to prove the contract and oral evidence is not admissible. [P 246 C 2]

(c) Deed—Alteration — Conditional promise to pay contained in document made unconditional promise to pay by cutting portion of document—Party responsible for such alteration cannot recover on such document.

When there is a document and under the law no other evidence other than the document itself or secondary evidence of its contents can be used to prove a contract, the document, if available must be produced before the Court or a case must be made out for admitting secondary evidence. But if the plaintiff who sues upon that document has made alternations, interpolations in it, he has not placed the original document before the Court as the document has lost its identity by having been altered in the meantime, and as he himself has been responsible for destroying its identity, he cannot in justice and equity be allowed to adduce secondary evidence of its contents. Hence, where the document as it originally stood was a conditional promise to pay and by cutting off a portion the party has made it an unconditional promise to pay, that party is not entitled to recover on such document : *7 Cal 616 and 33 Cal 812, Rel. on.* [P 246 C 2; P 247 C 1]

Subba Rao — *for Appellants.*

C. M. Acharya, B. Mahapatra and B. K. Das — *for Respondents.*

Judgment. — This second appeal arises out of a suit for recovery of money which has been dismissed by both the Courts below. The case of the plaintiffs as set out in the plaint was that they sold to the defendant a certain property for a consideration of Rs. 4000 which was mentioned in the sale deed itself. It was alleged by the plaintiffs that out of the consideration Rs. 1500 remained unpaid and was to be paid to a creditor of the plaintiffs', Maguni, who held a mortgage of some of their properties. It was alleged that the defendant did not pay the money to the creditor, who brought a suit. The plaintiffs further alleged that out of the sum of Rs. 1500 so due the defendant paid to them Rs. 305 and therefore the suit was for Rs. 1195 only and interest thereon. The defence was that the entire consideration of Rs. 4000 was paid up. The defendant however admitted that there was an independent agreement between him and the plaintiffs to the effect that the plaintiffs would make over to him the village and the settlement papers of the properties sold and would help him in the realisation of the arrears of rent of the period prior to the sale. These arrears were assigned by the plaintiffs to the defendant by the sale deed itself. The defendant admitted having paid Rs. 305 to the plaintiffs, but he said, it was a part payment as the plaintiffs had by that time done something towards carrying out the promise made by them, but as the plaintiffs failed to carry out their part of the promise nothing was due to them.

The Courts below have held that the plaintiffs' story that Rs. 1500 remained unpaid out of the consideration of Rs. 4000 was false and that the entire consideration as mentioned in the deed had been paid up. They also held that there was an independent agreement between the plaintiffs and the defendant for the payment of Rs. 1500 in consideration of certain things to be done by them which they did. Both of them however have agreed in dismissing the suit on three grounds, one, that the plaintiffs could not succeed on a case not made out in the plaint, second, that the documents relied upon by the plaintiffs were tampered with and therefore the plaintiffs could not

use them to support their claim and, the third, that the suit was barred. The plaintiffs have preferred this second appeal. The plaintiffs produced two documents which have been marked as Exs. 1 and 2. The former is a letter addressed by the defendant to Mr. S. N. Das Gupta, an advocate of this Court, in which he had promised that he would bring the mortgage bond dated 8th August 1917 from Hrudananda Sahu son of Maguni and would make it over to him, that is, the advocate, and that if he did not do so he would pay Rs. 1500. The document as it stands makes it an unconditional bond but both the Courts below have held that there was a condition attached to it by way of post script which has been torn off by the plaintiffs.

The next document is Ex. 2 which is supposed to be an adjusted account which shows that out of Rs. 1500 Rs. 205 was paid before and on the day when it was written, that is, 20th January 1933 another Rs. 100 was paid and the balance left was Rs. 1195. Here again, both the Courts below have found that at the end of the account the words "Baki Debu" which mean "I shall pay the balance" have been added in order to make it a fresh promise to pay. In our opinion the view taken by the Courts below is correct and there is no merit in this appeal. First of all, as pointed out by the Courts below, the plaintiffs' suit was that Rs. 1500 was left unpaid out of the consideration of Rs. 4000. They could not in the Courts below nor can they now rely upon an independent agreement and put forward a case quite different from the one made out in the plaint. The learned advocate, Mr. Subba Rao, has argued that from the very beginning the plaintiffs have been relying upon an independent contract, but a reading of the plaint makes it perfectly clear that their case was that the balance was left out of the consideration of Rs. 4000. The suit must be dismissed on this simple ground only.

As, however, Mr. Rao has argued the other points also, we would like to give our findings upon them. The fact that the document (Ex. 1) was tampered with is a finding of fact of the Courts below and is binding upon us in second appeal. Now let us see what is the effect. This independent contract which has been admitted by the defendant and was not referred to in their plaint by the plaintiffs was admittedly embodied into a letter written by the defendant to Mr. S. N. Das Gupta. Under S. 91, Evidence Act, the plaintiffs are debarred from adducing oral evidence to prove that contract once the terms of it were embodied into writing. It is not a case in which a contract was independently made and later the defendant acknowledged it in some writing. Here the terms of the contract were reduced to writing at the same time when it was made. Therefore the document only, or if permissible, a secondary evidence of its contents, can be the only evidence available to the plaintiffs to prove their case. Now this document has been found by the Courts below to have been mutilated by the cutting off of a portion of it which embodied the conditions on which the payment was to be made. The effect of this is that the plaintiffs are not entitled to succeed. The principle has been stated in 7 Cal 616[1] at p. 619, and is as follows :

> Where a man has been wicked enough to alter a document fraudulently in this way, we do not think it consistent with equity and good conscience or with sound policy, (especially in a country like this, where forgery and fraud is so lamentably common), that he should be entitled to recover upon it.

The principle may be illustrated in another way. It is this: When there is a document and under the law no other evidence other than the document itself or secondary evidence of its contents can be used to prove a contract, the document, if available, must be produced before the Court or a case must be made out for admitting secondary evidence. But if the plaintiff who sues upon that document has made alternations, interpolations in it, he has not placed the original document before the Court as the document has lost its identity by having been altered in the meantime, and as he himself has been responsible for destroying its identity, he cannot in justice and equity be allowed to adduce secondary evidence of its contents. In 33 Cal 812[2] Rampini and Mookerjee JJ. referred to the case in (1929) 1 Sm L C 780[3] and observed :

> Any change in an instrument, which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, an alteration, and such change will invalidate the instrument against

1. Gogun Chunder Ghose v. Dhuronidhar Mundul, (1881) 7 Cal 616=9 C L R 257.
2. Gour Chandra Das v. Prasanna Kumar Chandra, (1906) 33 Cal 812=3 C L J 363=10 C W N 783.
3. Master v. Miller, (1929) 1 Sm L C 780.

all parties not consenting to the change. This is a wholesome rule founded on sound policy and may be defended on two grounds, namely first that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected and secondly that by the alteration the identity of the instrument is destroyed, and to hold one of the parties liable under such circumstances would be to make for him a contract, to which he never agreed.

Now in the present case, on the finding of facts the document as it originally stood was a conditional promise to pay. By cutting off a portion it becomes an unconditional promise to pay. Therefore the plaintiffs are not entitled to succeed. The suit is also barred by limitation. If it was an unconditional promise to pay Rs. 1500 in case the document, referred to above, was not secured from Hrudananda Sahu, son of Maguni, and no time having been fixed for bringing the document from him, a reasonable time must be allowed. The suit has however been instituted six years after the writing of the letter, viz. on 11th January 1930. The learned advocate relied upon the fact that there was an acknowledgment of the debt and payment of the principal. He referred to Ex. 2. This has also been tampered with in material particulars. Instead of it being an evidence of payment of the principal or of adjustment of accounts by adding the words "Baki Debu" it became again an unconditional promise to pay.

Mr. Subba Rao contended that the Courts below were not justified in holding that the words "Baki Debu" are forged because no such issue was raised before the trial Court. He said that the contents of this document were mentioned in the plaint and it was distinctly stated that after adjusting the accounts the defendant promised to pay the sum due to the plaintiffs. There was no specific denial of this fact in the written statement nor the defendant alleged that there was any interpolation in this paper. He therefore urged that the learned Munsif ought not to have gone into the question whether the words "Baki Debu" were added to this document. We have carefully read the written statement. In fact there was a denial by the defendant and he said that he never paid any money towards the satisfaction of the claim as put forward by the plaintiffs and that he never promised to pay anything to them. He gave a different explanation of the payment as we have said before. However the two grounds set forth above are by themselves sufficient for the dismissal of the appeal. The appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 247

HARRIES C. J. AND ROWLAND J.

Raja Brajasunder Deb — Plaintiff — Petitioner.

v.

Mani Behera and others — Defendants — Opposite Party.

Civil Revn. Nos. 57, 61 and 62 of 1937, Decided on 7th December 1938, from orders of Sub-Judge, Puri, D/- 5th May 1937.

Civil P. C. (1908), O. 1, R. 8 — Suit by cosharer in fishery estate for declaration that principal defendants namely persons following trade of fishermen and others of their caste had no right in fishery — Relief against principal defendants only for damages for fish actually caught and for injunction restraining principal defendants from further trespass can be joined with former relief.

A cosharer in a fishery estate brought a suit claiming declarations that the principal defendants namely persons following the trade of fishermen and other of their caste and calling had no right in the fishery, to recover damages from the principal defendants for fish actually caught and to have an injunction from the Court against the principal defendants restraining them from further trespass on the fisheries in the possession of the plaintiff :

Held that the plaintiff had claimed to recover damages from the principal defendants only for trespass actually committed by them. There was no reason why this relief which neither the plaintiff claimed in a representative capacity himself nor sought to enforce against the defendants in any representative capacity should not be joined with the claim against defendants in a representative capacity in respect of a declaration of right. Similarly there was no objection to the plaintiff maintaining this representative suit for a declaration along with his direct claim for an injunction against the principal defendants restraining them from further trespass. [P 248 C 2]

B. K. Ray, L. Mahanty and G. Jagati — *for Petitioner.*

B. N. Das — *for Opposite Party.*

Rowland J. — These applications arise out of three analogous suits and are against interlocutory orders passed by the Subordinate Judge. The plaintiff who is the applicant is a cosharer to the extent of seven annas odd in certain estate in which there are fisheries. The pro forma defendants are the other cosharers and the principal defendants are persons following the trade of fishermen. It is said that the principal defendants in the winter of 1935-36 from time to time made inroads on the fisheries in possession of the plaintiff and took fish therefrom; hence these suits are brought claiming declarations that the principal

defendants, and others of their caste and calling have no right in the fishery, to recover damages from the principal defendants for fish actually caught and to have an injunction from the Court against the principal defendants restraining them from further trespass on the fisheries in the possession of the plaintiff. As regards the first relief for declaration that the defendants and others had no right in the fishery, the suit was framed in accordance with O. 1, R. 8, Civil P. C., as a representative suit, the permission of the Court having been duly obtained. The principal defendants resisted the suits claiming a permanent right of fishery on a fixed rent for themselves and their castemen about eight hundred in number. They denied that the plaintiff was in possession of the fishery and they referred to a proceeding under S. 145 between themselves and some cosharers of the plaintiff in the year 1918 which had been decided in favour of the principal defendants. They raised some technical issues which they asked the Subordinate Judge to take up as preliminary issues before proceeding to hear the suits on the merits. The substantial objections were that the suit was not maintainable in view of the provisions of S. 42, Specific Relief Act, the plaintiff not being in possession and not having prayed for recovery of possession, that the court-fee paid was insufficient and that damages could not lawfully be claimed in a representative suit.

The Subordinate Judge, after hearing the parties but without taking any evidence, has withdrawn the permission granted under O. 1, R. 8 given to the plaintiff to sue the principal defendants as representatives of themselves and others. He held that a higher court-fee was payable than that which has been paid and called on the plaintiff to pay it. He held that in order to make the suit maintainable the plaintiff must amend his plaint by adding prayers for a declaration of his title and for recovering possession. He gave the plaintiff a stated time for compliance with these directions. The court-fee called for has been paid and we are not disposed to interfere with the order of the Subordinate Judge in so far as it refers to this matter. The plaintiff had valued the subject-matter of the suit for purposes of jurisdiction at Rs. 11,000 but the relief at Rs. 3400. The value of the suit for purposes of jurisdiction and for purposes of court-fee must be the same, S. 8, Suits Valuation Act.

As regards the withdrawal of permission to maintain a representative suit under O. 1, R. 8, the Subordinate Judge has fallen into error and his order, in my opinion, cannot be supported. He has referred to a case in which plaintiffs themselves suing as representatives sought to join with their claim for a declaration of their right a claim to recover damages. There would be obvious difficulties in giving or executing a decree of this kind in favour of persons not named in the proceedings. A similar position might arise if in the present suit the plaintiff had sought to recover damages not only from the principal defendants but from all the other members of the class of fishermen whom they were impleaded to represent. But this is not the case. The plaintiff has claimed to recover damages from the principal defendants only for trespass actually committed by them. There is no reason why this relief which neither the plaintiff claims in a representative capacity himself nor seeks to enforce against the defendants in any representative capacity should not be joined with the claim against defendants in a representative capacity in respect of a declaration of right. Similarly there is no objection to the plaintiff maintaining this representative suit for a declaration along with his direct claim for an injunction against the principal defendants restraining them from further trespass. Therefore, the grounds on which the Subordinate Judge withdrew the permission granted under O. 1, R. 8, are not sound, and so far as this matter is concerned, I would accede to the application and set aside this part of the order of the Subordinate Judge. The permission granted under O. 1, R. 8 would be deemed to stand good.

Then as to the finding that the suit is not maintainable under S. 42, Specific Relief Act, the Subordinate Judge seems to have misunderstood the position. In the plaint it was alleged that in spite of the fishery having had a somewhat checkered history in the past it was at present in the possession of the plaintiff. If that was so, then S. 42 was no bar to the suit. The defendants no doubt alleged something different and if it was found as a result of hearing on evidence that the plaintiff was out of possession it might be that the result at the conclusion of the suit would be that S. 42 came into operation to bar the suit. But if the plaintiff chooses to take his chance of being able to prove the facts asserted by him in the plaint, it is not for the Subordi-

nate Judge at the preliminary stage to anticipate what the findings of fact in the suit and are likely to be or to pass any order on the plaintiff for amendment of the plaint.

As regards the prayer for declaration of plaintiff's title which the Subordinate Judge asked the plaintiff to insert in his plaint, this hardly seems to arise as the title of the plaintiff as proprietor does not seem to be at all controverted, and the order calling on the plaintiff to amend the plaint by inserting this prayer was uncalled for. To the above extent I would allow the applications and direct the Subordinate Judge to proceed with the hearing of the suit, parties bearing their own costs in each of these applications.

Harries C. J. — I agree.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 249

FAZL ALI AND MANOHAR LALL JJ.

Puni Sethi and others — Petitioners.

v.

Gangadhar Patro and others —

Opposite Party.

Civil Revn. No. 21 of 1937, Decided on 18th April 1939, from decision of Collector, Balasore, D/- 4th March 1937.

Orissa Tenancy Act (2 of 1913), S. 204— Order of Collector in appeal in case where subject-matter is valued at less than Rs. 100 and to which cl. 3 of S. 204 applies is not revisable by High Court.

High Court has no power to revise the order of the Collector passed in appeal in a case in which the subject-matter is valued at less than Rs. 100 and to which the provisions of cl. 3 of S. 204 apply as in these circumstances the Collector cannot be held to be subordinate to High Court.

[P 250 C 2]

L. N. Das — *for Petitioners.*

G. Dhal — *for Opposite Party.*

Manohar Lall J. — This is an application in revision on behalf of the defendants against an order of the Collector of Balasore dated 4th March 1937 by which he in appeal reversed the decision of the Rent Suit Deputy Collector of Bhadrak dated 21st December 1936 by which the suit of the respondents, which was instituted for recovery of certain sum said to be due to the plaintiffs for rents, was dismissed. The plaintiffs' case in short was that for two years, 1342 and 1343F, the defendants had taken 2.53 acres of land belonging to the plaintiffs in village Bahudarada, pergana Senaut on produce rent under an oral settlement in Magh 1342; the defendants did not pay the produce rent but promised to send Rs. 37-10-0 from Calcutta for 1342 Fasli but failed to carry out the promise. In the year 1343 there was again a failure to pay the dues to the plaintiffs and when the crop of that year was harvested the plaintiff stopped its removal from the field with the result that the defendant and the plaintiff agreed to have a punchayat. The punchayat settled that the defendant should pay Rs. 35 to the plaintiff for 1342 but it did not decide anything regarding the crop of 1343. It was alleged that the defendant paid Rs. 26 to the plaintiff and removed the crop, but as the dues of the plaintiff remained unsatisfied he instituted the suit giving rise to the present proceedings. The defendant denied all the allegations of the plaintiff and asserted that he never took any oral settlement of the land in suit nor was he ever in possession thereof during the years in suit.

The trial Court held that there was no satisfactory evidence regarding the allegation of the plaintiff that the defendant had taken an oral settlement of the land, that he never promised to send Rs. 37-10-0 from Calcutta, that the story of the panchayat was a myth and that there was no evidence which could be relied upon to prove the payment of Rs. 26. In short he held that there was no satisfactory evidence regarding any of the allegations of the plaintiff. As to the possession of the land by the defendant for the years in suit the learned Deputy Collector held that he was unable to accept the case of the plaintiff that the defendant had possession of the land as a tenant. The plaintiff then appealed to the learned Collector who pointed out that the only issue in the case was whether the relationship of landlord and tenant existed between the plaintiff and defendant. Upon a careful perusal of the evidence upon the record he disagreed with the findings of the trial Court and held that

> nothing has been shown on the record of the evidence to justify the conclusion that the alleged contract on the strength of which the defendants cultivated the land for two years was a myth.

He therefore decreed the suit of the plaintiff as claimed. The defendants have moved this Court to exercise our powers of revision. It is contended by the learned Advocate for the respondents that this Court has no jurisdiction to interfere with the order of the learned Collector by reason of the provisions of S. 204, Orissa Tenancy Act of 1913. He contends that the order

sought to be revised is not an order which decides any question whether rent is payable for the land or not nor does it decide a question relating to title to land or some interest therein as between parties to the suit and that as the subject-matter of the claim in dispute is admittedly below Rs. 100 in value the appeal rightly lay to the Collector, that no further revision to the High Court is provided by the Section against the order of the Collector passed in such cases. Reliance was placed by the learned advocate on the case in 35 Cal 547[1] and on the case in 39 I C 748=1 Pat L W 548.[2] But these cases are of no assistance in deciding the question before us as they depended upon the construction of S. 153, Ben. Ten. Act, where the words are not "as between parties to the suit" as in the corresponding Section of the Orissa Tenancy Act but "as between parties having conflicting claims thereto." The case which is nearer to the present case is 38 I C 667.[3] In that case the suit had been instituted by the plaintiff, who was the purchaser at a revenue sale of a portion of touzi No. 2837 to recover from the defendant, who was the proprietor of a four anna share in a sarbarakari tenure included in that touzi, arrears of rent. The defendants had pleaded that no rent was payable by them on the ground that by an arrangement with the plaintiff's predecessor in interest they never paid any rent for this tenure. On these facts the issue framed was "Does the relationship of landlord and tenant exist between the parties?" The learned Judges of the High Court pointed out that upon the pleading the issue which arose was whether this sarbarakari tenure is liable to pay any rent or not and therefore the Collector had no jurisdiction to entertain an appeal against the decision of the Deputy Collector as cl. 2 of S. 204, Orissa Tenancy Act, was clear that where a Deputy Collector decides that the rent is payable for land or not an appeal under sub-s. (3) ought to have been preferred to the District Judge and not to the Collector and, therefore, they held that the plaintiff having failed to come to the District Judge the Collector had no jurisdiction to entertain the appeal and set aside the judgment and decree passed by the Deputy Collector and directed that the memorandum of appeal should be returned by the Collector for presentation to the District Judge.

In the present case the learned Deputy Collector or the Collector has not decided whether rent is payable for the land or not nor does the Collector by the order under revision or the Deputy Collector decide any question relating to title to land or any interest therein. The only matter which the Collector in disagreement with the Deputy Collector has decided is that the defendant was in possession of the land upon the oral contract for two years, the title of the plaintiff to the land was never in controversy nor was the interest of the defendant in the land ever put in issue. The question which now arises for decision is whether this Court has any power to revise the order of the Collector passed in appeal in case in which the subject-matter is valued at less than Rs. 100 and to which the provisions of cl. 3 of S. 204 of the Orissa Tenancy Act apply. In my opinion the Collector in these circumstances cannot be held to be subordinate to this Court. He is amenable to the jurisdiction of this Court if he decides any question mentioned in cl. 2 when his decision becomes appealable to the District Judge or High Court. That situation does not arise in the present case. But the learned Advocate for the petitioner argued that this Court always has the power to revise orders of Subordinate Courts and as the Collector is sometimes subordinate to this Court when deciding cases of the character now before us but beyond Rupees 100, he must be taken to be subordinate to this Court for all purposes. I do not agree with this contention. If this argument were correct we could revise under our powers under S. 115, Civil P. C., an order of the Collector passed under the Excise Act or Embankment Act for instance. But this obviously cannot be done. In each case the Court must examine what is the nature of the dispute that the Deputy Collector or the Collector is deciding under the Orissa Tenancy Act and the result of the examination will decide, after applying the provisions of the various clauses of S. 204, of the Orissa Tenancy Act, whether in that case this Court can exercise its powers of revision. Applying these considerations to the present case I am clearly of the opinion that this Court has no power to interfere in revision with the order passed by the Collector, who was competent to entertain the

1. Shilabati Devi v. Roderigues, (1908) 35 Cal 547=12 C W N 448.
2. Ganga Singh v. Raghunandan Das, (1916) 3 A I R Pat 261=39 I C 748=1 Pat L W 548.
3. Gopi Biswal v. Ramchandra Sahu, (1916) 3 A I R Pat 257=38 I C 667=2 Pat L J 46.

appeal and decide it on its merits. I would dismiss this application with costs. Hearing fee one gold mohur. The rule is discharged.

Fazl Ali J.—I agree.

D.S./R.K. *Rule discharged.*

A. I. R. 1940 Patna 251

HARRIES C. J. AND ROWLAND J.

Dula Bibi—Petitioner—Appellant.

v.

Parmananda Das — Opposite Party — Respondent.

Appeal No. 29 of 1936, Decided on 9th December 1938, from original order of Sub-Judge, Cuttack, D/- 13th August 1936.

Res Judicata—Constructive—Extent of applicability to execution proceeding.

The doctrine of constructive res judicata is applicable to execution proceedings to this extent, that where a judgment-debtor fails to raise all his objections to the application in execution made by the decree-holder which he might and ought to have raised and the application is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections in a later execution of the same decree: *A I R 1924 All 34, Rel. on.* [P 251 C 2]

M. S. Rao and S. P. Das Gupta — *for Appellant.*

P. C. Chatterji — *for Respondent.*

Rowland J.—This is an appeal from an order in execution dismissing the objection of the appellant that the decree could not be executed against her property, namely tauzis Nos. 3644 and 3647. The suit has been brought by the respondent against Dula Bibi, the mother of the appellant, as a mortgage suit. There being a question whether the decree would be able to be satisfied out of the mortgaged property, he in the lifetime of Dula Bibi obtained an order of attachment before judgment of these two tauzis. Thereafter he obtained a decree against Dula Bibi and took out Execution Case No. 172 of 1933 against her praying that the decretal amount be realized by sale of the mortgaged property and these two tauzis. During this execution Dula Bibi died and the appellant was substituted in her place. She took an objection, Ex. C, that lots 3 and 4, namely these two tauzis, could not be sold until the mortgaged property was exhausted. On this petition the order passed by the executing Court was Ex. A on 29th September 1934 :

Lots 1 and 2 should be sold first and after they are found insufficient to satisfy the decree lots 3 and 4 will be sold.

That execution case was eventually dismissed. The mortgaged properties, it seems, could not be brought to sale because of a regular suit on behalf of a third party claiming them. The decree-holder now seeks to proceed against the two tauzis above mentioned and the judgment-debtor has objected that they are not liable to be taken in execution of the decree, because they are not properties of Dula Bibi which have come into the hands of the appellant but are the appellant's own property. The Subordinate Judge on two grounds rejected the objection. First, he said that no such objection having been taken in the previous execution the principle of constructive res judicata was applicable and the judgment-debtor was concluded by the order dated 29th September 1934, and could not raise this point again. Secondly, on the merits he held that each of these tauzis had been the personal property of Dula Bibi and had come to the judgment-debtor as Dula Bibi's heir. On both these points the decision of the Subordinate Judge is challenged, but it is, on both points, in my opinion, correct.

The law is that the doctrine of constructive res judicata is applicable to execution proceedings to this extent, that where a judgment-debtor fails to raise all his objections to the application in execution made by the decree-holder which he might and ought to have raised and the application is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections in a later execution on the same decree. There are numerous authorities in support of this proposition, and it is not necessary to refer to the repeated decision of the Privy Council which have laid down the general principles to be followed. In 45 All 735[1] a case was considered which is almost exactly on all fours with the facts of the case before us, the objection referred to the question against what property the decree-holder was entitled to proceed and an order passed in a previous execution that the decree-holder was entitled to proceed against certain property was held to be binding between the parties in subsequent execution proceedings. It was not, therefore, open to the objector to raise again in the present proceedings the contention that the execution against these properties could not proceed. On the merits the Subordinate Judge has given good reasons for his finding that

1. Kapur Chand v. Kanhaiya Lal, (1924) 11 A I R All 34=74 I C 513=45 All 735=21 A L J 641.

tauzis Nos. 3647 and 3644 belonged to Dula Bibi. As regards tauzi No. 3647 there was the unrebutted testimony of a witness for the decree-holder, and as regards tauzi No. 3644 it appears that it became the property of Dula Bibi by virtue of a deed of family arrangement or compromise by which a probate dispute between her and Lakshmi Bibi was settled. The compromise agreement has been exhibited as Ex. E and it shows that Dula Bibi by it takes the interest which is given to her by the compromise. Substantially the disputed properties were divided, eight annas going to Dula Bibi and eight annas to Lakshmi Bibi. The nature of the interest of each is thus described :

According to these shares we by ourselves and from generation to generation have become owners in possession.

The words described an absolute estate of inheritance, and I do not think it is necessary to go behind so clear an expression. We have been referred to Ex. F, a copy of a notice issued by the Land Registration Department publishing the fact that Lakshmi Bibi and Dula Bibi had got their names registered. Lakshmi Bibi is said to have succeeded by virtue of inheritance and will, Dula Bibi by something which is incomplete, the paper being torn, but it may also be by inheritance and will. There is nothing here to show that she even then represented herself as having succeeded by inheritance from her husband. The last holder of the property had been Jagannath who had left the disputed will. In the result I would affirm the decision of the Subordinate Judge and dismiss this appeal with costs.

Harries C. J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 252

ROWLAND J.

Mahabir Gope and others — Petitioners.

v.

Samrathi Singh — Opposite Party.

Criminal Revn. No. 517 of 1939, Decided on 1st November 1939.

(a) Criminal P. C. (1898), S. 107 — Sanehas or reports made by prosecution witnesses regarding past conduct of accused and his disposition to use violence are admissible under S. 157, Evidence Act, to corroborate what witnesses have testified to in Court.

Sanehas or reports made by several of the prosecution witnesses on various dates in the absence of the accused regarding his past conduct and disposition to use violence though not substantive evidence of the matters mentioned in them are admissible under S. 157, Evidence Act, to corroborate what the witnesses have testified to in Court in a proceeding under S. 107, Criminal P. C.

[P 252 C 2 ; P 253 C 1]

(b) Criminal P. C. (1898), S. 107—Principle that Crown must show that likelihood of danger to peace continued to present day does not apply where claims are to immovable property and accused is not likely to abandon his intention to use violence in support of his claim.

The principle that to support an order for security it is incumbent on the Crown to show not only that there was a likelihood of a breach of the peace at some past time, but that this likelihood continued to the present date, does not apply to cases where claims are to immovable property and there is no indication that the party of the accused are likely to abandon their claims or to give up the intention of using violence in support of them: *A I R 1927 Pat 231, Disting.* [P 253 C 1]

(c) Criminal P. C. (1898), S. 107—Intention of S. 107 in demanding security.

The intention of S. 107 in demanding security in case of apprehended violence by accused is preventive and not penal. [P 253 C 1, 2]

Jafar Imam and K. P. Varma — *for Petitioners.*

B. N. Rai and K. K. Sinha — *for Opposite Party.*

Order.—This application is presented on behalf of nine persons who have been ordered each to execute a bond in Rs. 500 with one surety in Rs. 500 under S. 107, Criminal P. C., to keep the peace for one year. An appeal to the Sessions Judge against this order was dismissed. The facts found are that one Samrathi Singh has taken raiyati settlement of a large block of land in village Chorgaon and is in possession as found by both Courts; but the petitioners who are goalas of the village object to his possession and have repeatedly interfered putting up frivolous claims of their own possession over portions of Samrathi's raiyati lands. It was said by Samrathi in his petition to the Magistrate that he apprehended violence at the hands of the accused in order to dispossess him from his lands and the Court substantially accepting his allegations has bound down the accused persons.

Two points are taken in revision. The first is that the trial Court has admitted as evidence of the past conduct of accused and their disposition to use violence sanehas or reports made by several of the prosecution witnesses on various dates in the absence of the accused. It was said that these should not have been used in evidence against the accused and were in no way binding on them. It is no doubt correct to say that these sanehas are not substantive evidence of the matters mentioned in them,

but in every case the person who made the report has been examined to testify to the fact reported by him and S. 157, Evidence Act, is authority for the use of the reports in order to corroborate what the witnesses have testified to in Court. I do not therefore find that there is substance in this objection, though the Court below would do well to use careful expression so as not to let it appear as if such reports had been treated as substantive evidence or as more than corroboration under S. 157 of facts deposed to.

The next point was that to support an order for security it was incumbent on the Crown to show not only that there was a likelihood of a breach of the peace at some past time, but that this likelihood continued to the present date. In support of this, reference is made of cases in the Bombay and Allahabad High Courts which were followed in this Court in 8 P L T 370.[1] All those cases referred to apprehensions of a breach of the peace arising out of religious differences between Hindu and Mahomedan communities. The decisions seem to have proceeded on their own facts and as pointed out by Das J. in the Patna case, no hard and fast rule can be laid down in cases of this nature. It often happens that religious enthusiasm though acute at a particular moment subsides and no danger of breach of the peace remains; but the present is not an instance of a religious dispute but of claims to immovable property and there is no indication that the party of the accused are likely to abandon their claims or to give up the intention of using violence in support of them. Indeed after the initiation of these proceedings two further incidents are reported to have taken place on 16th and 20th January 1939 respectively. I do not therefore think that the cases cited have any application to the circumstances before me.

It was next said that the evidence against certain of the individual accused was hardly sufficient; but this matter has been considered by the first Court and also by the Appellate Court below and I do not feel disposed to reopen that matter. Finally it is suggested that the security demanded is excessive and it is stated that all the accused are at present in jail in consequence of their inability to furnish the security demanded. In a case of this kind the intention of the Section is preventive and not penal. The amount of security demanded seems to me to be unnecessarily high and I would modify it directing instead that each of the petitioners before me shall execute a bond in Rs. 200 with two sureties in Rs. 100 each. The period of one year mentioned in the bond will of course run from the date of the Magistrate's original order.

D.S./R.K. *Order modified.*

1. Mirza Zulfakar Beg v. Emperor, (1927) 14 AIR Pat 231 = 103 I C 607 = 8 P L T 370 = 28 Cr L J 719.

A. I. R. 1940 Patna 253

AGARWALA AND ROWLAND JJ.

Gaya Prasad—*Decree-holder* —

Appellant.

v.

Liquidator Sadr Central Co-operative Society, Gaya — *Judgment-debtor* —

Respondent.

Misc. Appeal No. 80 of 1939, Decided on 31st January 1940, from order of Sub-Judge, Second Court Gaya, D/- 22nd November 1938.

Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 57 (2) — Payment of debts of Society whether decretal or otherwise is matter touching affairs of Society.

The affairs of a Society in liquidation are confined to the winding up of the Society and the payment of its debts, the collection of amounts due to it and of contributions from members from whom contributions are due in the event of the other assets of the Society being insufficient to pay its debts. The payment of debts of the Society whether decretal or otherwise is clearly a matter touching the affairs of the Society and the proceedings to realise such debts are barred by sub-s. 2 of S. 57 except by leave of the Registrar. [P 254 C 1]

G. P. Das and Lal N. Sinha — *for Appellant.*

A. N. Lal and Rai Guru Sharan Prasad — *for Respondent.*

Agarwala J. — This is an appeal by the decree-holder from a decision of the Subordinate Judge of Gaya confirming a decision of the Munsif. The relevant facts were as follows : One Sarjoo Lal was a Director of the Gaya Central Co-operative Bank and the holder of 40 partly-paid preference shares. In accordance with the rules of the Bank he had nominated the plaintiff as the person to whom moneys due to him were to be paid in the event of his death. On his death the Bank having gone into liquidation the liquidator called upon the plaintiff to pay the balance due on the preference shares left by Sarjoo Lal. Thereupon the plaintiff instituted a suit for a declaration that the liquidator's order calling upon him to pay this balance was ultra vires and for an injunction restraining the liquidator from executing the contribution order. The suit

was decreed and the liquidator filed an appeal to this Court. That appeal was dismissed with costs. The plaintiff then applied to the Civil Court for execution of the decree for costs. The Courts below have concurred in holding that the application is barred by S. 57 (2), Bihar and Orissa Co-operative Societies Act (Bihar and Orissa Act, VI of 1935). That sub-section provides:

> While a society is in liquidation no suit or other legal proceeding shall be proceeded with or instituted against the liquidator as such or against the Society or any member thereof on any matter touching the affairs of the Society, except by leave of the Registrar and subject to such terms as he may impose.

The plaintiff-appellant did not ask for or obtain the leave of the Registrar to institute the present execution proceeding. The only question to my mind is whether application in execution is a matter touching the affairs of the Society within the meaning of sub-s. 2 of S. 57. That sub-section imposes a bar to certain proceedings in the case of a Society that is in liquidation. The affairs of a Society in liquidation are confined to the winding up of the Society and the payment of its debts, the collection of amounts due to it and of contributions from members from whom contributions are due in the event of the other assets of the Society being insufficient to pay its debts. The payment of debts of the Company whether decretal or otherwise is to my mind clearly a matter touching the affairs of the Society and the proceedings to realize such debts are barred by sub-s. 2 of S. 57 except by leave of the Registrar. I would therefore dismiss this appeal with costs.

Rowland J.—I agree. The Subordinate Judge appears to have been of opinion that this execution proceeding was barred both by sub-s. 1 and by sub-s. 2 of S. 57, Bihar and Orissa Co-operative Societies Act, 1935. I entirely agree that this is barred by sub-s. 2 and it is not necessary to express an opinion as to the correctness of the Subordinate Judge's view that it was also within the mischief of sub-s. 1.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 254

WORT J.

Anandi Prasad and others — Petitioners.

v.

Mt. Dulhin Kishori Kuer — Opposite Party.

Misc. Judicial Case No. 17 of 1939, Decided on 22nd November 1939.

(a) Succession Act (1925), S. 302—Application regarding payment of annuity under will lies under S. 302.

An application with regard to annuity payable to the applicant by executrix under a will lies under S. 302: *A I R 1935 P C 203, Rel. on.* [P 254 C 2; P 255 C 1]

(b) Will — Validity — Will giving absolute estate to testator's wife with direction to pay annuity to certain institution — Absolute estate is not cut down by such direction — Bequest to institution is not invalid.

Where a testator by a will gives absolute estate to his widow and directs that it shall be incumbent on the widow to pay certain amount as annuity to certain institution, the absolute estate given to the widow is not cut down by such direction and the bequest to the institution cannot be said to be invalid. [P 255 C 2]

(c) Limitation Act (1908), Arts. 120 and 123—Application regarding annuity is governed by Art. 123.

An application for payment of annuity under a will is governed by Art. 123 and not by Art. 120: *A I R 1938 Pat 600, Foll.* [P 256 C 1]

C. P. Sinha — *for Petitioners.*

Dr. D. N. Mitter and B. N. Mitter — *for Opposite Party.*

Order.—This is an application taken out under S. 302, Succession Act, with regard to annuity payable under a will dated 19th February 1930. The testator died in the same year, indeed the next day, leaving an absolute estate to his widow subject to a payment to the petitioning College of a sum of Rs. 700 per annum. The relevant words in the will are:

> It shall be 'proper' on the part of the Musammat to continue to pay, after my demise, a sum of Rs. 700 (seven huudred rupees) out of the income of my properties to the Nalanda College at Bihar annually and make over every year a sum of Rs. 700 to the Trustees of the said college for expenses of the school department;

and then follows:

> and this amount of rupees seven hundred shall all along be continued to be paid every year by the said Musammat.

The first point taken was the question of jurisdiction and it was contended that the application did not lie under S. 302, Succession Act, which contains provisions merely for the purpose of determining questions raised by the executor or trustees calling the assistance of the Court as regards the administration of the estate. At first I felt inclined to hold that that was the correct view to be taken of S. 302; but it seems to me perfectly clear that this point has been decided, if not directly, by inference, by their Lordships of the Privy Council in 63 I A 61.[1] One of the main questions which

1. Secretary of State v. Srimati Parijat Debi, (1935) 22 A I R P C 203=159 I C 329=63 I A 61=63 Cal 677 (P C).

came to be decided in that case was whether it was necessary for the applicant, who was the mother of a beneficiary under the will, to take out a succession certificate, as against a debtor under S. 214, Succession Act. It was held by the Courts in India and by their Lordships of the Judicial Committee that the Administrator-General of Bengal, against whom the application was made was not a debtor within the meaning of that Section. I said that the matter of S. 302 was decided by inference if not expressly. The short answer to the case would have been that the application did not lie under the Section. But their Lordships expressly mentioned the Section and there was no argument suggesting that the application could not be maintained. It may be that I am not correctly stating the decision of their Lordships with regard to S. 302, as it would appear at p. 73 of the Report that this very question was at least mentioned. Their Lordships observed as follows:

> Their Lordships are of opinion that there is nothing in the order of Costello J. dated 17th March 1931, which does not come within the material words of S. 302;

and then quoting: "in regard to the estate or in regard to the administration thereof." Dr. Mitter, who appears on behalf of the person who is entitled to the absolute estate in this property, does not seriously contend that the decision to which I have referred is not an authority on this point. I overrule therefore the objection with regard to S. 302, Succession Act. The second contention is that the bequest contained in para. 5 of the will is invalid or in the alternative, merely a pious wish on the part of the testator, and therefore not binding on the widow. There was some suggestion that the translation is not correct. In Appeal from Original Decree No. 11 of 1934, where the matter of probate came before this Court, the will is translated in these words: "It shall be 'incumbent' &c. Dr. Mitter would ask me to construe the clause in this way; "it shall be 'proper' on the part of the Musammat." But even had it been open to me to do that, I would still have the clause which I have already read and which is in para. 5 of the will to this effect: "and this amount of rupees seven hundred shall all along be continued to be paid every year." But it is not open to me to put the construction which Dr. Mitter suggests on the clause of the will. If there is any objection on the part of the respondent to the only translation of the will which is before me, there is a certain procedure to adopt to have the matter put right. That procedure has not been adopted, and I am unable to accept the suggestion made by Dr. Mitter in this behalf.

The question whether the estate is cut down by para. 5 does not seem to me to arise. It is a misconception to say that the absolute estate in all the properties given to the widow is cut down by such directions as are contained in para. 5 of the will. The absolute estate is still there, and, if I may use the expression (which is not strictly applicable to this country) the fee simple is in the widow, but subject to certain conditions which in this case is a payment of Rs. 700 per annum to the college which payment does not cut down the estate. Therefore, in my judgment, it could not be said that the bequest to the college is invalid. The question whether this is merely a pious wish on the part of the testator has already been dealt with by me with regard to the matter of translation. If the words in the will are "it shall be incumbent" and later "this amount shall all along be continued to be paid," there is no doubt that there is an obligation on the part of the widow to pay over to the college this annual sum of Rs. 700. Some argument was addressed to me on S. 173, Succession Act, which provides:

> Where an annuity is created by a will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will.

I must say with great respect to Dr. Mitter I fail to see what connexion that has with the will before me. There is no question arising as to the validity of the gift being a gift to the college, and therefore, in my judgment, that part of the case necessarily fails. A further argument was presented under S. 114 of the Act and it was contended that the bequest in cl. 5 of the will was invalid as it would vest beyond the period provided for by the Section. S. 114 provides:

> No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period.

In other words, it is the rule against perpetuity. There is no question here that the bequest vests beyond the lifetime of one or more persons living but immediately upon the death of the testator. It is first contended that the annual sum of Rs. 700 is not chargeable upon the corpus of the

estate but merely on its income. The argument as I understand it is that the widow has not at the present moment in her possession the arrears which were payable as from the date of the probate of the will. It is impossible for me to deal with the question because it does not arise. The petitioners here (who are trustees) are not asking for a charge on the corpus of the estate, but merely for a payment over of the annuity payable under the terms of the will. Whether it is a charge on the income of the property or not in these circumstances, as I have already stated, does not arise. The decision of the Court of Appeal in England in (1939) 1 Ch 277[2] was relied upon. At the moment, in any event, I need not trouble myself with the question, because as I have already stated, it does not arise. The last point is the question of limitation. Shortly stated, Dr. Mitter's argument is that Art. 120, Limitation Act, applies, as the word "annuity" does not occur in Art. 123 which reads :

> For legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.

It certainly was not the last, it might be the second and certainly not the first, because this is not a legacy but an annuity. I see the force of the argument addressed to me in this regard, but the matter has been finally disposed of by a case which, so far as I am concerned, is binding on me. I refer to the decision of Manohar Lall J. in 19 P L T 202.[3] That was a case of annuity and it was held by the Court that Art. 123, Limitation Act, applied. Until that decision is reversed—a decision which, as I have already said, is binding on me, the point taken by Dr. Mitter cannot be entertained. In the result, the petitioners, who are trustees of the Nalanda College in Bihar, are entitled to a direction against the Musammat (Mt. Dulhin Kishore Kuer, the widow and the executrix) for the payment over of the sum of Rs. 700 per annum from 20th February 1930, with interest at the rate of 6 per cent. per annum under S. 353. The petitioners are entitled to costs : the hearing-fee is assessed at five gold mohurs.

D.S./R.K. *Order accordingly.*

2. In re Coller's Deed Trusts : Coller v. Coller, (1939) 1 Ch 277.
3. Hemangini Devi v. Anil Krishna Banerjee, (1938) 25 A I R Pat 600=181 I C 283=17 Pat 350=19 P L T 202.

A. I. R. 1940 Patna 256

HARRIES C. J. AND WORT J.

Sree Radha Gobinda Jieu Thakur and others — Defendants — Appellants.

v.

Susil Kumar Roy Chaudhury and others — Plaintiffs — Respondents.

Letters Patent Appeals Nos. 15, 16 and 17 of 1938, Decided on 26th April 1939, from decision of Mohamad Noor J., D/- 6th April 1938.

Orissa Tenancy Act (2 of 1913), S. 16 — S. 16 does not prevent landlord from moving and consenting to transfer before application under S. 16 is made—No particular form of consent is necessary — Whether consent was given is question of fact.

Section 16 does nothing more than place a duty upon the transferee to move, in the sense of a debtor finding out his creditor, but it does not prevent the landlord from moving and agreeing to the transfer before the application contemplated by S. 16 is made. The Act nowhere lays down what form the consent should take and whether consent has been given or not is a question of fact : *A I R 1919 Pat 507, Disting.* [P. 257 C 1]

G. C. Das — *for Appellants.*

S. K. Mitra — *for Respondents.*

Wort J.—This appeal is from the decision of Mohammad Noor J. by which he allowed the claim of the plaintiff landlords under S. 16, Orissa Tenancy Act, to the transfer fees in three suits ; the defendant was a transferee who was liable to pay the fees to the landlords under that Section of the Act which I have mentioned. On 11th June 1930, the landlords entered the defendant's name in their register. Some days later kabuliyats were executed by the defendant in favour of the landlords. In those circumstances it is impossible to hold otherwise than that the landlords consented to the transfer. That being so in my judgment it is clear that the landlords were entitled to the fees provided by the Section to which I have referred. The argument put forward by the learned advocate on behalf of the defendant-appellant is in my opinion unsustainable. S. 16 provides that "in cases other than those covered by S. 15" S. 15 of the Act making exception to the liability to pay the transfer fees

> when a tenure or portion of a tenure is transferred by sale, gift or exchange, the transferee or his successor in interest shall apply to the landlord to whom the rent of the tenure or portion thereof is payable for registration of the transfer, and the landlord shall in the absence of good and sufficient reason to the contrary, allow the registration of the transfer (S. 16, Orissa Tenancy Act).

Sub-s. (2) of that Section provides that if the landlord "accepts the fee authorized

by sub-s. (1) his consent to the transfer shall be deemed to have been given." Now what in my opinion is a wholly artificial argument is that, as the Section provides that the transferee "shall" apply to the landlord, nothing can confer on the landlord any right to the registration fee till that application is made by the transferee. That in my opinion is an impossible construction to be placed upon the Act. S. 16 of the Act does nothing more than place a duty upon the transferee to move, in the sense of a debtor finding out his creditor, but it does not prevent the landlord from moving and (sic) agreeing to the transfer (as in this case before us) before the application contemplated by S. 16 is made. If the contention of the learned advocate for the defendant-appellant is correct, it would result in this, that although the transfer has in fact been agreed to by the landlord, the defendant can preclude the landlord from recovering the fee which is rightfully due to the landlord under S. 16 of the Act by not taking action. In the circumstances of this case, as I have already said, the transfer must be deemed to have been consented to by reason of the entry in the register of the landlord on 11th June and the acceptance of the subsequent kabuliyats. The Act nowhere lays down what form the consent should take and whether consent has been given or not is a question of fact which has been decided against the defendant in the Court below, and in addition the necessary inference from the facts which I have mentioned would be that consent had been given.

Reliance was placed upon the decision of this Court in 4 Pat L J 387.[1] There it was clear from the facts as found by the Courts that on the application of the transferee the landlord had refused to recognize the transfer. There was some question whether his agent had authority to recognize any such transfer, and that was decided in the negative. Not having given his consent he proceeded to bring the action out of which the appeal arose, and Sir Dawson Miller in delivering the judgment of the Court made this observation:

> It follows that the landlord's consent not having been given before the institution of the suit there was at the time of the institution of the suit no cause of action and that the plaintiff's suit must be dismissed.

Reliance was placed upon certain observations which it is said would support the contention that the condition precedent to the right of the landlord to claim the transfer fee was the application by the transferee. The case does support the contention as it was found that the landlord had not consented to the transfer. In one part of the Section (the first part) it places a duty upon the transferee to move and in another part of the Section to which I have already referred (sub-s. 2) it protects the tenant by providing that once the landlord has accepted the fee, he cannot turn round and say that he has not consented to the transfer. On the findings and the necessary inference that the landlord has consented to the transfer, the landlord was entitled to recover. The judgment of Mohamad Noor J. is right and must be upheld. The appeal fails and must be dismissed with costs throughout. This order governs all three Letters Patent appeals.

Harries C. J. — I agree.

G.N./R.K. *Appeal dismissed.*

1. Gobind Ramanuj Das v. Debendra Bala Dasi, (1919) 6 A I R Pat 507 = 52 I C 231 = 4 Pat L J 387.

A. I. R. 1940 Patna 257

WORT AND MEREDITH JJ.

Saroda Prasad Ghosh and another — *Defendants* — Appellants.

v.

Debendra Nath Ghosh and others — *Plaintiffs* — Respondents.

Appeals Nos. 414 and 415 of 1938, Decided on 1st December 1939, from appellate decrees of Dist. Judge, Manbhum, D/- 7th March 1938.

Succession Act (1925), Ss. 105 and 173— Annuity in favour of legatee and his putra poutradi krame, (i, e. to his sons, grandsons etc., in due succession) — Annuity not made charge on property — Legatee pre-deceasing testator— Legacy comes within S. 105. Illus. (ii) and therefore lapses.

An annuity is perpetual only in those cases where it is a charge on a specific property in which circumstances the law assumes that it is not annuity alone but the property itself that has been bequeathed. [P 259 C 1]

Where an annuity is made by a will in favour of a person and his putra poutradi krame, (i. e. to his sons, grandsons etc. in due succession) the legatee takes an estate of inheritance. But where he predeceases the testator the legacy lapses as the case falls within S. 105, Illus. (ii): *8 I A 46 (P C)*; *and 18 W R 359 (P C)*, *Rel. on*; *40 I A 105 (P C)*, *Ref.* [P 258 C 2]

S. C. Mazumdar and P. N. Sanyal — *for Appellants.*

R. S. Chatterji — *for Respondents.*

Wort J. — These two appeals arise out of actions in which the plaintiffs claimed to be beneficiaries under the will of one

Rameshwar Ghosh who died in the year 1927 having left a will which was made in the year 1915. By this will he left his estate to his wife Smt. Sudhamukhi Dasi, and, after the death of his wife, to his daughter. The wife predeceased the testator. The daughter took the estate under the terms of the will, and by those terms after her death, two persons were to take the property, one Sriman Saroda Prasad Ghosh (the testator's nephew) and the other Sriman Nalinaksha Ghosh (the testator's grandson). By the terms of the will, these last persons whom I have mentioned, were to pay a number of annuities including one of Rs. 36 both to Bistu Charan Ghosh and Banamali Ghosh. Appeal No. 414 refers to the case of Banamali and Appeal No. 415 refers to the case of Bistu. In the Court below, it has been found as a fact that Banamali pre-deceased the testator, but that Bistu survived him. In spite of this finding the learned Judge in the Court below reversed the decision of the trial Court, and came to the conclusion that the annuity to Banamali did not lapse under the provisions of S. 105, Succession Act. He applied Illus. (iv) to the facts then before him. S. 105 provides that:

> If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.
>
> (2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

The illustration which the learned Judge in the Court below has applied to the facts of this case is this:

> A sum of money is bequeathed to *A* for life, and after his death to *B*. *A* dies in the lifetime of the testator: *B* survives the testator. The bequest to *B* takes effect.

The learned Judge has therefore come to the conclusion on the terms of the will that the testator has expressed an intention that the legacy or the annuity shall not lapse. In my judgment the conclusion of the learned Judge arrived at in this connexion is erroneous. In my opinion although S. 97, Succession Act, does not apply to this will, it quite clearly appears from the decision of their Lordships of the Judicial Committee of the Privy Council in 8 I A 46[1] that the interest which was given to Banamali was an absolute interest. But that, as I shall in a moment point out, does not finally determine the matter. Their Lordships of the Judicial Committee of the Privy Council, while dealing with words similar to the words in the will before us in this case, *putra poutradi krame*, which have been translated as 'to their sons, grandsons, etc. in due succession' approved of the statement of the law by Sir Barnes Peacock in the well-known Tagore's case, 18 W R 359,[2] to the following effect:

> A gift to a man and his sons and grandsons, or to a man and his sons' sons, would, in the absence of anything showing contrary intention, pass a general estate of inheritance according to Hindu law. I believe the words usually used in Bengal are *putra poutradi krame*, and in the Upper Provinces *naslan baad naslan*, the literal meaning of the former being to sons, grandsons, etc., in due succession, and of the latter in regular descent or succession.

In my judgment therefore the words used by the testator in this case gave the estate of inheritance to Banamali and Bistu, but that as I have already said does not determine the matter. The question to be decided is, whether in the events which have happened the annuity has lapsed. It has been found as a fact that Banamali pre-deceased the testator. In my judgment therefore the most that could be said in favour of Banamali's case is that it comes within Illustration (ii) under S. 105 of the Succession Act:

> A bequest is made to *A* and his children. *A* dies before the testator, or happens to be dead when the will is made. The legacy to *A* and his children lapses.

Some reference is made to Skinner's case reported in 40 I A 105.[3] There their Lordships of the Judicial Committee had to construe these words in the will:

> That my private zamindari may, at my demise, descend to my eldest son and to his lawful male children; in the event of my eldest son dying without lawful male children, the above-mentioned private zamindari shall descend to my next male heir, and should all my sons die without lawful male children . . . . . to my female children.

Their Lordships of the Judicial Committee pointed out that S. 84, Succession Act of 1865 (which in terms was similar to S. 97 of the present Act) could have no application by reason of the fact that the testator had died two years before the Act came into force; but, in any event, they had given effect to the intention of the testator as expressed in the will, and came to the conclusion that the use of the words 'shall

1. Ramlal Mookerjee v. Secretary of State, (1881) 7 Cal 304=8 I A 46 = 10 C L R 349 = 4 Sar 225 (P C).

2. Jotendramohan Tagore v. Ganendramohun Tagore, (1872) I A Sup Vol 47 = 18 W R 359 =9 Beng L R 377=2 Suther 692=3 Sar 82 (PC).

3. Richard Ross Skinner v. Naunihal Singh, (1913) 35 All 211=19 I C 267=40 I A 105=11 A L J 494 (P C).

descend to my next male heir' in cl. (5) will cut down the gift made in cl. (4) to Thomas Brown Skinner, and gave him interest for life only. There is another aspect of the case, and that is indicated by S. 173 of the Act which deals specifically with annuities and provides :

Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Generally speaking, the principle of law applicable is that an annuity is a perpetual annuity only in those cases where it is a charge on a specific property, in which circumstances the law assumes that it is not annuity alone, but the property itself, that has been bequeathed. But we still have the question to determine, namely even although a contrary intention is expressed within the meaning of S. 173 of the Act, what is the position in the events which have happened in this case. In my judgment, quite clearly the case is governed by S. 105, Succession Act, and in the events which have happened, the legacy has lapsed. This is not a gift to a person and then to some other person. The words used which I have construed on the authority of the decision of the Privy Council do not describe a person or persons but have the effect of giving an absolute estate to the persons directed to pay the annuities in dispute in this case. That disposes of the appeal in Banamali's case.

In Bistu's case similar considerations apply, but with this exception that Bistu survived the testator. The judgment of the learned Judge in the Court below as regards Bistu's case is, in my judgment, correct, although for reasons somewhat differing from those expressed by the learned Judge. The result therefore is that Appeal No. 414 of 1938 is allowed with costs, and Appeal No. 415 of 1938 is dismissed with costs.

Meredith J.—I agree. I would only like to add one word, and that is that the argument put forward for the appellant that the words putra poutradi referred not to the legatees of the annuities, but to the testator's nephew and grand nephew, is an entirely unsustainable argument. In that respect I am in complete agreement with the interpretation put on the will by both the Courts below.

G.N./R.K. *Order accordingly.*

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* A. I. R. 1940 Patna 259

HARRIES C. J. AND FAZL ALI J.

Gopal Das and others — Appellants.

v.

Jageshwari Prasad Narain Deo and others — Respondents.

Appeal No. 223 of 1938, Decided on 11th January 1940, from original order of Sub-Judge, Patna, D/- 16th May 1938.

*** Civil P. C. (1908), O. 22, R. 10—Decree passed by first Court affirmed on appeal — Decree of first Court does not become non-entity—Purchaser of decree passed by first Court after same is confirmed in appeal is entitled to be substituted in place of his vendor.**

When a person purchases a decree, what in fact he purchases is the right acquired by the decree-holder under the decree and so it is only when the decree purchased by him is reversed or set aside, that it can be legitimately said that the decree purchased by him confers no right upon him. A decree passed by a Court of competent jurisdiction does not become a non-entity merely because it has been affirmed on appeal. Indeed, such a decree receives further sanctity as a result of the affirmance. Hence where a decree passed by Court is affirmed on appeal and a person subsequently purchases the decree of the first Court it cannot be said that he acquires no right under the decree. He therefore can be substituted under O. 22, R. 10 in place of his vendor: *14 M I A 465 (P C); A I R 1917 All 281 and 40 Cal 173, Rel. on.* [P 260 C 2; P 261 C 1, 2]

L. K. Jha, M. N. Pal and S. P. Srivastava — *for Appellants.*

B. N. Mitter and Brij Kishore Prasad Sinha — *for Respondents.*

Fazl Ali J.—This is an appeal from an order of the Subordinate Judge of Patna rejecting an application made by the appellants under O. 22, R. 10, Civil P. C. It appears that in the year 1917 one Harihar Prasad Narain Deo had instituted a suit in the Court of the Subordinate Judge of Gaya against his elder brother Isri Prasad Narain Deo for the partition of the Dhanwar estate. Subsequently, the sons of Harihar Prasad Narain Deo were added as plaintiffs and the suit was transferred to the Court of the Subordinate Judge at Patna. On 22nd August 1925 the suit was dismissed by the Subordinate Judge, but on appeal it was partially decreed by the High Court. The High Court held that the plaintiffs were not entitled to claim partition of the Dhanwar estate which was impartible, but they were entitled to a preliminary decree in respect of moveables and a number of villages which had been acquired by one Ran Bahadur Singh, the last holder of the impartible estate, and had not been incorporated with it. The plaintiffs not being satisfied with the decree

of the High Court appealed to the Privy Council and their Lordships of the Privy Council by their judgment dated 29th July 1936 allowed the appeal in part and modified the decree of the High Court by including therein two villages named Telonari and Palanki among the properties to be partitioned. They further referred to the Court of the Subordinate Judge under O. 41, R. 25, Civil P. C., the question whether

any villages to be specified by the appellants from list A or B filed with the plaint were the self-acquired properties of Maharaja Ran Bahadur Narain, deceased and if so, whether any such self-acquired villages were incorporated by him with the estate.

Now, it appears that the appellants had a money decree against Harihar Prasad Narain Deo and in execution of that decree they attached the preliminary decree of the partition suit passed by the High Court on 26th February 1931. On 15th April 1937 they purchased the aforesaid preliminary decree and on 14th September 1937 they filed a petition in the partition proceedings then pending in the Court of the Subordinate Judge at Patna to the following effect:

That the petitioners purchased the rights, title and interest of plaintiff 1 in auction sale in Execution Case No. 97 of 1936 in this Court on 15th April 1937 as will appear from the sale certificate filed herewith and the sale was confirmed and now plaintiff 1 has no interest left in the suit.

It is therefore prayed that your honour may be graciously pleased to strike off the name of plaintiff 1 and substitute the petitioners' names in place thereof and pass such and further order or orders as your honour may deem fit and proper in the case.

The application was opposed by the heirs of Harihar Prasad Narain Deo who had died in the meantime and it was ultimately rejected by the Subordinate Judge by his order dated 16th May 1938 the material part of which runs as follows :

First point for consideration, therefore is whether these persons (the appellants) have acquired any interest in the properties by virtue of their purchase of the High Court decree when that decree had already been superseded by the decree of the Privy Council. As the sale certificate stands they have not purchased the right, title and interest of Harihar Prasad Narain Deo in the properties sought to be partitioned but in the decree itself. Now, as observed above, the decree purchased by them had already been superseded by the decree of the Privy Council. The effect of this would be that the decree purchased by them was non-existent at the time of their purchase and so they have acquired nothing by this purchase and cannot be substituted as representative of Harihar Prasad Narain Deo. Their prayer for substitution is accordingly rejected.

Against this order the appellants have preferred the present appeal. In my judgment the view expressed by the Subordinate Judge that the appellants by purchasing the High Court decree acquired no rights whatsoever is not correct. It is true that they purchased the High Court decree after the decision of the Privy Council, but it is to be remembered that the only effect of that decision was to confirm all the rights which had been acquired by Harihar Prasad Narain Deo and his sons under the preliminary decree of the High Court and to confer upon them a further right to claim partition of two villages which were held to be part of the impartible estate by the High Court. It is evident that when a person purchases a decree, what in fact he purchases is the right acquired by the decree-holder under the decree and so it is only when the decree purchased by him is reversed or set aside, that it can be legitimately said that the decree purchased by him confers no rights upon him. Therefore as the rights acquired by Harihar Prasad Narain Deo under the High Court decree were not taken away from him, but confirmed by the decision of the Privy Council, it seems difficult on general principles to hold that the appellants got nothing as purchasers of the High Court decree. But then arises the question as to whether this view can be reconciled with the proposition which has been propounded in a number of cases decided by this Court as well as the other Indian High Courts that where the decree of a Court is affirmed or varied by the Appellate Court, it merges in the decree of that Court. Now, if we analyze the cases in which this proposition has been enunciated, we find that broadly speaking they fall under two heads: those relating to execution and those relating to amendment or review of a decree. The result of these decisions may be summed up as follows: firstly, where the decree has been affirmed or varied by a Court of appeal the decree of that Court is the only decree capable of execution; and, secondly, that in such cases the Court which affirms or varies the decree is the Court which can entertain an application for amendment or review. In my opinion, the rules so laid down are merely rules of procedure and cannot affect the substantive rights of the parties acquired under a decree which has not been reversed but substantially confirmed. In 14 M I A 465[1] the Privy Council dealing with the

1. Kristo Kinker v. Rajah Burrodakant Roy, (1870-72) 14 M I A 465=10 Beng L R 101=17 W R 292 (P C).

view expressed from time to time by Indian High Courts that the decree of a Court when affirmed in appeal merges in the decree of an Appellate Court observed as follows :

> The function of an Appellate Court is to determine that decree the Court below ought to have made. It may affirm, reverse, or vary the decree under appeal. In the first case, it leaves the original decree standing, super-adding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.
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> In all these cases the decree of the Appellate Court may be regarded either as a direction to the lower Court to make and execute a decree of its own accordingly, or as an independent decree, whether it is to be executed by the Appellate Court or by the lower Court. In the latter case a further question arises, viz. whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the Appellate Court as the sole decree capable of execution or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other.
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> *If the question were res integra, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz., that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court*, further than by saying, that there may be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal.

These observations and particularly those which I have italicized suggest that a decree of the first Court does not become a non-entity in law after it is affirmed on appeal. It has been held in several cases that where a person who was originally a party to a suit is not made a party to the appeal preferred against the decree passed in the suit either as an appellant or as a respondent and the Appellate Court has not adjudicated upon his case, the decree of the Court of first instance does not merge in that of the Court of appeal : *see* 39 All 13[2] and 17 C W N 137.[3] These cases also show that the rule of merger has its own limitations and a decree passed by a Court of competent jurisdiction does not become a non-entity merely because it has been affirmed on appeal. Indeed, the proper view to take would be that such a decree receives further sanctity as a result of the affirmance. I am, therefore, unable to agree with the view expressed by the Subordinate Judge that the appellants acquired no rights whatsoever by purchasing the decree of the High Court, because they made the purchase after the decision of the Privy Council. It is true that the decree of the High Court was varied to some extent by the Privy Council, but that variation was in favour of Harihar Prasad Narain Deo and it is conceded by the appellants that in the circumstances of the case they are not entitled to the benefit of that variation.

I would, therefore, allow this appeal, set aside the order of the Court below and direct that the application of the appellants for substitution be disposed of according to law after dealing with the other objection, if any, raised by the respondents. Costs will abide the result of the application.

Harries C. J. — I agree.

D.S./R.K. *Appeal allowed.*

2. Gajraj Mati v. Swami Nath, (1917) 4 AIR All 281=36 I C 307=39 All 13=14 A L J 853.
3. Prasanno Kumar Mukerjee v. Sree Kanta Raut, (1913) 40 Cal 173=16 I C 365=16 C L J 202 =17 C W N 137.

A. I. R. 1940 Patna 261

HARRIES C. J. AND DHAVLE J.

Buxar Central Co-operative Bank Ltd. — Appellant.

v.

Akhouri Bindhyachal Prasad Singh — Respondent.

Appeal No. 215 of 1939, Decided on 29th November 1939, from appellate order of Sub-Judge, Arrah, D/- 25th May 1939.

Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 24-A — Compromise under S. 24-A bars execution of decree obtained by depositor for recovery of deposit made with Co-operative Bank.

The compromise with the sanction of the Registrar bars execution not by reason of any express provision in the Bihar and Orissa Co-operative Societies Act, but under the general law. Hence, a compromise under S. 24-A though not a bar to the passing of decree in favour of a depositor of a Co-operative Bank for recovery of deposit on a suit prior to the compromise is a clear bar to the execution of that decree. [P 262 C 2 ; P 263 C 1]

Mahabir Prasad and Brahmadeva Narain — *for Appellant.*

S. M. Mullick and Harnarayan Prasad — *for Respondent.*

Dhavle J. — This is an appeal from a decision disallowing objection of the appellant, the Buxar Central Co-operative Bank, Ltd., that execution of a decree obtained

against it by the respondent is barred by a scheme of compromise under S. 24-A, Bihar and Orissa Co-operative Societies Act (6 of 1935), which was sanctioned by the Registrar of Co-operative Societies on 15th October 1936. In 1927, the respondent deposited Rs. 13,000 with the appellant. In 1935 correspondence began between the parties regarding the re-payment of this sum, and failing to get satisfaction, respondent filed a suit on 3rd February 1936, for the recovery of his deposit. During the pendency of the suit the scheme of compromise under S. 24-A of the Act was agreed to by the required majority of creditors and sanctioned by the Registrar under sub-s. (2) of S. 24-A of the Act. The respondent's suit was decreed on 18th December 1936. An appeal was preferred by the appellant against this decree and dismissed by Wort J. (Chatterji J. concurring), who found that there was nothing either in the alleged arrangement (that is to say, the "scheme of compromise," the factum of which is not disputed before us) or in the Act itself which would bar plaintiff's claim or bar his action for the money or balance of the money deposited by him. The learned Judge went on to add :

> I propose to say no more for fear of dealing with matters which are not strictly before us in this appeal, the substance of the decision of this Court being that the plea taken up by the defendant society was not a bar to the plaintiff's suit.

When the respondent put the decree into execution, the appellant again pleaded the scheme of compromise by way of a bar. The lower Court found no provision in the Bihar and Orissa Co-operative Societies Act (Act 6 of 1935)

> ousting the jurisdiction of the Civil Court, either to entertain a suit for money deposited with the Central Co-operative Bank or for execution of a decree for such money obtained in a Civil Court,

and arrived at the conclusion that the provision in S. 24-A that the order of the Registrar shall be final "would not bar a proceeding in the Civil Court instituted before such scheme was contemplated or sanctioned." The objection of the judgment-debtor-appellant was accordingly dismissed. It is not very clear from the order of the lower Courts how far the contention advanced on behalf of the decree-holder that as a depositor he was not a creditor of the judgment-debtor within the meaning of S. 24-A was accepted by the lower Court ; but Mr. Sushil Madhab Mullick, who appears for the decree-holder-respondent, does not dispute the position that as a depositor the respondent was a creditor of the appellant. Sub-s. (2) of S. 24-A of the Act, makes the compromise agreed to by the specified majority, if sanctioned by an order of the Registrar,

> binding on all the creditors or the class of creditors, as the case may be, and also on the Society.

It was suggested on behalf of the respondent that he was not a party to the compromise ; but sub-s. (2) makes his individual participation absolutely immaterial. It has not been suggested on behalf of the respondent that the compromise, which was published in the Gazette with the order of the Registrar sanctioning it as required by sub-s. (4) of S. 24-A, was in any respect informal. The learned Subordinate Judge fell into an error in thinking that in this execution proceeding he was asked to hold that the finality of the order of the Registrar barred "a proceeding in the Civil Court instituted before such scheme was contemplated or sanctioned." It was the suit of the respondent that had been instituted before the order of the Registrar sanctioning the compromise ; but the execution proceeding itself came years after that order. It is true that the scheme was pleaded as a bar to the suit itself, but in overruling the plea Wort J. was careful enough "to say no more for fear of dealing with matters which are not strictly before us in this appeal." The learned Subordinate Judge has missed the point of this reservation. The compromise with the sanction of the Registrar bars execution, not by reason of any express provision in the Bihar and Orissa Co-operative Societies Act, but under the general law. A judgment-debtor is always entitled to resist execution on the basis of a compromise if the compromise is binding on the decree-holder and has the effect of barring execution.

It has been contended on behalf of the respondent that the compromise in the present case contains nothing to bar execution of the decree obtained by him. Now, it is true that the compromise says nothing expressly about any decrees obtained or to be obtained by any creditor of the Buxar Central Co-operative Bank. Indeed, it does not purport to impose any obligations on any of the creditors of the Bank. What it does do is to make such provisions as that in the first place at least 75 per cent. of the Bank's recoveries on account of principal shall be distributed strictly pro rata among the creditors, towards the principal, and that all recoveries on account of interest

shall, after meeting certain indispensable and also unforeseen expenditure, be similarly paid towards interest at certain flat rates. There are other restrictions imposed on the Bank as regards the manner in which it is to conduct its business. It is also provided that the lands purchased by the Bank may be sold to any creditor in set-off of his deposit, provided he is the highest bidder, and that the scheme is to be in operation for five years, unless it is revised earlier with the approval of the Registrar, if the financial position of the Bank should require it. This was the "scheme of compromise" which the Registrar sanctioned as in the best interests of all the parties concerned. It is plain that it would be no compromise at all if its effect was to impose no obligations on the creditors. It may, indeed, be doubted whether it would be binding as a compromise upon the Bank in the absence of any consideration moving from the creditors for the restrictions to which the Bank is subjected under the scheme. When pressed with this aspect of the matter, Mr. Mullick argued that what the respondent may be taken to have given up was his right to attach all the income of the Bank. But it is plain that at the time the scheme of compromise was arrived at, neither the respondent nor any other creditor of the Bank had any such right; the respondent still had to obtain his decree. It seems to me impossible to read the sanctioned scheme of compromise in any other light than as an arrangement under which creditors were to refrain from levying execution in return for the restrictions imposed upon the Bank as regards the disposal of its income and property. Mr. Mullick has contended that in this view the decree obtained by the respondent would become a nullity. But there is no substance in the contention. The decree is only a security for the debt that is owing to the respondent, and has the effect of establishing that debt as against the appellant; and though the compromise was no bar to the passing of a decree establishing the respondent's debt, it is, in my opinion, a clear bar to execution. I would accordingly allow this appeal with costs.

Harries C. J. — I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 263

FAZL ALI J.

Ram Janam Mahto and others — Petitioners.

v.

Sri Bendhyachal Kuer — Opposite Party.

Civil Revn. No. 224 of 1939, Decided on 12th December 1939, from order of Dist. Judge, Saran, D/- 30th March 1939.

Civil P. C. (1908), O. 33, R. 5— Application for leave to appeal in forma pauperis rejected on Munsif's report without hearing applicant— Rejection amounts to material irregularity.

Where on an application for leave to appeal in forma pauperis the Court directs the Munsif to make an enquiry whether the petitioner is a pauper or not and rejects the application without hearing the petitioner on the Munsif's report that the applicant is not a pauper, the Court acts in the exercise of its jurisdiction with material irregularity and the order of rejection passed by it cannot therefore be supported. [P 263 C 2]

Hareshwar Prasad Sinha and P. Zha — *for Petitioners.*

S. P. Srivastava — *for Opposite Party.*

Order. — In my opinion the order of the learned Judge against which this application is directed cannot be supported. It appears that the petitioner had applied to the Judge for leave to appeal in forma pauperis. The learned Judge on 27th January 1939 examined the petitioner's guardian on oath and then directed the Munsif to make an enquiry as to whether the petitioner was a pauper or not. Meanwhile a Deputy Magistrate also enquired into the matter and he as well as the Govt. Pleader reported that the applicant was a pauper. The Munsif however reported otherwise. On 23rd March 1939 the learned Judge without hearing the petitioner passed an order rejecting his application. After this order was passed the petitioner moved the Judge twice to hear his lawyer and review his order. But the learned Judge refused to do so. Whether the learned Judge was or was not justified in not reviewing his order need not be decided but there can be no doubt that in rejecting the petitioner's application without hearing him, he has acted in the exercise of his jurisdiction with material irregularity and the order passed by him cannot therefore be supported. It is true that the petitioner had appeared before the Munsif but he was entitled to show to the Judge that the report of the Munsif was wrong.

I therefore allow this application set aside the order of the learned Judge and

direct that the petitioner's application be disposed of according to law. There will be no order for costs.

G.N./R.K. *Application allowed.*

*** * A. I. R. 1940 Patna 264**

FULL BENCH

WORT, DHAVLE, VARMA, MANOHAR LALL AND CHATTERJI JJ.

Babu Upendra Nath Basu — Appellant.

v.

Pandaya Gulab Sarkar — Respondent.

Appeal No. 59 of 1938, Decided on 6th March 1940, from original order of Sub-Judge, Patna, D/- 8th January 1939.

*** * (a) Civil P. C. (1908), S. 122 and O. 21, R. 90 Proviso (i) (b) (Patna) — Proviso (i) (b) framed under S. 122 is not ultra vires — It merely puts applicant to terms and makes deposit entirely discretionary with Court.**

The proviso (i) (b) to O. 21, R. 90 added by the rules made by the Patna High Court under S. 122 is not ultra vires. O. 21, R. 90 itself is a rule of procedure and prescribes one of the modes in which an auction sale may be set aside. Strictly speaking, it does not create any right but provides a remedy. The amended rule made by the High Court does no more than lay down a procedure to be adopted when an application under O. 21, R. 90 is presented. The amended rule does not shut out the applicant from seeking his remedy before the Court. It is for the Courts to decide in each case whether to insist upon the 12½ per cent. deposit being made or any amount less than that, or not to require any deposit at all. The matter is left entirely in the judicial discretion of the presiding officers of the Court. The amended rule merely places the party upon terms. It is on the same footing as an order as to security for costs under O. 41, R. 10, Civil P. C., being merely a condition imposed upon the applicant: and being a matter of procedure, it is within the powers of the High Court under S. 122. The Civil Procedure Code itself, as its Preamble shows, relates to the procedure of the Court of Civil Judicature. The wording of S. 122 also suggests that the rules in Sch. 1 all relate to procedure, otherwise the last portion of S. 122 which says "may by such rules annul, alter or add to all or any of the rules in Sch. 1," will hardly fit in with the context: *A I R 1921 P C 80 and A I R 1939 Pat 248 (F B), Rel. on; A I R 1914 Mad 287 (F B) and A I R 1937 Rang 419 (F B), Discussed and Disting.; (1898) 2 Q B D 340 and (1832) 2 Cr & J 558, Disting.* [P 267 C 2; P 268 C 1, 2; P 269 C 1; P 270 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Litigant has no common law right to set aside Court sale.

In India a litigant has no right under the common law to set aside a Court sale. The right to set aside such sale does not exist apart from the provisions of the Statute under which the sale is held, and therefore the right to set aside a sale held under the Civil Procedure Code does not exist apart from the provisions of that Code: *A I R 1937 Rang 419 (F B), Not approved.* [P 269 C 2]

S. N. Bose and S. Mustafi—*for Appellant.*

Sir Sultan Ahmed and K. Dayal — *for Respondent.*

Wort J. — The question referred to this Full Bench is, whether the amendment made to O. 21, R. 90, Civil P. C., making the deposit of 12½ per cent. of the amount of the sale proceeds or the furnishing of security as a condition of the admission of the application under the rule is ultra vires the High Court under S. 120 (2) of the Code? The matter was referred to a Full Bench by reason of a decision of two Judges of this Court, dated 19th April 1939, by which the Court confirmed the decision of the lower Court declining to dispense with the deposit as provided by the rule. Having regard, however, to a decision of the Full Bench of the Rangoon High Court in 1937 R L R 268[1] to the effect that a rule not dissimilar to the one before us was beyond powers of the rule-making authority of the High Court at Rangoon, the question which I have stated has arisen for the determination of this Full Bench. O. 21, R. 90, Civil P. C., as amended, provides in sub-cl. (1):

> Provided that no application to set aside a sale shall be admitted unless (a) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and (b) the applicant deposits with his application such amount not exceeding 12½ per cent. of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

It was contended by the learned advocate appearing on behalf of the judgment-debtor that the amendment of the rule put an obstacle in the way of his exercising his common law right to have the sale of his property set aside. The argument is fallacious. No such common law right exists. Had it not been for the rules under the Civil Procedure Code, apart always from questions of fraud, there would be no such right in the judgment-debtor. It would be immaterial whether his property is sold at a high or low price and the ground of material irregularity arises only by reason of directions of the Legislature that the property should be sold subject to certain rules and conditions. Again it was argued that the amendment placed an obstacle in the way of a judgment-debtor exercising his rights under O. 21, R. 90 that the making of the rule which provides for the deposit of money or security as a condition precedent to his application was a power which was beyond the rule making authority, as it would affect substantive rights

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1. O. N. R. M. M. Chettyar Firm v. Central Bank of India Ltd., (1937) 24 A I R Rang 419 =172 I C 102=1937 R L R 268 (F B).

and not merely questions of procedure. S. 122, Civil P. C., provides :

High Courts established under the High Courts Act, 1861, or the Government of India Act, 1915 . . . may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in Schedule 1.

It will be seen that the amendments of the rules allowed are as regards "regulating their own procedure and the procedure of the Civil Courts." This argument to some extent depends upon a construction of the amendment which was decided against in the Full Bench decision of this Court in 20 P L T 275.[2] There the judgment-debtor had made an application, but had omitted to make the deposit with the application. That deposit was made at a subsequent date. The original application was within the period of limitation, i. e. thirty days, but the deposit was beyond that period. The question which arose in that case was, whether the application was barred by limitation. This Court held that it was not so barred; that the question of the deposit was within the discretion of the executing Court, and that Court must exercise its discretion either in favour or against the applicant and that it was not necessary, as a condition precedent to and at the time of filing of an application, for the judgment-debtor to make the deposit. Therefore it can no longer be argued that the deposit is a condition precedent to the filing of such an application. To that extent it cannot be said that the rule is anything more than placing the judgment-debtor on terms. Reliance as I have said has been placed on the Full Bench decision in 1937 R L R 268,[1] but in my judgment that decision does not support the contention of the appellant. The amendment made by the Rangoon Court is different from that which we have under consideration. The proviso to the amendment made by the Rangoon Court was to this effect :

Provided that no application to set aside a sale shall be admitted unless (a) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and (b) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale whichever is less, and in case the application is unsuccessful the costs of the opposite parties shall be a first charge on the amount so deposited.

There is a further proviso regarding 'irregularity or fraud' with which we are not concerned. The Chief Justice of the Rangoon Court in delivering the judgment made this observation :

The effect of R. 90B is that an application made under the rule never comes before the Court unless and until the deposit of money referred to therein has been made by the applicant. It is not a rule to regulate procedure but lays down an indispensable preliminary before any proceedings take place at all. Although the Rule Committee has wide powers and can, provided any new rule it seeks to lay down is not inconsistent with the body of the Code, abrogate existing rights of the subject, it can only do so in matters of procedure. It purports to shut out any applicant, who fails to deposit the amount required from proceeding with his application.

It will be seen that the question which arose in the Full Bench decision of this Court in 20 P L T 275[2] was incidentally decided. The Rangoon Court came to the conclusion that the proviso to their rule was a condition precedent, whereas on the construction placed by the Full Bench decision of this Court in 20 P L T 275[2] upon the amendment, the application could be filed without the deposit, the question of deposit being decided later. Taking the matter in steps, it will therefore be seen that the construction placed by this Court upon the amendment

does not purport to shut out an applicant, who fails to deposit the amount required, from proceeding with his application at all.

Further, it is to be observed that the Chief Justice, in delivering the judgment in the *Rangoon case*,[1] made this statement, after saying :

Although the Rule Committee has wide powers and can, provided any new rule it seeks to lay down is not inconsistent with the body of the Code : hence a rule which directed that upon an application being heard the Court might require the deposit of moneys, or put the applicant upon terms (though stringent) as part of the procedure in the hearing of the application, would seem to be valid.

Strictly construed, the proviso, which is before this Bench for consideration, is nothing more than a rule which places the applicant on terms as to the hearing of the application. Roberts C. J. in support of his view of the Rangoon rules, has referred to Broom's Legal Maxims, and observes : "It has long been a received rule that no one is to be deprived of his property in any judicial proceedings unless he has an opportunity of being heard" and refers to (1832) 2 Cr & J 558.[3] (1832) 2 Cr & J 558,[3] however, was a case in which, under an Act of George III, the Bishop was entitled to require an incumbent to nominate a curate

2. Brij Behari Lal v. Firm Srinivas Ram Kumar, (1939) 26 A I R Pat 248=181 I C 579=18 Pat 327=20 P L T 275 (F B).

3. Capel v. Child, (1832) 2 Cr & J 558=2 Tyr 689 =1 L J (N S) Ex 205=37 R R 761.

with a stipend. No nomination was made and the Bishop being of the opinion that owing to the negligence of the incumbent the duties of the church were inadequately performed and having exercised that power by appointing a curate in the events which had happened charged the incumbent with the stipend and took out the process of sequestration. It was pointed out that the requisition calling upon the incumbent to nominate a curate was in the nature of a judgment and without giving the incumbent an opportunity of being heard was invalid. This state of affairs is very far from the case which is before us, and indeed, if I may be allowed to say so with respect to the Chief Justice of the Rangoon Court, far removed from the case which was before that Court. There was no question there, nor is there any question here of determining a matter in the absence of the interested party.

Reference was also made to 38 Mad 823.[4] There under S. 9, Presidency Small Cause Courts Act (15 of 1882) the High Court was empowered to make rules for the Presidency Small Cause Courts. Such powers were with regard to rules relating to matters of procedure and practice. Under the Rules of the Presidency Small Cause Courts it was necessary, at the time of presenting an application for a new trial, either to deposit in Court the amount of the decree or to give security for the due performance of the decree. It was decided that the rule was in conflict with S. 38 of the principal Act, and was therefore ultra vires. It was held that the rule under consideration was a rule that affected a substantive right i. e. a new trial, and could not be said to relate to practice or procedure. Reference in that case was made to the decision in (1905) A C 369[5] where Lord Macnaghten said :

> To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.

But Sir Charles White in the Madras case in delivering the judgment of the Court, made this observation—an observation similar to that made by the Chief Justice of the Rangoon Court :

> Of course, there is no objection to the Small Cause Court, if they think fit, making it one of the terms which they are entitled to impose when they make an order for a new trial, that the condition imposed by O. 41, R. 2 should be satisfied before they grant the application.

The treatment of the question by the Rangoon Court and by Sir Charles White is a matter of degree. If, as Sir Charles White stated, there was a right to impose conditions on the hearing (that is what I understand him to mean) of an application for a new trial, it seems to me to be difficult to hold that what the Court could do without a rule, could not be done if there were a rule in that sense ; in other words, if the Court is entitled to impose conditions on the hearing of an application, it seems to me necessarily to follow that that right would not be abridged by a rule entitling the Court to impose such conditions. It would appear that the appellant can get no substantial assistance either from the *Rangoon case*[1] or from the *Madras case.*[4]

Again in (1898) 2 Q B D 340,[6] to which reference was made, under S. 43, Licensing Act, 1872, in England, any person who opposes before licensing Justices the grant of a new license, may oppose the confirmation of the grant by the confirming authority. The same Section gave power to the Justice in Quarter Sessions to make rules as to the proceedings to be adopted for confirmation of new licenses. Under the rules made by a Court of Quarter Sessions, every person intending to oppose the confirmation of any provisional license before the County Licensing Committee must, within seven days after the grant of the provisional license, give notice to the applicant and to the Clerk of the Peace of his intention to oppose the confirmation. It was held that such a rule was ultra vires the Justices in Quarter Sessions. Wills J. in his judgment, said :

> I think the sounder view is that the right of the Justices to make rules however wide may be the area that they cover, cannot affect the privilege of the objector to be heard in opposition to the confirmation, and that these particular rules really do impose fresh conditions upon the exercise of the objector's right,

and later :

> The rule imposes as a necessary preliminary to the right to oppose the confirmation something which is not to be found in the statute; it is therefore in my opinion ultra vires.

Further the learned Judge says :

> It is clearly within their (Justices') power to say that if adequate notice of opposition to the confirmation of the license has not been given the costs of any adjournment thereby rendered necessary, or any other costs thrown away, must be

4. Madurai Pillai v. Muthu Chetty, (1914) 1 AIR Mad 287=22 I C 775=38 Mad 823=26 M L J 227 (F B).
5. Colonial Sugar Refining Co. v. Irving, (1905) A C 369=74 L J P C 77=92 L T 738=21 T L R 513.
6. Queen v. Bird : Ex parte Needes, (1898) 2 Q B D 340=67 L J Q B 618=79 L T 156=46 W R 528=62 J P 422=14 T L R 384.

paid by the objector; nothing could be more reasonable.

Kennedy J. in the same case said:

To make an absolute rule which has the effect of debarring a man from the exercise of an absolute statutory right unless he complies with a number of requirements is, in my opinion, clearly ultra vires.

This case does not assist the appellant, as it will be seen from the observations of Kennedy J. that its effect was to debar a man from exercising an absolute statutory right unless he complies with a number of requirements. In the matter before us, by reason of the decision of the Full Bench of this Court the imposition of the condition is a matter of discretion and is nothing more than putting the applicants on terms. But the real question we have to decide is whether this is a matter of procedure, and therefore within the powers granted by S. 122, Civil P. C. This question is I think concluded by the decision in 48 I A 76.[7] Under O. 41, R. 10, Civil P. C.:

the Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.

Under cl. (2) of that rule:

where such security is not furnished within such time as the Court orders the Court shall reject the appeal.

In 48 I A 76[7] an appeal was preferred in the High Court at Calcutta under S. 15 of the Letters Patent of 1865 against the rejection by the Court in its original civil jurisdiction of a petition under the Probate and Administration Act (5 of 1881). There was a failure to comply with the order to give security for costs. The High Court acting under the rule to which I have referred dismissed the appeal, after certification by the Registrar that the order for security had not been complied with. The appellant filed a petition asking for three months further time which was rejected. Later, the appellant sought to proceed in forma pauperis and this application was also rejected. Lord Sumner, in delivering the judgment of the Judicial Committee of the Privy Council, made this statement at page 80 of the Report:

The appellant further contended broadly that the orders and rules made under the Code of Civil Procedure 1908, have no application to appeals brought under the Letters Patent of 1865. This contention again is too wide. The real question is, whether O. 41, R. 10, applies to such appeals, as the High Court thought that it did, and to this question alone their Lordships will proceed to address themselves.

Then later at page 82:

There is a fallacy involved in the appellant's argument that the Letters Patent right of appeal is limited and to a certain extent taken away by orders and rules, which prevent the High Court from permitting the continuance of such an appeal in forma pauperis at any stage, for there is of course a marked difference between a right of appeal on ordinary terms and without special indulgence, and a power to relieve the appellant in the exercise of that right from the burden of the ordinary terms. The High Court order as to security for costs is not a limit on the right to appeal, nor does it take the right to appeal away, but it is a rule of procedure now applicable to the appeal under the Letters Patent under the words "any law for the time being in force," which are contained in S. 104.

Their Lordships therefore were of the opinion that O. 41, R. 10, which gave the Court power to order security for costs, is nothing more than a rule of procedure. On the construction of the proviso, i. e. the amended rule at present under consideration, and, according to the decision of the Full Bench of this Court to which I have made repeated reference, this is nothing more than putting the party on terms. It is not an obstacle in the way of the applicant as was the rule in the Rangoon Court, the rule there allowing no discretion on the part of the Judge, being an absolute bar to the application. Here it is merely placing the party upon terms. It is on the same footing as an order as to security for costs under O. 41, R. 10, being merely a condition imposed upon the applicant: and being, as their Lordships of the Judicial Committee stated in 48 I A 76,[7] a matter of procedure, it is within the powers of this Court under S. 122, Civil P. C. With this opinion I would direct that the case be remitted to the Judges of this Court for final disposal.

Dhavle J.—I agree.

Varma J.—I agree that O. 21, R. 90 Civil P. C., as it stands at present, is not ultra vires of the rule-making powers of the Patna High Court. The chief argument advanced against this view was based upon a decision of the Rangoon High Court; but looking at the rule as it stands in Rangoon it is quite clear that the provisions of that rule are different from those of the Patna rule. The provisions of the Patna rule have been explained by the Full Bench of this Court in 20 P L T 275.[2] In the light of that decision it cannot be said that by this rule the applicant is shut out from seeking his remedy before the Court. Under the

7. Sabitri Thakurain v. Savi, (1921) 8 A I R P C 80=60 I C 274=48 Cal 481=48 I A 76 (P C).

present rule it will be for the Courts to decide in each case whether to insist upon the 12½ per cent. deposit being made or any amount less than that, or not to require any deposit at all. The matter is left entirely in the judicial discretion of the presiding officers of the Courts.

Manohar Lall J.—I have had the advantage of seeing in advance the judgment prepared by my brother Wort J. I entirely agree with his reasons and the conclusion at which he has arrived. I only wish to impress upon the subordinate Courts that the amended rule which is being held intra vires of the High Court should not be allowed to be used in practice as an engine of oppression on the litigants. This danger can easily be avoided by deciding whether security should be demanded and if so in what form from the applicant on exercising a sound judicial discretion keeping in view the circumstances of each applicant and the facts of each application.

Chatterji J.—The question for the decision of which this Full Bench has been constituted is whether the proviso (i) (b) which has been added to O. 21, R. 90, Civil P. C., by this Court in exercise of its rule making power is ultra vires. The proviso runs thus:

(i) Provided that no application to set aside a sale shall be admitted unless,

* * * * *

(b) the applicant deposits with his application such amount not exceeding 12½ per cent. of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

On 9th December 1937 the appellant filed an application in the Court below under O. 21, R. 90, to set aside a sale held in execution of a mortgage decree on 10th November 1937. At the same time he made an application supported by an affidavit stating that on account of the present depression he was unable to arrange for the security money required to be deposited under the amended rule, and praying that the security might be dispensed with. On 11th December 1937, the Court after hearing his pleader rejected the prayer for dispensing with the security and ordered that if Rs. 1329 representing 12½ per cent. of the purchase money was not deposited by 8th January 1938 the application under O. 21, R. 90 should stand dismissed. On 8th January, he filed a petition praying that he might be allowed to offer security in property. This prayer was refused and no further steps being taken, the application under O. 21, R. 90 was rejected on the same day. Against this order the present appeal is directed. The appeal was at first heard by Mohammad Noor and Rowland JJ., before whom the contention was raised that the amendment to O. 21, R. 90 made by this Court in exercise of its rule making power was ultra vires. The question being of great importance was referred by them to a larger Bench. The amendment to O. 21, R. 90 was made by this Court in exercise of its power conferred by S. 122, Civil P. C. That Section is as follows:

High Courts (constituted by His Majesty by Letters Patent and the Chief Court of Oudh) may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules, annul, alter or add to all or any of the rules in Sch. 1.

The point taken by Mr. S. N. Bose on behalf of the appellant is that S. 122 gives the High Court power only "to make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence." But, it is said, the amendment to O. 21, R. 90 which imposes a condition upon the applicant to deposit security is not merely a rule of procedure but is a rule which takes away the substantive right conferred by O. 21, R. 90 as framed by the Legislature, and therefore such amendment was in excess of the powers conferred by S. 122. Mr. Bose attempted to argue that the right to set aside a sale is a right possessed by a litigant under common law, but he had to concede that the right to set aside a sale held under the Civil Procedure Code does not exist apart from the provisions of that Code. O. 21, R. 90 itself, in my opinion, is a rule of procedure and prescribes one of the modes in which an auction sale may be set aside. Strictly speaking, it does not create any right but provides a remedy. The amended rule made by the High Court does no more than lay down a procedure to be adopted when an application under O. 21, R. 90 is presented. It may be assumed without conceding that something might perhaps be said in favour of the appellant's contention if the effect of the amended rule had been to make the security required by it a condition precedent to the presentation of the application under O. 21, R. 90. But it has been held by a Full Bench of this Court in 20 P L T 275[2] that no such condition is imposed by the amended rule. The true position is that a person aggrieved by

a sale is quite at liberty to present an application under O. 21, R. 90. But before his application is admitted he may be put on terms as to furnishing security. The security, it should be mentioned, is meant to secure payment of the costs to the opposite party in the event of the application being unsuccessful as will appear from the following clause which also was added by the same rule made by this Court :

(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i) (b), if any.

It is to be remembered that the Code of Civil Procedure itself, as its Preamble shows, relates to the procedure of the Courts of Civil Judicature. The wording of S. 122 also suggests that the rules in Sch. 1 all relate to procedure; otherwise the last portion of the Section which says "may by such rules annul, alter or add to all or any of the rules in Sch. 1" will hardly fit in with the context. This passage in the Section to my mind affords a complete answer to the contention raised. Mr. Bose relies on a Full Bench decision of the Rangoon High Court in A I R 1937 Rang 419[1] in which it was held that a proviso to O. 21, R. 90, in some respects similar to proviso (i) (b) which we are here considering, was ultra vires the rule-making powers of that High Court. The proviso there was as follows :

Provided that no application to set aside a sale shall be admitted unless :

(b) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale, whichever is less, and in case the application is unsuccessful, the costs of the opposite parties shall be a first charge on the amount so deposited.

The learned Judges in that case took the view that the proviso could not be regarded as a rule regulating procedure but in fact it was designed to prevent proceedings being instituted. In the first place, it is to be observed that though there is some apparent similarity between the Rangoon rule and our rule, the two rules are in substance essentially different. The Rangoon rule requires deposit of the entire decretal amount or the purchase money, whichever is less, and the deposit is imperative; whereas our rule leaves a discretion to the Court (1) to fix the amount of security which must not exceed 12½ per cent. of the purchase money, (2) to determine whether the security should be in cash or in property and (3) to dispense with the security altogether, if a proper case is made out. Thus, the effect of the Rangoon rule is practically to shut out the applicant from proceeding with his application unless he makes the deposit which in many cases may not be possible. Our rule on the other hand gives him an opportunity to be heard in the matter of security. In the said Rangoon case Leach J. observed :

I can well understand a rule stating that once a litigant has been heard the Court shall have the right to say that he shall carry the matter no further unless he complies with certain conditions, but before putting a litigant on terms the Court must first hear him, and if proviso (b) were allowed to stand, he might never be able to obtain a hearing.

The proviso (b) of our rule exactly falls within this observation because its object is merely to put the applicant on terms before he can be heard further in the matter. In the second place, the Rangoon decision seems to have proceeded to this view :

The right which exists is not, I am persuaded, conferred upon the person interested by O. 21, R. 90, which is in this respect declaratory of the common law.

With all respect to the learned Judges I am unable to agree that in India a litigant has a right under the common law to set aside a Court sale. The right to set aside such sale, in my opinion, does not exist apart from the provisions of the Statute under which the sale is held. In my view therefore the Rangoon decision cannot be regarded as an authority for the contention raised by the appellant. The next case relied upon by Mr. Bose is 38 Mad 823[4] which was decided by a Full Bench of the Madras High Court. In that case the question was whether O. 41, R. 2, Presidency Small Cause Court Rules, made by that High Court was ultra vires. That rule provided that no application (for a new trial) should be entertained unless the applicant at the time of presenting the application either deposited in Court the amount due from him under the decree or order, or gave security to the satisfaction of the Court or the Registrar for the performance of the decree or order in respect of which the application was made. It was held that the right to apply for a new trial was a substantive right and could not be taken away by any rules made by the High Court. In that very case White C. J. who delivered the judgment observed :

But if by statutory enactment a power is given to a rule-making authority to make rules, the rules, as it seems to me if they were within the power given, would be good even if they purported to abridge the rights given by the statute.

As I have already held that the amended rule under O. 21, R. 90 made by this Court is a rule relating to procedure and not tak-

ing away any substantive right, this Madras decision is of no assistance to the appellant. On the other hand, Sir Sultan Ahmad on behalf of the respondent has drawn our attention to the decision of the Privy Council in 48 Cal 481.[7] Their Lordships while dealing with the provisions of O. 41, R. 10, Civil P. C., observed that that rule was a rule of procedure. Lord Sumner who delivered the judgment said :

> The High Court order as to security for costs is not a limit on the right to appeal, nor does it take the right to appeal away, but it is a rule of procedure.

Order 41, R. 10 provides that if the security for costs which is demanded is not furnished the Court shall reject the appeal. If therefore O. 41, R. 10 is to be regarded as a rule of procedure there is no reason why the amended proviso to O. 21, R. 90 which requires security to be furnished should not be so regarded. In my opinion, the question referred to us should be answered in the negative, in other words, the proviso (i) (b) to O. 21, R. 90, Civil P. C., which has been added by the rules made by this High Court under S. 122, Civil P. C., is not ultra vires.

G.N./R.K. *Reference answered in the negative.*

A. I. R. 1940 Patna 270

FAZL ALI AND MEREDITH JJ.

Ram Kumar Ram Saraff — *Defendant* — Appellant.

v.

Mohan Lal Maharaj, Plaintiff and others, Defendants — Respondents.

Appeal No. 619 of 1938, Decided on 30th November 1939, from appellate decree of Sub-Judge, Bhagalpur, D/- 26th May 1938.

(a) Civil P. C. (1908), O. 20, R. 7—Date of decree is date of judgment — Assignment of decree after delivery of judgment is valid.

Under O. 20, R. 7, the date of the decree is the date of the judgment and the decree must therefore in law be deemed to have come into existence on the date when the judgment was delivered. Therefore the assignment of a decree after the judgment has been pronounced though the decree may not have been prepared and signed, is valid: *A I R 1920 Lah 395, Disting.* [P 271 C 1]

(b) Decree — Assignment — Assignment of decree under appeal — Assignee can execute appellate decree.

The assignment of a decree under appeal gives the assignee the right to execute the appellate decree, as what is assigned is not only the decree itself but the interest of the decree-holder therein as finally determined: *A I R 1918 Mad 279, Foll.* [P 271 C 2]

(c) Hindu Law — Alienation — Manager— Assignment by one of two kartas is voidable only at instance of other coparceners—Stranger cannot impugn it.

A deed of assignment executed by one of the two kartas of a joint Hindu family is voidable at the option of the other coparceners who alone may be affected by his unauthorized act, and no person who is a stranger to the family and does not possess a right to have the transaction defeated on other grounds (e. g. under S. 53, T. P. Act,) has a locus standi to intervene and impugn such an alienation, merely because it is in excess of his authority to deal with the property for family purposes: *A I R 1935 Lah 867 and 19 Cal 123 (P C), Rel. on.* [P 272 C 1]

(d) Civil P. C. (1908), O. 21, R. 63 — Evidence gone into on both sides—Onus immaterial.

In a suit under O. 21, R. 63, the onus is primarily on the plaintiff whose claim was rejected in proceedings under O. 21, R. 58; but when evidence has gone into on both sides, the question of onus is of secondary importance. [P 272 C 1]

Mahabir Prasad and S. C. Muzumdar — *for Appellant.*

Khurshaid Husnain, K. Dayal and K. P. Sukul — *for Respondents.*

Fazl Ali J.—This is an appeal by defendant 1 (one of the defendants first party) in a suit under O. 21, R. 63, Civil P. C., which has been decreed in favour of the plaintiff. It appears that defendants 15 to 19 (defendants third party) owed money to the plaintiff as well as to defendants first party. On 2nd April 1930, defendant 15 and one Meghraj, who held a power of attorney from defendant 16, executed a deed purporting to assign in favour of the plaintiff a decree for Rs. 2506 obtained by defendants third party against defendants second party. This decree was subsequently appealed against by defendants second party, but their appeal was dismissed and the decree was upheld by the Appellate Court on 7th September 1934. In 1934 defendants first party executed a decree which they had obtained against defendants third party and on 5th October 1934, they attached the appellate decree passed on 7th September 1934 in favour of defendants third party against defendants second party. On 23rd January 1935, the defendants second party paid a sum of Rs. 3369 which was the total amount due on that date under the decree attached by them and the defendants first party filed a petition of satisfaction. The plaintiff thereupon applied under O. 21, R. 58, and claimed that the decree in question having been assigned to him in 1930, the defendants first party could not attach it afterwards in execution of their decree and that he was entitled to the sum which had been realized by defendants first party from the judgment-debtors (defendants second party).

This claim was disallowed and so on 22nd July 1935, the plaintiff instituted the present suit. The suit having been decreed in the Courts below, one of the defendants first party has preferred this second appeal impleading defendants 2 to 4 as respondents in the appeal.

It may be stated here that in the suit which defendants third party, had brought against defendants second party, the judgment was pronounced on 31st March 1930, that is to say, two days before the deed of assignment, but the decree was not prepared and signed until 7th April 1930. The first point raised on behalf of the appellant is that the plaintiff did not acquire a valid title to the decree inasmuch as it was not in existence on the date of the assignment. In support of this argument it has been pointed out that the Code itself draws a distinction between a judgment and a decree and that no decree can be enforced until it has been prepared and signed. I think however that a complete answer to this contention is provided by O. 20, R. 7 which provides that the decree shall bear the date on which the judgment was pronounced. The assignment of a decree is nothing more than an assignment of the rights conferred by the decree. These rights are acquired as soon as the decree is passed or pronounced and cannot be made dependent on the preparation of the decree which is more or less a ministerial Act. As the Code provides that the decree shall bear the date on which the judgment is pronounced, the decree must in the eye of law be presumed to have come into existence on the date on which the judgment was pronounced. The mere fact that the decree cannot be executed until it has been prepared and signed cannot avail the appellant, because the law makes it necessary that a petition for execution must contain certain particulars embodied in the decree. The learned advocate for the appellant has placed some reliance upon 54 I C 913[1] in which the Court refused to entertain an appeal on the ground that no decree had been prepared in the case in which the appeal had been preferred. The facts of the case were however peculiar and the case is hardly in point.

The next question raised on behalf of the appellant was that because the plaintiff was the assignee of the decree of the trial Court only, the assignment in his favour did not carry with it the right in the decree of the Appellate Court which was passed on 7th September 1934, and was attached by the defendants first party on 5th October 1934. A similar point appears to have been raised in A I R 1918 Mad 279[2] wherein it was pointed out by the learned Judges who decided that case that when a decree is assigned what is transferred is not the decree itself but the interest of the decree-holder in the decree as may be finally determined and therefore the assignment of a decree carries with it the right to the decree passed in appeal.

The next point urged on behalf of the appellant was that the assignment in favour of the plaintiff was not valid inasmuch as in the power of attorney held by Meghraj from Munnoo Lal no authority was given to him to execute a deed of assignment relating to a decree. It appears from the judgments of the Courts below that there were two kartas in the joint family of which defendants 15 to 19 were members, these being Kanhaiya Lal and Munnoo Lal. From a genealogy which forms part of the written statement of defendant 1, it appears that both Munnoo Lal and Sita Ram on whose behalf Meghraj executed the assignment deed are sons of Kanhaiya Lal, one of the executants of the deed. Munnoo Lal was adopted by one Dilsukh Rai, the only son of Tormal, and Kanhaiya Lal was adopted by Balkishun Das, a brother of Tormal. It appears that Sitaram has been adopted by his brother Munnoo Lal. The judgment of the trial Court further shows that the descendants of Balkishun Das and Tormal were joint. Assuming then that Meghraj was not empowered by the power of attorney to execute a deed of assignment relating to a decree, the point which is still to be decided is whether the assignment, which was admittedly executed by one of the two kartas of a joint family can be challenged by a person who is not a member of the joint family.

In my opinion this point is fully covered by the decision of the Lahore High Court in 16 Lah 714[3] which is based upon the observation made by the Judicial Committee in 19 Cal 123.[4] In that case it was held that under the Mitakshara law though

1. Gela Ram v. Ganga Ram, (1920) 7 A I R Lah 395=54 I C 913=1 Lah 223.

2. Ponnusani Pillai v. Chidambaram Chettiar, (1918) 5 A I R Mad 279=44 I C 849=35 M L J 294.
3. Imperial Bank of India, Jullundur v. Maya Devi, (1935) 22 A I R Lah 867=159 I C 474=16 Lah 714=37 P L R 831.
4. Hanuman Kamat v. Hanuman Mandur, (1892) 19 Cal 123=18 I A 158=6 Sar 91 (P C).

the manager of a joint Hindu family cannot alienate joint family property except for family necessity or with the consent of the co-parceners if they are adults, yet an alienation by him which cannot be supported on those grounds, is not unlawful or void ab initio, but is voidable at the option of the other co-parceners, who alone are affected by his unauthorized act, and no person who is a stranger to the family and does not possess a right to have the transaction defeated on other grounds (e. g. under S. 53, T. P. Act) has a locus standi to intervene and impugn such an alienation, merely because it is in excess of his authority to deal with the property for family purposes. In the present case the assignment was never challenged by Munnoo Lal or Sitaram. Thus, the question as to whether Meghraj was empowered to assign the decree under the power-of-attorney does not arise. I should also state that the document, though it is somewhat obscurely worded, may well bear the construction which has been put upon it by the Courts below; that is to say, it expressly authorizes Megharj to execute such documents as are signed by Kanhaiya Lal (who was after all the father of Munnoo Lal and Sitaram) without reference to Munnoo Lal and Sitaram. It was contended on behalf of the respondents that this appeal is incompetent inasmuch as it has not been preferred on behalf of all the members of the defendants first party. But as the other members have been impleaded as respondents, there was nothing to prevent us from passing a decree in favour of all the defendants first party under O. 41, R. 33, Civil P. C., if we thought that the appeal should be allowed. The question however is merely academic because the appeal fails on its merits. I would therefore dismiss the appeal with costs and the cross-objections not being pressed by the respondents, must also be dismissed but without costs.

Meredith J. — I agree with my learned brother. I do not think the findings of fact are vitiated by any misplacement of onus. On the contrary, the lower Appellate Court has correctly stated the position in observing that the onus was primarily on the plaintiff because his claim was rejected in a proceeding under O. 21, R. 58, Civil P. C., but when evidence had been gone into on both sides, the question of onus was of secondary importance. O. 20, R. 7, Civil P. C., seems to me a complete answer to the contention that when the assignment was made, there was no decree in existence which could be assigned. Judgment had been pronounced, although the formal decree had not been prepared, and though the decree was not signed until some days after the assignment, still under O. 20, R. 7 the date of the decree is the date of the judgment, and the decree must therefore in law be deemed to have come into existence on the date when the judgment was delivered. The argument that it was the decree of the Appellate Court which the defendants first party attached and that that decree was never assigned is, in my view, completely met by A I R 1918 Mad 279[2] wherein it was laid down that the assignment of a decree under appeal gives the assignee the right to execute the appellate decree, as what is assigned is not only the decree itself but the interest of the decree-holder therein as finally determined.

Lastly, the argument, that there was no valid assignment as Meghraj's power of attorney did not give him any authority to execute a sale deed relating to a decree, finds answer in 16 Lah 714.[3] If the execution be held to be by one karta only out of the two, then the document would be merely voidable at the option of the other co-parceners and not wholly void. The assignment would therefore be valid in law unless and until avoided by any of the co-parceners, or any one deriving through them. In the present case the other members of the family of the defendants third party were impleaded in the suit and did not appear to challenge the assignment. The finding moreover was that the assignment was for consideration and for benefit of the joint family. Apart from that both the lower Courts have interpreted the power of attorney (Ex. 6) as authorizing Meghraj to sign kewalas of all sorts if they bear the signature of the other karta Kanhaya Lal. The power of attorney may be badly worded but there is nothing in it, in my opinion, which would justify us in holding that the interpretation put upon it by both the Courts below is wrong.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 272

DHAVLE J.

Sheikh Mohsin and others—Petitioners.

v.

Emperor.

Criminal Revn. No. 576 of 1939, Decided on 8th December 1939, against order of Magistrate, First Class, Darbhanga, D/- 19th August 1939.

(a) Criminal P. C. (1898), Ss. 263 (b) and 537 — Mere non-compliance with S. 263 (b) is not enough to quash conviction.

Failure by a Magistrate to enter the date of the commission of an offence in the prescribed form as required by S. 263 (b) is not enough to warrant quashing of the conviction unless it be shown that the defect had led or could possibly have led to any prejudice or failure of justice: *A I R 1930 Cal 212 (F B) and A I R 1927 P C 44, Rel. on.* [P 273 C 1]

(b) Criminal P. C. (1898), Ss. 263 (f) and 537 — Mere failure to comply with S. 263 (f) does not warrant quashing of conviction.

In the case of a summary trial under S. 379, Penal Code, the Magistrate ought, of course, to comply with the requirements of 263 (f) but the mere failure to enter the value of the stolen property in the form does not suffice to raise any question of possible or probable prejudice or failure of justice unless it is shown that there was a real defect of jurisdiction by reason of the property alleged to have been stolen exceeding Rs. 50 in value: *A I R 1927 P C 44, Rel. on ; A I R 1922 Pat 227 and 20 W R Cr 17, Disting.* [P 274 C 1]

(c) Criminal P. C. (1898), Ss. 355 and 537 —Failure to sign memorandum of evidence of each witness is not sufficient by itself to vitiate conviction.

Failure of a Magistrate to sign the memorandum of evidence of each witness as required by S. 355 (2) unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned is not enough by itself to warrant the quashing of the conviction : *A I R 1927 P C 44 and A I R 1921 Cal 165, Rel. on; A I R 1922 Pat 5, Disting.* [P 274 C 2]

Rajeshwari Prasad — *for Petitioners.*

Order. — This is an application in revision by four petitioners who have been convicted under S. 448, I. P. C., and sentenced, two of them to fines of Rs. 30 each and the other two to fines of Rs. 15 each. The trial was summary. The petitioners moved the Sessions Judge for referring the case to this Court, and the points urged before him were that the trial was bad because the Magistrate had not complied with certain requirements of S. 263, Criminal P. C. Cl. (b) of that Section requires the date of the commission of the offence to be entered in the prescribed form, and it is pointed out that this was not done. It does not seem to have been urged before the Sessions Judge that this defect, such as it was, had led or could possibly have led to any prejudice or failure of justice so as to warrant the quashing of the conviction—a consideration to be borne in mind since the decision of their Lordships of the Judicial Committee in 5 Rang 53.[1] In 57 Cal 1228,[2] a Full Bench decision of the Calcutta High Court, Rankin C. J., pointed out how the Criminal P. C., is a long list of imperatives like the word "shall,"

some of which have reference to matters which are in no way vital and many of which are directed to minor incidents of procedure. But for S. 537, there would be grave disadvantages in a Code which makes statutory so many and so various requirements. That Section obviates the difficulty which would arise by reason of all irregularities bearing the character of transgressions of statute.

The learned Chief Justice pointed out how, in view of difference of opinion in India, the Judicial Committee had in the Rangoon case carefully explained and applied S. 537 "for the guidance of the Courts," and how that decision must now govern the interpretation of the Section unless and until the Legislature shall see fit to amend the Section. Another defect that was pointed out was the failure of the Magistrate to show the value of the property as required by cl. (f) of S. 263. The petitioners had been put on trial for offences under Ss. 418, 379 and 323, and though they were sentenced under S. 448 only, the trial under S. 379 did call into operation cl. (f) of S. 263. As to the omission to enter this detail, reliance was placed on 6 P L T 114,[3] a ruling (be it noticed) of 1922, long before the decision of their Lordships of the Judicial Committee in the Rangoon case. Ross J. who decided the case in question purported to follow 20 W R Cr 17,[4] a case in which a summary conviction of theft was set aside because in the prescribed form the value of the stolen property was not mentioned, nor did it anywhere appear what the value of the property alleged to have been stolen really was. In the case before Ross J., there was a charge sheet which showed "P. S. Rs. 10" and "P. R. Rs. 10" from which it was argued that the property in respect of which the offence was committed was valued at Rs. 10. The learned Judge however found that the Magistrate had not directed his mind to the question of his jurisdiction to try the case summarily as being dependent on the value of the property stolen not exceeding Rs. 50, and in this view he set the conviction aside. It will be seen at once that this is not what

1. Abdul Rahman v. Emperor, (1927) 14 A I R P C 44=100 I C 227=54 I A 96 = 5 Rang 53 =28 Cr L J 259 (P C).

2. Emperor v. Eman Ali, (1930) 17 A I R Cal 212 =1930 Cr C 212=123 I C 664=31 Cr L J 536 =57 Cal 1228=51 C L J 171=34 C W N 296 (F B).

3. Brij Nandan Pandey v. Emperor, (1922) 9 A I R Pat 227=81 I C 33=25 Cr L J 545=6 P L T 114.

4. Queen v. Abheen Parrida, (1873) 20 W R Cr 17.

had happened in 20 W R Cr 17,[4] for, there the learned Judges found that it did not appear anywhere what the value of the property alleged to have been stolen really was.

In the present case the proceedings began with a first information lodged with the police by Mt. Hamudan, and in this first information the offence complained of is shown as "house trespass and theft of grain worth Rs. 5-12-0 under Ss. 448, 379, I. P. C." Mr. Rajeshwari Prasad for the petitioners has contended that the first information is no part of the record of the case. But this will be so only if the form prescribed under S. 263 is regarded as the whole record of the case for all purposes. A good deal of public work however is generally unavoidable before a Magistrate begins his trial under Chap. 22, Criminal P. C., as cognizance cannot be taken without materials, and unless the trying Magistrate is empowered to take cognizance under S. 190, Criminal P. C., (and many Magistrates in this province are not), reference to papers other than the form prescribed under S. 263 becomes necessary if it is desired to find out how the trying Magistrate came to handle the case at all.

The learned advocate cited 7 Lah 303[5] in support of the proposition that in a case coming under S. 264, Criminal P. C., the judgment and judgment alone is the only record. This is undoubtedly supported by sub-s. (2) of S. 264, and was used by the learned Judge of the Lahore High Court in support of the view that it is not necessary to frame a charge in a case tried summarily in which an appeal lies. But we are not concerned in the present case with S. 264, Criminal P. C., to say nothing of the fact that even in cases coming within that Section, it might become necessary for certain purposes to refer in revision to the papers preliminary to the summary trial. The trying Magistrate in the present case ought, of course, to have complied with the requirements of cl. (f) of S. 263, but knowing as we do that he must have had the first information report, &c., in the case before him, it seems to me impossible to assume that there was a real defect of jurisdiction in the present case by reason of the property alleged to have been stolen exceeding Rs. 50 in value. No such suggestion was made below, and the mere failure to enter the value in the form does not suffice to raise any question of possible or probable prejudice or failure of justice, the governing factor in S. 537, Criminal P. C.

Yet another defect urged on behalf of the petitioners is the failure of the Magistrate to sign the memorandum of evidence of each witness. In support of this is cited 3 P L T 322,[6] in which it was observed that in a summary trial of a warrant case the Magistrate is bound to make a memorandum of the substance of the evidence of each witness and to sign the said memorandum as required by cl. (2) of S. 355. Jwala Prasad J., who made the observation referred to S. 264, Criminal P. C., as prescribing the mode in which the record of the evidence of witnesses was to be prepared. But the Section that applies in the present case is S. 263 which provides that in cases where no appeal lies, the Magistrate or Bench of Magistrates, need not record the evidence of the witnesses ; and as was pointed out in 48 Cal 280,[7] this provision must be read as an exception to the general provision contained in S. 355 (1). Moreover, even if it be assumed that this does not save the Magistrate from making a memorandum of the substance of the evidence of each witness, the failure of the Magistrate merely to sign his memorandum cannot be regarded, since the decision of their Lordships of the Privy Council in the case from 5 Rang 53,[1] as sufficient by itself, to vitiate the conviction.

In my opinion, the points raised on behalf of the petitioners are no more than irregularities which ought not to have been committed. So far as they involve definite breaches of the requirements of the law, they are to be deprecated, but "unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned," they are not enough to warrant the quashing of the conviction. The application in revision is therefore dismissed.

G.N./R.K. *Application dismissed.*

5. Emperor v. Salig Ram, (1926) 13 A I R Lah 301=94 I C 415=27 Cr L J 639=7 Lah 303 =27 P L R 265.

6. Balkeshwar Singh v. Emperor, (1922) 9 A I R Pat 5=65 I C 546=23 Cr L J 114 = 3 P L T 322.

7. Satish Chandra Misra v. Manmatha Nath Mitra, (1921) 8 A I R Cal 165=61 I C 846 = 22 Cr L J 462=32 C L J 451=48 Cal 280.

A. I. R. 1940 Patna 275

FULL BENCH

HARRIES C. J., DHAVLE AND MANOHAR LALL JJ.

Bishun Prasad — Appellant.

v.

Kamta Prasad Misra and others, Plaintiffs and others, Defendants — Respondents.

Appeal No. 755 of 1937, Decided on 13th March 1940, from appellate decree of Sub-Judge, Monghyr, D/- 17th April 1937.

Bengal Regulation (43 of 1793), S. 33 (1) — Grant of Jagirs to invalided soldiers—Nature—Jagirdar or his heirs are not tenants of zamindar — Jagirs are protected from annulment under S. 37, Exception 1, Bengal Revenue Sale Law.

The provisions of the regulations relating to jagir lands granted to invalided soldiers clearly indicate that the lands which were granted to invalids or their heirs are regulated by the terms of the regulations themselves and are not tenures granted by the zemindar in any sense of the term. The zemindar is not entitled to assess rents upon the jagirdars nor to realize direct the malikanah payable to him nor to resume the lands upon the death of the invalid or his heirs. In truth the grant of this kind of jagir is a grant by the Government by virtue of its paramount power of a piece of land to its invalided soldiers which would remain in perpetuity in the possession of the heirs of the jagirdar provided the heirs complied with the terms in the regulations. Therefore the jagirdar is not a tenant of the zamindar in any sense of the term. S. 33 (1) merely defines the status of the heir of the grantee in the village hierarchy and does not in the least derogate from the rights which the Government was providing anxiously by means of the various regulations prior to and after Regn. 43 of 1793 to enable the heirs of the grantee to remain upon the land in perpetuity. Therefore the rights of the heirs of the grantee to continue to hold the land in perpetuity agreeably to the holders and their heirs observing the terms of the various regulations are not at all affected by a revenue sale and are protected from annulment under S. 37, Exception 1, Bengal Revenue Sale Law. The legislation of 1859 (Revenue Sale Law) was clearly not intended to get rid of the permanent mukarrari character given to these grants by the old regulations, nor did it have the effect of repealing the special protective provisions previously enacted: *13 M I A 317 (PC), Rel. on; A I R 1920 Pat 533, Disting. Beng L R Sup Vol 202 (FB); 20 W R 44 (P C) and 10 M I A 123 (P C), Ref.*

[P 279 C 1, 2; P 283 C 1]

Mahabir Prasad and B. B. Saran — *for Appellant.*

Sir M. N. Mukherji, S. N. Bose, K. P. Sukul and Prem Lal — *for Respondents.*

Manohar Lall J. — The respondents instituted a suit for recovery of possession over 2.82 acres of land covered by survey plot No. 166 in khata No. 126 in Mahal Gobindbigha. The mahal originally belonged to defendants fourth party and was sold for arrears of Government revenue in the year 1930 and purchased by the ancestor of defendant first party who obtained delivery of possession in July 1930. The cause of action for the suit was that the ancestor of the defendant second party was set up as a tenant of the land and as the result of a criminal proceeding started in July 1933, the Criminal Courts passed an order under S. 145 declaring the possession of the defendant second party with the result that the plaintiffs were dispossessed on 20th July 1933.

The plaintiffs' case was that the disputed land known as Jagir Badal Singh was a grant made by Government to Havildar Badal Singh, an invalided soldier, under the provisions of regulations for invalided sepoys and was a tenure existing from the time of the Permanent Settlement and was protected from annulment after the revenue sale of 1930—the land was admittedly acquired by the ancestor of the plaintiffs some time in 1872. The defence to the action was that the jagir was not a grant made to any invalided soldier and did not exist from the time of the Permanent Settlement and was not a protected interest within the meaning of S. 37, Revenue Sale Law, and that it was properly annulled after due notice had been given to the Jagirdar.

Before the trial Court it was not disputed that the land in suit appertained to Jagir Badal Singh Havildar. He found from an examination of two old documents, Ex. 3 and Ex. 4, that the Jagir was created some time before February 1800. Ex. 3 which is a certified copy of a register containing a list of the jagirs granted to various invalided soldiers of Pargana Salemabad by the Government contains a note that the specified area of jagir land was granted to Badal Singh Havildar in Gobind Bigha. Ex. 4 is a certified copy of an entry in the register maintained by the Collector from 1200 to 1235 Fasli and Ex. 5 is the Batwara Rubakar on partition of Mahal Gobind Bigha. Each of these documents shows that the village Gobinda Bigha was first temporarily settled with Dhrub Singh, who later on surrendered the estate, which then remained for some years in the khas possession of the Government. But, later on, when Dhrub Singh agreed to the terms of the engagement offered by the Government the village was permanently settled with him on 9th December 1800. Again in the Batwara Khasra

(Ex. 6) of 1866-67 the ancestors of the plaintiffs were shown to be in possession over the land known as Jagir Badal Singh with a liability to pay rent at 3 annas per bigha. It follows from these documents that the jagir in question was existing in February 1800 but the trial Court proceeded to presume backwards and held that the jagir in question was in existence in the year 1793 and therefore he came to the conclusion that this was protected from annulment under the first exception to S. 37 of Revenue Sale Law (Act 11 of 1859).

The defendants appealed to the learned Subordinate Judge who agreed with the conclusion of the trial Court and held that the jagir existed in February 1800, that the permanent settlement of the estate was made by Dhrub Singh in December of the same year and that the rent at 3 annas per bigha became payable as a consequence of the operation to this jagir of the provisions of Regn. 1 of 1804. He also agreed with the trial Court that there was no clear evidence as to the exact date of the creation of the jagir, but he differed in making the presumption that the jagir existed in 1793 and came to the conclusion that upon the evidence in the present case he could only hold that the jagir did exist in February 1800. He interpreted the words "permanent settlement" in the first exception to S. 37 to mean the permanent settlement of the particular estate and as he had found that the estate in which this jagir was situated was settled with Dhrub Singh in December 1800, that is to say after the jagir was created in 1800, he took the view that the jagir was protected from the annulment within the meaning of the first exception to S. 37 of the Revenue Sale Law. He distinguished the case reported in 5 Pat L J 79[1] which was cited before him on behalf of the appellants on the ground that the interpretation of S. 37 of Revenue Sale Law was not in issue therein as it was found in that case that the defendants were not tenure holders but mofassil talukdars under cl. 2, of S. 10 of Regn. 7 of 1822. He relied upon the case in 19 I C 872,[2] where it was held that for the purposes of S. 37, Revenue Sale Law, 1859, the word "settlement" must be taken to mean the permanent settlement of the estate concerned and not the year 1793 in which greater portion of Bengal was permanently settled. In the result he agreed with the learned Munsif and dismissed the appeal. Hence the second appeal by the defendant first party to this Court. When the matter was argued before a Division Bench consisting of my Lord the Chief Justice and myself we thought that the decision of this Court in 5 Pat L J 79[1] may require reconsideration and as the question was of great importance the appeal was referred for decision to the Full Bench.

Sir Manmatha Nath Mukherji appearing for the respondents submitted that the jagir in question is wholly outside the province of S. 37, Revenue Sale Law, and that the question as to whether the case in 5 Pat L J 79,[1] was correctly decided or not does not fall to be determined in the present case. It seems to me that the learned Advocate for the respondents is correct in his contention. A short review of the Regulations by which jagirs were granted to invalided sepoys is necessary to determine the true character of the present jagir.

On 18th February 1789, the first regulation for invalided sepoys was passed by the Governor-General in Council by which the East India Company was relieved from a part of the expense of the native invalided establishment at Monghyr and gave an option to the invalided native troops which were then at Monghyr or who may hereinafter be invalided, to receive a grant of waste land in lieu of the pay allowances given to them by the Government. The areas of waste land which each class of invalided soldiers could obtain was indicated in Art. 1—the Collectors of Bihar and Shahabad were directed to make it a rule to select as far as may be in their power such tracts of waste land for the invalids as may be brought into cultivation with the least difficulty and at the smallest expense so that they may afford a produce adequate to the labour of the tillage and may have an opportunity of procuring with greater facility such assistance as may be required for enabling them to establish themselves upon their lands (Art. 5). Art. 6 provided that the original grantee shall hold the lands allotted to him rent-free for life, without being subject to any tax or demand whatever. Art. 7 provided that the sannads for the lands so granted in Bihar, Rotas and Shahabad should be made out under the official seal and signatures of the Collectors of those districts.

1. Laljit Upadhyay v. Wajihunnissa Begam, (1920) 7 A I R Pat 533 = 54 I C 658 = 5 Pat L J 79.
2. Hamed Ali v. Atlas Ali, (1913) 19 I C 872.

The situation on the death of the original grantee was to be regulated by Arts. 8 and 9, namely that upon the death of the original grantee his lands should be continued to his heirs at law at a fixed jumma, to be assessed by the Collectors upon an estimate of the actual net produce after deducting one-tenth therefrom to be annually paid to the zemindar as maliconnah by the mocurrery holder, who shall thenceforward be considered upon the same footing as other persons in the Province holding lands at a fixed rent, and the Collectors were to fix the rent payable to the Government. After the rent payable to the Government and the maliconnah payable to the zamindar was determined, the Collectors were required to cause mocurrery sunnuds to be drawn out and authenticated in the mode already described in Art. 7 in the name of the heirs of the deceased who, it is important to note, were authorized to hold these lands in perpetuity, so long as they should continue to discharge the rent and maliconnah with which they may be assessed. Art. 10 dealt with the situation which would arise if the original grantee died within five years from the date of the grant. Art. 11 stated that if any of the mocurrerydars omitted to discharge the amount of Government's rent and the maliconnah payable to the zamindar, their mocurrery leases with the rights and privileges thereto annexed should be sold to the best bidder for the liquidation of the amount of the demands against them. By a Resolution dated 24th December 1790, the Board of Revenue agreed that in order to obviate the objections which the landholders may entertain to the allotment of waste lands to invalids

> the whole amount of the fixed jumma to be assessed upon such lands after the death of the original grantee agreeable to the Regulation of 18th February 1789, be declared to belong to the proprietor of the village in which such lands may be situated, and that he be not subject to any additional demand on the part of Government on account thereof during the term of the engagements that may exist between him and Government at the time that the lands so granted may become liable to the payment of such Jumma.

It is obvious from a consideration of these provisions that these jagirs were granted by the paramount power to the invalided soldiers for life and to their descendants in perpetuity subject only to the descendants paying a fixed rent to the Government and maliconnah to the zamindar in whose village the lands were situated and further that the income from these lands was not to form a part of the assets upon which revenue was assessed upon the zamindar. The decennial settlement of the public revenues of Bengal, Bihar and Orissa was made by Regulations dated 18th September 1789, 25th November 1789 and 10th February 1790 wherein it was notified to the proprietors of land, with or on behalf of whom a settlement might be concluded, that the jama assessed upon their lands under those regulations would be continued after the expiration of ten years and remain unalterable for ever provided the Directors of the East India Company agreed. By Regulation 1 of 1793 dated 22nd March of that year, but passed by the Governor-General in Council on 1st May 1793, it was intimated to the zamindars that the Directors of the East India Company have agreed and therefore the jama which has been or may be assessed upon their lands under the above mentioned regulations would be fixed for ever and that after the expiration of the terms of that settlement no alteration will be made in the assessment which they have respectively engaged to pay, but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever. It will be noticed that this Permanent Settlement Regulation does not at all interfere with the rights and liabilities of the jagirs granted to invalided soldiers. Regulation 43 of 1793 re-enacts in the form of a regulation the rules passed on 18th February 1789 and 24th December 1790, for granting of lands to invalided soldiers; it was passed by the Governor-General in Council on 1st May 1793 and also embodies the new rules which were passed on 25th February 1793. It consists of 33 Sections.

The terms upon which the new grants are to be held by the invalids and their heirs are substantially the same as in the earlier regulations. Section 5 provides by the first article that the land is to continue the property of the zamindar or other proprietor and is never to be separated from his estate. The third article defines that the invalids are to hold the land free of rent or any demand whatever during their lives, and after their demise, the land is to devolve to their heirs. The fourth article enjoins the heirs of the invalids to pay to the zamindar one-tenth of the produce of the land as malikanah for the first five years and thereafter by the fifth article the payment of one-tenth malikanah is to cease and the Collector was required to assess the

lands with a net rent, equal to two-thirds of the amount paid for other lands in the district of the same description and quality and this rent was to be paid to the zamindar or other proprietor but was not liable to any variation. The seventh article provides that if an invalid dies without heirs, the land was to be given to the option of a fresh man coming upon the establishment to supply his place in the thana upon his agreeing to take the lands upon the terms to which he would have succeeded to them had he been the heir of the deceased. But if no fresh man agrees to take the lands upon these terms the lands are to revert to the zamindar or other proprietor who is entitled to dispose of them in such manner as he may think proper. The eighth article states that if the invalid dies and leaves heirs who are not willing to receive the lands upon the foregoing terms, or are incapable of cultivating them, the heirs should be allowed to dispose of their rights to any of the invalids belonging to the thana, the purchaser becoming subject to all the conditions in the articles regarding the heirs of the invalid. The ninth article provides that if an invalid from idleness or perverseness wholly neglects the tillage of his jagir for two years after he is put in possession, the jagir is to be forfeited and given to a fresh man.

Similarly the 10th article provides that if an heir to a jagir leaves the land uncultivated for one year after he claims it and is ordered to be put in possession, the land may be forfeited and transferred to any other invalid, or heir, or successor of an invalid, who will take it upon the same terms as he would have been entitled to hold it, had he been the heir of the deceased. In the event of no invalid agreeing to take the jagir upon the above terms, the jagir was to revert to the zamindar or other proprietor. The 11th Article deals with the situation when the lands which should devolve upon the heirs or successors of the invalids are to be assessed and if any parts of them are not brought into cultivation they may be resumed and the zamindar or other proprietor is given the liberty to grant pattas for those portions to whomsoever he shall think proper after an option has been given to the person who has omitted to cultivate them to bring them into cultivation within a year. The 12th article provides that the malikanah and rent to which the lands are declared liable are to be collected by the Collector and accounted for to the zemindar or other proprietor by credit being given him for the amount in part of his stipulated annual payments to Government. It further provides that no increase of revenue is to be levied from the zemindar or other proprietor during the time of the engagement which may subsist between him and Government on account of the rent or malikanah which may become payable to him from the lands of the invalids during the term of such engagements. Art. 13 enjoins the Collector to obtain from the proprietor a pattah for an invalid or his heir or successor if he is put in possession of a jagir. The pattah is to be in the name of the possessor of the land specifying the amount of the rent or assessment, the quantity of land, the boundaries of it, and the terms of the tenure. S. 8 provides that where invalids are established upon lands which are the property of the Government, they are to hold them upon the same terms as invalids settled upon lands belonging to zemindars or other proprietors of land paying revenue to Government. Sec. 9 lays down that widows being heiresses to the jagirs of their husbands should be allowed to marry whom they please without forfeiture of their jagirs, which, after their death, are to devolve to their heirs at law. S. 27 provides that jagirs while possessed by invalids are not to be assigned as security for money borrowed by them, nor are they to be answerable after their decease for debts contracted by them, but when jagirs devolve to the heirs or successors of invalids, they are to be answerable for debts contracted by such heirs and successors.

Section 33 consists of fourteen articles. Art. 1 provides that the rules contained in the first 32 Sections which I have summarised above, will not apply to those invalids who have already accepted lands under the resolutions of 18th February 1789 and 24th December 1790. It provides that those invalids are to be considered as tenants of the landlords in whose estate they are settled and that in order to secure them and their heirs in the possession of the lands which have been made over to them the Collectors are to apply to the zemindars to grant them pattas, confirming the land to them and their heirs as patta taluks agreeably to the terms of those Regulations. Art. 2 reproduces the terms of the Regulation of 18th February 1789 and Art. 14 reproduces the terms of the Regulation of 24th December 1790. In the year 1795

Regn. 56 was enacted to allow the heirs of invalids to hold the land rent-free on the expiration of the tenth year from the date of the original grantee's being put in possession in case of his dying within ten years. But this was rescinded by Regn. 1 of 1804. By that Regulation, the better management of the invalid jagirdar establishments and of the invalid pension establishments was provided. Art. 2 rescinds Regn. 43 of 1793 and Regn. 56 of 1795 and instead of the terms thereof similar rules were enacted which were inserted in Art. 9 consisting of 16 sub-sections. Art. 27 distinctly provides that S. 33 of Regn. 43 of 1793 is to remain in force. By Regn. 11 of 1808 the rent payable by the heirs of invalid soldiers was again regulated. It states in cl. 1 that by cl. 6 of S. 9, Regn. 1 of 1804, it was enacted that after the expiration of a period of five years the payment of malikanah shall cease and the proprietor of the land shall be entitled to rent in the proportion of two-fifths of the annual produce, whether in kind or money as may be agreed on between the parties and that the intention of this provision was not to increase the rate of rent payable by the heirs of invalids to the zamindars for which no motive could exist, because

> the lands in question not being included in the assets on which the jumma payable by the zamindars to Government had been adjusted,

but that the modification was adopted on the supposition that a difficulty might occur in ascertaining the sum equal to two-thirds of the amount paid for other lands in the district and therefore by the new Art. 3 it was enacted that the zamindars shall be entitled to receive a net rent equal to two-thirds of the amount paid for other lands in the district of similar quality. By Regn. 2 of 1811 the existing rules for the support of invalided officers were amended in some particulars which are not material for the purposes of this enquiry.

It seems to me from a perusal of the carefully worded provisions of these Regulations relating to jagir lands granted to invalids that the jagir lands which were granted to invalids or their heirs are regulated by the terms of these Regulations themselves and are not tenures granted by the zamindar in any sense of the term. The zamindar is not entitled to assess rents upon the jagirdars nor to realize direct the malikanah payable to him nor to resume the lands upon the death of the invalid or his heirs. The rents assessed upon the lands when they come into the possession of the heirs of the jagirdar are not to be taken into consideration in increasing the revenue payable by the zamindar to the Government. The malikanah is not payable to him nor realizable by him, but this is to be realized by the Collector and when realized it is to be credited in the account against the revenue due to the Government from the zamindar. In truth the grant of this kind of jagir is a grant by the Government by virtue of its paramount power of a piece of land to its invalided soldiers which would remain in perpetuity in the possession of the heirs of the jagirdar provided the heirs complied with the terms in the Regulations.

It has already been seen that upon the death or extinction of the heirs of the jagirdar or upon their refusal to carry out the terms of the jagir grants the land does not revert to the zamindar but reverts to him only if no other invalid is found willing to take the land upon those terms or if no fresh man coming upon the establishment of invalids is willing to supply his place in the thana upon the same terms. It seems to me therefore quite clear that the jagirdar, as I stated before, is not a tenant of the zamindar in any sense of the term and for this reason I do not accept the contention of the learned counsel for the appellant when he relies upon cl. 9 of S. 33, Regn. 43 of 1793 that the mocurrery holder shall thenceforward (upon the assessment of rent on the death of the original grantee) be considered upon the same footing as other persons in the province holding lands at a fixed rent. This clause which merely defines the status of the heir of the grantee in the village hierarchy does not in the least derogate from the rights which the Government was providing anxiously by means of the various Regulations prior to and after Regn. 43 of 1793 to enable the heirs of the grantee to remain upon the land in perpetuity.

I therefore agree with the contention of the learned advocate for the respondents that the rights of the respondents in the present jagir to continue to hold the land in perpetuity agreeably to the holders and their heirs observing the terms of the various Regulations are not at all affected by the revenue sale of the year 1930. In this view it is unnecessary to consider the correctness of the decision in 5 Pat L J 79.[1] I would dismiss the appeal with costs.

Harries C. J. — I agree.

Dhavle J. — I agree that this jagir is governed by the terms of the Regulations in force at the time it was created and that it is not liable to be avoided and annulled under S. 37, Bengal Land Revenue Sale Law 11 of 1859, as a tenure which, though mukarrari, cannot be shown to have been in existence at the time of the Permanent Settlement. In 5 Pat L J 79,[1] the contention that an under-tenure cannot be annulled under S. 37 because it was created by Government was overruled. That was a case of mufassil talukdars obtaining their settlement under Regn. 7 of 1822. Ours is a jagir which was in existence in February 1800, and which must therefore have been created either under the pre-settlement Regulations which were repeated in S. 33, Regn. 43 of 1793 for such grants, or under the new provisions enacted under that Regulation for later grants, to invalided soldiers. If the former be the case, the heirs of the invalid were, under Art. 9 of the old provisions, entitled to a mocurrery sunnud under the official seal and signature of the Collector, to hold the land

> in perpetuity, so long as they shall continue to discharge the rent and malikanah with which they may be . . . . . assessed,

and this must be borne in mind in construing the provision in the preceding article that the mocurrery holder "shall . . . . . be considered upon the same footing as other persons in the province holding lands at a fixed rent." Such a grant would of course be prior to the Permanent Settlement but as will be presently seen it is not really on this ground that it is saved from annulment under S. 37 of the Act of 1859. According to the Preamble or Introduction, in S. 33 of the Regulation of 1793, to the pre-settlement regulations under which such grants — they were grants of waste land — were made, the grantees are to be considered tenants of the land-holders in whose estate they are settled and with a view to secure them and their heirs in the possession of the lands, the Collectors are to apply to the zamindars

> to grant them pottahs, confirming the land to them and their heirs as pottah talooks, *agreeably to the terms of the above mentioned regulations* under which they received the lands and which as far as they regard the provinces of Bengal, Behar and Orissa are hereafter inserted as the rules by which *all* questions regarding any such grants as may have been made are to be decided.

(The italics are mine). These pottah talooks are thus special creations of the ruling power, merely confirmed by pottahs from the zamindars who under the regulations of 24th December 1790 were not subjected to any additional demand of revenue on account of the rents permanently assessed on them. Post-settlement grants to invalided soldiers were as will again be presently seen, expressly saved from interference by purchasers at revenue sales, but it was obviously considered unnecessary to make any such provision for the grants made under the pre-settlement regulations because they were made by Collectors under express statutory authority as tenures at rents fixed in perpetuity. S. 33 of Regn. 43 of 1793 was expressly saved by S. 27 of Regn. 1 of 1804 and remained in force until both these regulations were repealed by Act 29 of 1871, but the repealing Act is not to affect "any right already acquired" or "any exemption affirmed, recognized or derived by, in or from, any enactment hereby repealed." It must therefore apply to pre-settlement "invalid jagirs" notwithstanding Act 11 of 1859 on the principle *generalia specialibus non derogant.* If the grant was made not under the pre-settlement regulations but under Regn. 43 of 1793 the position is even clearer.

Under cl. 1 of S. 5 of this Regulation, the Collector was to make a proposal to the proprietor to take a lease of the land on the part of Government on the terms specified in the following 19 articles. The land was to continue the property of the zamindar or other proprietor and was never to be seperated from his estate. The invalid grantees were to hold the land free of rent. On their death and after a certain interval of time which was varied by subsequent regulations and during which malikanah only was to be paid to the propietor, their heirs were to hold the land on a rent to be paid to the proprietor which was not liable to any variation (Art.:5). If an invalid should die without heirs it was open to a fresh man coming upon the establishment to supply his place in the invalid thana and take the land as his heir (Art. 7). The heirs could, instead of taking the lands, "dispose of their rights to any of the invalids belonging to the thana" (Art. 8). The malikanah and rent was to be collected by the Collector and accounted for to the proprietor by credit being given him for the amount in part payment of his stipulated annual payments to Government and no increase of revenue was to be levied from the proprie-

tor during the term of his engagement with Government on account of such rent or malikanah (Art. 12). After "the permanent assessment" of the land a pottah was to be obtained from the proprietor, through the Collector, in the name of the possessor specifying inter alia "the terms of the tenure as above defined" (Art. 13). On all the lands in a thana having become liable to the permanent rent or assessment Government were to withdraw the regulating officer and the thana was thenceforward to be

> upon the same footing as other villages in the zamindaree or estate, the heirs and successors of the original grantees continuing to hold their lands upon the terms specified in their pottahs (Article 15);

and the proprietor was thenceforward to be at liberty to recover his rent by the process, (viz., distraint) prescribed in Regn. 17, 1793, in the same manner as from other persons holding lands upon pottahs (Art. 16). Apart from such remarkable peculiarities of these "jaghirs" as the lease of Government, the transfer to other men coming upon the establishment, and other stipulations with Government, there is S. 6 of the Regulation with the marginal note: "Any person succeeding to an estate, in which lands have been leased to Government, to abide by the terms of the lease," the Section itself providing that if the estate .... in which any lands leased to Government under this Regulation may be situated shall be disposed of at public sale .... neither the lease of Government nor the terms of the tenures of the invalids, or their heirs or successors, are to be in any respect affected but the new proprietor is to be bound by the terms of the deeds in the same manner as the proprietor who granted them would have been, had he retained the property, "notwithstanding anything that may be said to the contrary in Regn. 44 of 1793, or any other Regulation passed on 1st May 1793."

Now, Regulation 44 of 1793 made a distinction between public sales for the discharge of arrears of the public assessment (S. 5) and other sales, whether public or private or transfers (S. 4). The effect of public sales for arrears was under S. 5, to cancel all engagements of the proprietors with their dependent talookdars as also all leases to underfarmers and pottahs to ryots (a class of tenants which received increasing protection until the Rent Act 10 of 1859, discussed in the well-known Great Rent case—Beng L R Sup Vol. 202;[3]) and the purchaser was to be

> at liberty to collect .... whatever the former proprietor would have been entitled to demand according to the established usages and rates of the pergunnah .... had the engagements so cancelled never existed.

Although S. 6, Regn. 43 of 1793 excluded the application of Sec. 5 of Regn. 44 of 1793 to these invalid jaghirs, it is necessary to deal a little further with the latter Section in order to determine whether S. 37 of Act 11 of 1859 can affect invalid jaghirs granted after the Permanent Settlement. Regn. 43 of 1793 was replaced as a whole by Regn. 1 of 1804, S. 19 of which, with a view to establish, as nearly as may be practicable, a uniformity of system throughout the invalid thannahs, directed Collectors to endeavour to conclude agreements with the zamindars, rendering all lands then held by invalids (excepting the lands granted to invalids under the Regulations of 18th February 1789) subject to the conditions specified in S. 9 which, it is to be observed, are essentially on the same lines as in S. 5 of Regn. 43 of 1793. S. 10 of Regn. 1 of 1804 reproduces S. 6 of Regn. 43 of 1793 with the notable addition, at the end of the words "or on any subsequent date." S. 5 of Regn. 44 of 1793 itself was construed in such cases as 10 M I A 123[4] and 13 M I A 317[5] to mean that the talookdar's tenure was not avoided altogether upon a revenue sale but was only made liable to have its rent enhanced "according to the established usages and rates of the Pergunnah or district." As the preamble to the Regulation shows, the Section was based on the consideration among others that it was "repugnant to the ancient and established usages of the country according to which the dues of Government from the lands (which consists of a certain proportion of the annual produce of every beegah of land, demandable according to the local custom in money or kind, *unless Government has transferred its right* to such proportion to individuals for a term or in perpetuity, or *fixed* the public demand upon the whole estate .... are

3. Thakooranee Dossee v. Bisheshur Mookerjee, (1865) Beng L R Sup Vol 202=3 W R Act X Rul 29 (F B).

4. Ranee Surnomoyee v. Maharajah Sutteeschunder Roy Bahadur, (1863-66) 10 M I A 123 = 2 W R 13=2 Sar 60=1 Suther 548 (P C).

5. Khajah Assanoollah v. Obhoy Chunder Roy, (1869-70) 13 M I A 317 = 13 W R 24 = 2 Suther 306 = 2 Sar 535 (P C).

inalienable without its express sanction," to let enagagements made by proprietors with their talookdars and even ryots be binding on revenue purchasers. The italics are again mine, and have a bearing upon Art. 12 of S. 5 and S. 6 of Regn. 43 already referred to. The same policy was expressly followed in the elaborate Revenue Sale Regn. 11 of 1822. S. 29 of this Regulation made what the marginal note calls a "declaration as to extent of right conveyed by sale," and S. 30 deals with the question of "undertenures, how affected by sale for arrears." The former Section negatived any claim of right founded on any act of the original engager or his representatives to affect the title and interest conveyed to the purchaser by the sale; and this, on the ground that

> the act of sale transfers to the purchaser of the property and privileges which the engaging party possessed .... at the time of settlement, free from any accidents or incumbrances that may subsequently have beeen imposed, ... the property and privileges possessed .... being perpetually hypothecated to Government for the revenue assessed thereon. S. 30 made all tenures which may have originated with the defaulter or his purchasers ... as well as all agreements with ryots .... subsequently to the settlement. .... liable to be avoided and annulled by the purchaser of the estate .... at the sale for arrears due on account of it .... subject only to such conditions of renewal as attached to the tenure at the time of settlement aforesaid, saving always and except bona fide leases of ground for the erection of dwelling houses ....;

"and this was done" in pursuance of the principle of holding the estate of a defaulter answerable for the punctual realization of the Government revenue in the estate in which it stood at the time the settlement was concluded (at which time, by the dissolution of its previous engagements, Government must be considered to resume all rights possessed on the acquisition of the country, save where otherwise specially provided). It will be observed that the Section refers not to the Permanent Settlement of Bengal, Behar and Orissa, but to the settlement of the particular estate, which did not take the assets of jagirs like ours into account. Regn. 11 of 1822 was replaced as a whole by the Bengal Land Revenue Sale Law, Act 12 of 1841, which, by S. 27, provided that the purchaser of an estate sold for the recovery of arrears in the permanently settled districts shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement, and shall be entitled after notice ... to enhance at discretion (anything in the existing Regulation to the contrary notwithstanding) the rents of all under-tenures in the said estate and to eject all tenants thereof with the following exceptions : first, tenures which were held as istemraree or mocurreree at a fixed rent, more than 12 years before the Permanent Settlement. The Section makes a difference between the Permanent Settlement and the settlement of the particular estate. It was reproduced in S. 26 of the next Revenue Sale Law, Act 1 of 1845, which replaced the Act of 1841 and in its turn made way for Act 11 of 1859, which only extended the saving of istemraree or mukarrari tenures to such as have been held at a fixed rent from the time of the Permanent Settlement. As Sir James Colvile said in the case in 13 M I A 317 : [5]

> The general policy of the Revenue Sale Laws that have been passed since the Perpetual Settlement has been to protect the public revenue by placing the purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They therefore gave or sought to give to the purchaser, the power of abrogating all engaments made by the defaulting zamindar or his predecessors since the settlement, whereby the zamindary rents and profits, which were the security to Government for the due payment of its revenue, were diminished. The Indian Legislature however has not uniformly tried to effect this general object by precisely the same means. The various Regulations and Acts which it has from time to time passed for the purpose differ in the language of their provisions and in the stringency of the power conferred by them.

If these observations are borne in mind, there cannot be any doubt that S. 37 of the Act of 1859 was not intended to affect in any way the very special grants to invalided soldiers made under the Regulations of 1789 and 1793, the object of the Legislature from 1793 onwards having been to safeguard the public revenue by enabling the revenue purchaser to get rid of all engagements diminishing the security to Government which were entered into by the defaulting proprietor or his predecessors without lawful authority. Though under Art. 15 of S. 5, Regn. 43 of 1793 (as under Art. 8 of the Regulations of 1789) these jaghirs are placed on the same footing as other grants at a fixed rent, we must not, in considering whether they are among the under tenures liable to be annulled under S. 37 of Act 11 of 1859, overlook their origin, their statutory character as permanent mukarraris, and their express exemption from the effects of a revenue sale by S. 6 of the Regulation of 1793 which was emphatically affirmed

by S. 10, Regn. 1 of 1804. It was not the policy of the Revenue Sale Laws to place the purchaser of an estate at a revenue sale in a better position than the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed and who subsequently made these grants under the specific authority of Regn. 43 of 1793, without subjecting himself to an increase of revenue on that account (Art. 12 of S. 5) : see also Sir James Colvile's observations in 20 W R 44[6] on the reasons for the statutory title of the revenue purchaser and its extent. The legislation of 1859 was clearly not intended to get rid of the permanent mukarrari character given to these grants by the old regulations, nor did it have the effect of repealing the special protective provisions previously enacted.

G.N./R.K. *Appeal dismissed.*

6. Forbes v. Meer Mahomed Hossein, (1873) 20 W R 44=12 Beng L R 210 (P C).

A. I. R. 1940 Patna 283

HARRIES C. J. AND DHAVLE J.

Bank of Bihar Ltd. — *Plaintiff* — Appellant.

v.

Omitave Chattarji and another — *Defendants* — Respondents.

Appeal No. 467 of 1938, Decided on 17th November 1939, from appellate decree of Dist. Judge, Gaya, D/- 10th May 1938.

(a) Deed—Construction — Deed held created charge.

The manager of a Bank in consideration of his appointment to the post of manager and for the due and proper discharge of his duties agreed to furnish security to the extent of Rs. 4000 and transferred his house by deed to the Bank in pursurance of the aforesaid agreement. The deed also contained a provision that in the event of the removal of the manager from the post by resignation, dismissal, death or otherwise, the Bank would reconvey the house to the manager :

Held that if the document was read literally the moment a dismissal occurred as a result of dishonesty, the Bank were bound to surrender their security to the dismissed servant, but read as a whole it did create a charge in favour of the Bank, for the document could not mean that the manager would be entitled to the return of the security when he had been dismissed for dishonesty or such like.

[P 284 C 2 ; P 285 C 1]

(b) Civil P. C. (1908), O. 34, Rr. 14 and 15 and O. 2, R. 2 — Charge created on property for payment of money—Chargee can sue for money in first place and subsequently bring suit to enforce charge—Subsequent suit is not barred by O. 2, R. 2,

By reason of R. 15 of O. 34 the provisions of R. 14 apply to a chargee. A chargee may therefore bring a suit to recover the money charged on immovable property and may subsequently bring a suit to bring that immovable property to sale in satisfaction of his decree. Neither a mortgagee nor a chargee can, on obtaining a money decree, execute that decree against the mortgaged or charged property. They must by a subsequent suit, bring the mortgaged or charged property to sale. Rules 14 and 15 are an exception to the general rule laid down in O. 2, R. 2 which does not bar such a suit. *AIR 1916 Pat 252 and AIR 1926 Pat 31, Disting.* [P 285 C 2 ; P 286 C 1]

Rai Gurusaran Prasad, Ramnandan Prasad and Girijanandan Prasad — *for Appellant.*

B. C. De and Rajkishore Prasad — *for Respondents.*

Harries C. J. — This is a plaintiff's appeal from concurrent decrees of the Courts below dismissing the suit for enforcement of a certain charge. The facts of the case can be shortly stated as follows : The plaintiff Bank appointed Ashutosh Chattarji, the father of the contesting defendant, as manager of their Gaya Branch. Ashutosh Chattarji, before he took up his duties, executed on 19th July 1918, a document which is merely described as an indenture. The document opens with a recital in these words :

> Whereas the said Babu Ashutosh Chattarji agreed that on being appointed manager of the Bank of Bihar, Gaya Branch, on a salary of seventy-five (Rs. 75) per mensem he, the said Babu Ashutosh Chattarji, would furnish security to the aforesaid Bank of Bihar, Ltd., amounting to the value of Rs. 4000 (Rupees four thousand) for the due and proper discharge of his duties and whereas the said post of manager of Bank of Bihar, Ltd., Gaya Branch, on a salary of Rs. 75 (seventy-five) has been conferred on him.

Then follows :

> This indenture witnesseth that in pursuance of the aforesaid agreement and in consideration of the said post of manager . . . . . the said Babu Ashutosh Chattarji doth hereby grant, convey and transfer unto the said Bank of Bihar, Ltd., or its successor-in-office his house named 'Kirk view' . . . . . valued at Rs. 4000 (rupeees four thousand) and all the estate, right, title and interest of the said Babu Ashutosh Chattarji . . . . . .in the said house and every part thereof. To have and to hold as security for the said post of manager . . . . . provided always that in the event of the removal of the said Babu Ashutosh Chattarji from the post of manager, Bank of Bihar, Ltd., Gaya, by resignation, dismissal, death or otherwise, the said Bank of Bihar, Ltd., Patna, or its successors-in-office shall reconvey the kebala of the aforesaid house unto and to the use and possession of the said Babu Ashutosh Chattarji. . . . . .

The document was registered, and Ashutosh Chattarji took up the post of manager. On 15th May 1924, Ashutosh Chattarji was

discharged, and in the year 1926 the plaintiff Bank brought a suit against him in the Court of the Subordinate Judge for accounts and for amounts due in respect of losses suffered by the plaintiff Bank through the conduct of Ashutosh Chattarji. The litigation had a somewhat long history, but eventually, on 23rd February 1930, an award was made in favour of the plaintiff Bank by Babu Rajendra Prasad for Rs. 4500 with future interest at six per cent. per annum. The dispute had during its course been referred to Babu Rajendra Prasad as the sole arbitrator. On 21st March 1931, this award was filed in Court and a decree passed in its terms. The plaintiff Bank realized various sums from time to time and in the year 1934, Ashutosh Chatterji died. The present suit was filed on 25th February 1936, against the defendants who were the sons of Ashutosh Chattarji. The claim was for Rs. 4864-6-6, being the balance due on the decretal amount, and the plaintiff claimed that this amount should be realized out of the house, which it was said was charged by the document of 19th July 1918, to which I have already made reference.

The defendants resisted the suit on a number of grounds: but it is only necessary to consider two of them in this appeal. It was said that the document created neither a mortgage nor a charge and further that the suit was barred by reason of the provisions of O. 2, R. 2, Civil P. C. Both the lower Courts came to the conclusion that the document did not create a simple mortgage: but neither Court appears to have considered whether the document created a charge. Further, both the Courts were of opinion that the suit was barred by reason of O. 2, R. 2, and accordingly dismissed the plaintiff's claim in its entirety. Mr. Rai Gurusaran Prasad on behalf of the appellants has argued, in the first place, that the document of 19th July 1918, clearly creates a charge. He is prepared to concede for the purposes of his argument that the document does not create a simple mortgage, and it is therefore unnecessary to consider that aspect any further. A "charge" is defined in S. 100, T. P. Act, in these terms:

> Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall so far as may be, apply to such charge.

On behalf of the appellant, it is said that this house belonging to Ashutosh Chattarji was by act of parties made security for the payment of money to the Bank. It was made security for the payment of any sum which might become due from Ashutosh Chattarji to the Bank by reason of his failure to discharge his duties in a due and proper manner. Mr. B. C. De, on the other hand, has argued that the document does not create a charge, because the property is not made security for the payment of money to the Bank.

The document is not very happily drafted, but when it is read as a whole, it is in my view clear that the intention of the parties was that the house in question should be held by the Bank as security for any amount up to Rs. 4000, which might become due from Ashutosh Chattarji to the Bank by reason of his misconduct or failure to discharge his duty. The opening recital, in my view, makes it clear that such was the intention. In the recital it is said that Ashutosh Chatterji agreed that he would furnish security to the value of Rs. 4000 for the due and proper discharge of his duties. In the body of the document he then conveys and transfers to the Bank the house named "Kirk View" which the Bank was to have and to hold as security for the said post of manager. In other words, they were to have and to hold the house as security for the due performance by Ashutosh Chattarji of his duties as manager. The concluding portion of the document does raise difficulties, because there is a provision that in the event of the removal of Ashutosh Chattarji from the post of manager by resignation, dismissal, death or otherwise, the bank shall reconvey the kebala of the aforesaid house unto and to the use and possession of the said Babu Ashutosh Chattarji. It has been urged that no security could have been contemplated because the bank were bound to return the kebala to Ashutosh Chattarji the moment he was dismissed. If Ashutosh Chattarji had been dishonest, dismissal would have inevitably followed on such dishonesty being discovered. If this document is read literally, the moment dismissal occurred as a result of dishonesty, the bank were bound to surrender their security to the dismissed servant. In my view such a meaning cannot be given to this provision, and it must be read in the light of the earlier provi-

sions. In my view what the document as a whole means is that the house was to be held by the Bank as security for any sum which might become due from the manager to the Bank as the result of misconduct, neglect or such like. If, on the other hand, no sum was due from the manager to the Bank, the former would be entitled to the return of his security the moment he left their employ. The document cannot mean that the manager would be entitled to the return of the security when he had been dismissed for dishonesty or such like.

Though, as I have said, the document is not very artistically worded, it does, in my view, make the house "Kirk View" a security for the payment of money to the Bank and accordingly does create a charge in favour of the Bank. Neither of the Courts below has considered this aspect of the case. It appears to have been argued before them that the document constituted a simple mortgage, and the Courts below came to the conclusion that as it was not a simple mortgage the claim was bound to fail. It is however clear that the plaintiff's claim can succeed even if the document does fall short of a simple mortgage provided it amounts to a charge.

Both the Courts below were also of opinion that the suit was barred by reason of the provisions of O. 2, R. 2, Civil P. C. The Courts came to the conclusion that assuming the document created a security, the plaintiff should have sought to enforce the security when it instituted proceedings in the first place. The Courts came to the conclusion that as the plaintiff had failed to ask for the enforcement of its security in the proceedings which culminated in the money decree, he could not bring subsequent proceedings for such enforcement. If however this document created a charge, O. 2, R. 2, could not, in my view, bar the suit. It is expressly provided by O. 34, R. 14, that :

> Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in O. 2, R. 2.

Order 34, R. 15, provides that all provisions contained in O. 34 which apply to a simple mortgage shall, so far as may be, apply to a charge within the meaning of S. 100, T. P. Act, 1882. By reason of the provisions of O. 34, R. 14, a simple mortgagee may obtain a money decree in respect of the sum secured by the mortgage. If he does, he may subsequently bring a subsequent suit to realize the amount of his decree by sale of the mortgaged property, and O. 2, R. 2, is expressly stated to be no bar to such a suit. By reason of O. 34, R. 15, the same provisions apply to a chargee. A chargee may bring a suit to recover the money charged on immovable property and may subsequently bring a suit to bring that immovable property to sale in satisfaction of his decree. Neither a mortgagee nor a chargee can, on obtaining a money decree, execute that decree against the mortgaged or charged property. They must, by a subsequent suit, bring the mortgaged or the charged property to sale. O. 34, Rr. 14 and 15, are an exception to the general rule laid down in O. 2, R. 2. Both the lower Courts have omitted to consider the effect of O. 34, Rr. 14 and 15. Mr. Rai Gurusaran Prasad has contended that the plaintiff Bank could, in the first place, institute a suit to recover the amount of money, which was a charge on the property, and later bring a suit for sale of the property to satisfy that amount.

Mr. B. C. De, on behalf of the respondents, has conceded that in certain circumstances a chargee may bring, first, a money suit and then a suit for sale of the property; but he has urged that the chargee can only do so where the liability to pay the money and the security is created by the same document. He has contended that if the document in question in this case created a charge, it did not create the personal liability of Ashutosh Chattarji. Mr. De has stated that that liability was the creature of the common liability and had nothing whatsoever to do with the document. Accordingly he has argued that as the personal liability and the liability of the property were not created by the same document, the plaintiff was bound to ask for sale in the first suit. Mr. De has stressed that O. 34, R. 14, only applies where a mortgagee or chargee has obtained a decree for the payment of money in satisfaction of a claim arising under a mortgage. He says that the decree must be in respect of a claim created by the mortgage or charge. The words however are "obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage." When the plaintiff sued Ashutosh Chatterji in the earlier suit and obtained a decree for only Rs. 4000, it certainly obtained a decree for the payment of money in satisfaction of a

claim arising under the charge. The property was charged with the payment of money due from Ashutosh Chattarji to the Bank by reason of the former's misconduct or neglect. It was in respect of that money that a decree was obtained, and in my view, it was clearly a decree for the payment of money in satisfaction of a claim arising under the charge. If that money had been paid, the charge would clearly have been extinguished. In my judgment the provisions of O. 34, Rr. 14 and 15, clearly apply to this case, and the plaintiff Bank was entitled to bring a suit for money in the first place and subsequently to bring a suit for enforcement of the charge.

Mr. De in support of his argument has relied upon a number of cases, and I will refer to the most important of them. In 2 Pat L J 55,[1] it was held that where a decree had been obtained to the effect that the plaintiff was to get maintenance at a certain rate and that the allowance decreed would be a charge on certain properties named, the properties could be brought to sale in execution of the decree and there was no need for a suit for sale. Mr. De relies upon this case as authority for his contention that after the plaintiff obtained the money decree his remedy was execution of that decree against the house in question or any other property of Ashutosh Chattarji. There is a great difference between the facts of the case now before the Court and the case in 2 Pat L J 55.[1] In the latter case, there was no charge created before the decree was obtained. There was merely a liability for maintenance. The decree however fixed that liability and created the charge, and what the Court held was that it was unnecessary to bring a subsequent suit to enforce that charge as it was the creature of the decree itself. Such a charge, the Court held, could be enforced in execution of the decree. The learned Judges pointed out that where a charge is created by the decree itself the case is not within O. 34, R. 14 or R. 15. The wording of those rules suggests that there is a charge in existence before the money decree is obtained. The case in 2 Pat L J 55,[1] therefore can be of no assistance whatsoever to the respondents in this case.

Another case relied upon by Mr. De was the case in 4 Pat 693.[2] This case followed the earlier case in 2 Pat L J 55[1] to which I have made reference. Here again the Court held that a declaratory decree creating a charge for maintenance could be executed without a separate suit and the decree-holder could bring the properties charged to sale through the agency of the execution Court without first having resort to a suit under the provisions of S. 67, T. P. Act. This case is of no assistance to Mr. De because it only applies to charges created by a decree itself and has no application to cases where a charge is created before the decree is obtained.

In my view as there was a charge in this case to secure moneys due from Ashutosh Chattarji to the Bank, the Bank could, in the first place, sue to recover those moneys and on failure to obtain satisfaction, could bring a subsequent suit to enforce their charge. The Courts below were, in my view wrong in dismissing the plaintiff's claim, which in my judgment should have been decreed to the extent of Rs. 4000 which is the limit stated in the deed of security.

I would, therefore, allow this appeal, set aside the decrees of the lower Courts and decree the plaintiff's claim to the extent of Rs. 4000. Let a preliminary decree be drawn up in the ordinary form of a charge decree allowing three months for payment. The preliminary decree will be for the payment of Rs. 4000 and no interest or costs will be added to that sum. The plaintiff Bank is entitled to costs in this Court and in the Courts below, but such costs are not to be added to the Rs. 4000 and are not to be charged on any property.

Dhavle J. — I agree.

G.N./R.K. *Appeal allowed.*

1. Braja Sunder Deb v. Sarat Kumari, (1916) 3 A I R Pat 252=38 I C 791=2 Pat L J 55.
2. Hari Sankar Rai v. Tapai Kuar, (1926) 13 AIR Pat 31=88 I C 923=4 Pat 693=6 P L T 802.

A. I. R. 1940 Patna 286

ROWLAND AND CHATTERJI JJ.

Mt. Razia Begam — *Judgment-debtor* — Appellant.

v.

Kishundeo Narain Mahtha and others — *Decree-holders* — Respondents.

Appeal No. 228 of 1938, Decided on 4th October 1939, from original order of Sub-Judge, Muzaffarpur, D/- 9th February 1938.

(a) Civil P. C. (1908), O. 21, R. 66, as amended by Patna High Court — Valuation entered in sale proclamation by agreement of judgment-debtor and decree-holder — Judgment-debtor cannot challenge sale on ground that

valuation was low and constituted substantial irregularity.

Where the valuations of the property to be sold in execution are entered under O. 21, R. 66 in the sale proclamation by agreement of both the decree-holder and the judgment-debtor, it is not subsequently open to the judgment-debtor to contend that the entries in the sale proclamation regarding valuation constituted substantial irregularity in the proceedings for sale on the ground that the valuation in sale proclamation was too low.

[P 287 C 2]

(b) Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), Ss. 13 and 14— Applicability — Ss. 13 and 14 do not apply to execution sale completed before passing of Act.

There is nothing in either the Bihar Money-lenders (Regulation of Transactions) Act or the Bihar Money-lenders Act (1938) to express the intention of the Legislature to invalidate a sale in execution of a decree which was completed before the passing of those Acts and which was otherwise good. In order that Ss. 13 and 14 may be applicable it is necessary that the execution should be pending. They do not apply when the sale of immovable property is confirmed and the execution becomes complete: *A I R 1939 Pat 592 and A I R 1936 P C 49, Disting.* [P 288 C 2]

T. N. Sahay — *for Appellant.*

S. N. Bose and K. Dayal — *for Respondents.*

Rowland J.—This is an appeal by the judgment-debtor, four of whose properties were sold in execution of a mortgage decree. On an application to set aside the sale of all the properties on the ground of alleged irregularities and inadequacy of price, the Subordinate Judge set aside the sale of two properties, Lots Nos. 2 and 4 of the sale and refused the application and confirmed the sale of the other two, namely Lots Nos. 1 and 3 of the sale. This appeal is against the confirmation of the sale of Lots Nos. 1 and 3. It was objected in the Court below that the processes in execution had been suppressed. This point was found against the judgment-debtor and that finding is not challenged in appeal.

The objection pressed here is that too low a valuation was entered in the sale proclamation in consequence of which the properties have been sold below their value causing loss to the judgment-debtor. The decree-holder had taken out execution of his decree in 1930 and the case came before this Court in Civil Revision No. 36 of 1931. In that case the valuation to be set by the Court on the properties was fixed by the agreement as follows :

Lot No. 1 . . . Rs. 7000
Lot No. 3 . . . „ 400

At that time Order 21, R. 66, Civil P. C., required a value assessed by the Court to be entered in the sale proclamation. This rule was amended with effect from 1st January 1936. Thereafter, its requirements were that the Court should enter in the sale proclamation the valuation placed on the property by the decree-holder and by the judgment-debtor, respectively, and no other valuation. In the present execution the sale proclamation contained an entry of the value as given by the decree-holder and also mentioned the valuation arrived at in the High Court. The decree-holder's valuation of Lot No. 1 was Rs. 1200 and of Lot No. 3 Rs. 45. These figures as well as the valuation put down in the High Court in the earlier proceeding were entered in the sale proclamation. This was done in pursuance of an order of the Court, dated 10th October 1936, in Miscellaneous Case No. 199 of 1936 and the order shows that the two valuations were entered in the sale proclamation by agreement of both parties. In my view, it is not now open to the judgment-debtor to contend that the entries regarding valuation in the sale proclamation constituted a substantial irregularity in the proceedings for sale. This I say with reference to the state of the law as it was then at the time of the sale proclamation and of the sale itself which took place on 7th April 1937. Lot No. 1 was purchased by a third party at Rs. 3000 and Lot No. 3 at Rs. 50.

As regards the adequacy of the price fetched, the Subordinate Judge refers to the evidence regarding the value of Lot No. 1 and appears to be of opinion that apart from the valuation on which the parties agreed in the High Court the remainder of the evidence did not support the view that the property was worth more than Rs. 3000 or that the judgment-debtor had suffered any material loss. He seems, however, to have thought himself bound to hold that the property was worth Rs. 7000 because this value had been placed on it in the High Court six years earlier.

As regards Lot No. 3, this consisted of 4 bighas, 7 kathas 11 dhurs of railway khanta land regarding which there seems to have been practically no evidence before him except the fact that its value had been fixed at Rs. 400 in the High Court. The Subordinate Judge may perhaps have relied on his own experience of the value of arable land and he expresses the opinion that the price seems to be rather a low price. When the proceedings leading up to

the sale were found to have been free from irregularity, he held that the sale could not be set aside. Assuming that the law remained as it was at the time of the sale, I think we should clearly be bound to affirm the decision of the Subordinate Judge.

But it is argued for the appellant that we ought to have regard to the provisions of the Bihar Money-lenders (Regulation of Transactions) Act 1939, Ss. 13 and 14 and that the sale not being held in accordance with the provisions of those Sections ought to be set aside — S. 13 requires the Court executing the decree to make an estimate of the value of the property of the judgment-debtor which is sought to be sold and of that portion of the property the proceeds of the sale of which are likely to be sufficient to satisfy the decree. S. 14 requires that the proclamation of the intended sale shall include only so much of the property the sale of which will be sufficient and shall state the value of the property, or portion of the property, to be sold as determined under S. 13. Further, it enacts that the property is not to be sold at a price lower than the price specified in the sale proclamation unless the decree-holder consents to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price specified for the property in the sale proclamation. It is contended that these Sections of the Act being retrospective, apply to an execution instituted before the commencement of the Act and that an execution though commenced earlier must be continued in accordance with the provisions of the Act. If indeed the sale proclamation was still to be issued at the time when the Act came into force, I have no doubt that the Act would be applicable and the said proclamation would have to be framed in accordance with its provisions. Even if a sale proclamation had issued and the sale were still to be held and the judgment-debtor asked that the sale should be held in accordance with the provisions of the Act and for that purpose a fresh sale proclamation should be issued, it would be the duty of the Court to comply with that request and issue the sale proclamation and hold the sale in accordance with that Act. This is the effect of the decision in 1939 P W N 667,[1] but in the present case the sale was completed before either the Bihar Money-lenders (Regulation of Transactions) Act, 1939, or the Bihar Money-lenders Act, 1938, was passed and there is nothing in either of those Acts to express the intention of the Legislature to invalidate a completed sale which was otherwise good. We are referred for the appellant to the Privy Council decision in 15 Pat 268[2] but in my opinion what was there decided does not apply to the case before us. Their Lordships were considering the effect of the words in S. 26 (N), Bihar Tenancy Act. The words are "shall be deemed to have given," and their Lordships held that the substantive rights of landlords and their accrued causes of action were being abrogated by this provision in the enactment in the circumstances. It was said "respect for pending suits over old transfers cannot be assumed." In the Bihar Money-lenders (Regulation of Transactions) Act, S. 13 is no doubt made applicable to applications for execution whether made before or after the commencement of the Act and this Section with S. 14 gives directions as to the preliminaries which are to precede a sale and the manner in which the sale is to be held. But in order that these Sections may be applicable, it seems to be necessary that the execution should be still pending and it has been held that on the sale of immovable property being confirmed, execution is complete. The order confirming the sale was passed on 9th February 1938, before either of the Acts which have been referred to were enacted. I am, therefore, of opinion that those provisions do not operate to invalidate the sale. In the result, I would dismiss the appeal with costs. There will be one set of hearing fee to be divided between the decree-holder and the auction-purchaser.

Chatterji J. — I agree.

G.N./R.K. *Appeal dismissed.*

1. Bishun Singh v. Palakdhari Singh, (1939) 26 A I R Pat 592=185 I C 129=1939 P W N 667.

2. K. C. Mukerjee v. Ramratan Koer, (1936) 23 A I R P C 49 = 160 I C 105 = 63 I A 47=15 Pat 268 (P C).

A. I. R. 1940 Patna 289

ROWLAND AND CHATTERJI JJ.

Nebti Mandal and others — Appellants

v.

Emperor.

Criminal Appeal No. 228 of 1939, Decided on 12th December 1939, from decision of Sess. Judge, Purnea, D/- 17th August 1939.

(a) Penal Code (1860), Ss. 302 and 201 — Accused may be tried under S. 302 and S. 201 at one trial.

An accused may be tried at one trial both under S. 302 for murder and under S. 201 for causing the disappearance of evidence of it. It is not necessary that the person to be convicted under S. 201 should be completely innocent of the murder: *A I R 1926 All 737 and AIR 1930 Mad 870, Foll. ; AIR 1925 P C 130, Rel on.* [P 289 C 2, P 290 C 1]

(b) Penal Code (1860), Ss. 302, 201 and 72 —Charge in alternative under S. 302 and S. 201 — Position may arise for punishment under S. 72.

Where the charge is framed in the alternative in respect of offences under Ss 302 and 201, the position may arise as contemplated by S 72. It may be open to the Court to give judgment that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty. Such a finding is in accordance with S. 367 (3) of Criminal P. C , and will have the consequence that under S. 72 the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all. [P 290 C 1, 2]

(c) Criminal P. C. (1898), S. 288 — Witness in Sessions Court resiling from his statement before committing Magistrate — Statement before committing Magistrate when corroborated can be used for all purposes of case.

Where a witness in the Sessions Court resiles from his statement made before the committing Magistrate, his statement before committing Magistrate when corroborated may be used for all purposes in the case : *A I R 1925 Pat 51; A I R 1937 P C 119; A I R 1936 Pat 11 and A I R 1934 Cal 124, Rel. on.* [P 293 C 1, 2]

(d) Evidence Act (1872), S. 154 — Evidence of witness cross-examined by party calling him can be relied on by either party — Permission to party to cross-examine his own witness should be freely granted.

The evidence of a witness who is cross-examined by the party calling him is still evidence and can be relied on by either party, the credibility of the facts deposed to being a matter for the jury: *A I R 1930 Pat 247; A I R 1931 Cal 401 and A I R 1933 Pat 517, Rel on.* [P 294 C 1]

By giving the permission to cross-examine nothing adverse to the credit of the witness is decided. There is no necessity to put obstacles in the way of a party who has called an unwilling witness. The circumstances in which a witness may be cross examined by the party calling him are not laid down in S. 154 which leaves the matter entirely to the discretion of the Court and there is no legal objection to such permission being freely granted. Once the mischief of considering the grant of permission to be equivalent to an adjudication or expression of opinion of the Court adverse to the veracity of the witness, is got rid of, it is harder to justify the refusal than the grant to any party of permission to cross-examine any witness who supports the case of his opponent : *A I R 1926 Pat 316, Not foll. ; A I R 1933 Pat 517 and 6 C W N 513, Rel. on.* [P 294 C 1, 2]

S. C. Chakravarti — *for Appellants (as Amicus Curiæ).*

Asst. Govt. Advocate — *for the Crown.*

Rowland J.—The three appellants were charged together and tried at one trial for offences under S. 302, I. P. C., and also under S. 201, the substance of the prosecution case being that one or more of the accused on the night of Wednesday 1st March 1939 at the residence of all of them committed murder of Mt. Paltanbati widow of Nebti's brother Jukti and that all of them secretly and hastily disposed of the body in order to prevent detection of the crime and subsequently gave false explanation to account for the death. As to the propriety of trying an accused at one trial both for murder and for causing the disappearance of evidence of it, the old decisions in which it was held some times that only a person completely innocent of the murder can be convicted under S. 201 have been reconsidered in some of the recent cases. In 6 Lah 226=52 I A 191[1] the Judicial Committee affirmed the conviction under S. 201 of three persons who had been tried on the charge of murder (S. 302), but the evidence being insufficient to establish this charge against them, had been convicted under S. 201. Their Lordships did not examine in detail the exact point whether in order to be convicted under S. 201, the accused person must be innocent of the major offence; but it is clear from the result of the case itself that to be accused of the major offence, does not in itself confer on the criminal any immunity from conviction in respect of the concealment of the evidence. In a case of this Court 10 Pat 140[2] the accused had been tried on charges both under S. 302 and under S 201 and the trial which was before a jury had resulted in their conviction under S. 201. The conviction was affirmed, Fazl Ali J. observing that he was inclined to accept the restricted interpretation of S. 201 which has been adopted in some of the recent decisions and

1. Begu v. Emperor, (1925) 12 A I R P C 130=88 I C 3 = 52 I A 191 = 6 Lah 226=26 Cr L J 1059 (P C).
2. Rup Narain Kurmi v. Emperor, (1931) 18 AIR Pat 172=1931 Cr C 460=132 I C 876=32 Cr L J 975=10 Pat 140=12 P L T 746.

according to which a person cannot escape conviction under this Section merely because he has been charged also with the principal offence or because there are some grounds for suspicion that he might be the principal culprit. But the learned Judge was not prepared to go so far as the Judges in the Allahabad case in 49 All 57[3] in which they were dealing with a case in which there was evidence that one Beni Singh had been done to death by one of three persons; the body had beed done away with by all three and the Sessions Judge found himself unable to convict any of them for concealing the corpse lest he should accidentally be convicting the murderer himself which certainly earlier decisions had said could not be done. The Judges observed that the

> point whether S. 201 applies to the actual culprit in a case of murder is obviously academic. None the less we are unable to agree with the view that a person who has actually committed a crime himself—whether murder or any other crime—is any the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. If the Legislature intended to provide such an exception, they would undoubtedly have said so in express language.

In a later decision, namely in 54 Mad 68[4] which came before the Madras High Court, Wallace and Jackson JJ., examined the proposition that Ss. 201 to 203, I. P. C., have no application to the person who actually committed the main offence mentioned in the Section and that the person who committed the main offence cannot be himself found guilty of causing evidence of that offence to disappear or of giving false information about it. After examining the decisions they observed:

> The true principle seems to be that there is no law preventing the main offender being convicted under Ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these Sections. But if the commission of the main offence is not brought home to him, then he can be convicted under Ss. 201 to 203. Therefore there is no misjoinder in charging an accused in the alternative with the main offence and under Ss. 201 and 203, I. P. C., nor is there anything irregular or improper in a Judge holding, as the learned Sessions Judge has done in this case, that, while the accused is himself not free from the suspicion of being the actual murderer, he can be none the less convicted under S. 201 or S. 203.

I am of opinion that the view expressed in these two decisions of the Allahabad and Madras High Courts is correct. Where the charge is framed in the alternative in respect of offences under Ss. 302 and 201, the position may arise as contemplated by Sec. 72, I. P. C. It may be open to the Court to give judgment that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty. Such a finding is in accordance with S. 367 (3), Criminal P. C., and will have the consequence that under S. 72, I. P. C., the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all.

Coming now to the facts, the deceased Mt. Paltanbati had her maternal home in village Khirda P.S. Araria. She was daughter of Bhore Lal deceased and his wife Bulni P. W. 4 of this case. Bulni has a brother Agamlal P. W. 7 of this case and Agamlal has a daughter Rama P. W 5 of this case, a child of six or seven years. Bhore Lal also had a brother whose son is Resamlal, a name which will appear later in the history of the case. Paltanbati was married in village Potia to Jukti son of Manbharan Goala. Jukti had a brother Nebti accused 1 of this case married to Pirni who was also accused but was acquitted in the Sessions trial. Jukti and Paltanbati had a son who died and another son Doman or Domra who was aged about five at the time of the event we are discussing. Manbharan the father-in-law of the deceased Paltanbati had a brother Raj Kumar accused 2 of this case and Raj Kumar has a son Uchit accused 3 who is married to Mt. Sabujni accused 5. At the time of the events under consideration, Manbharan was dead and Jukti was also dead, the latter having died about February 1938 since when Paltanbati had lived part of her time in the house of her brother-in-law Nebti, but a considerably greater part of the time in the house in which her mother Bulni was living with her brother Agamlal.

The story of the alleged crime begins on Tuesday 28th February 1939. The little boy Domra was ill and Paltanbati who was at that time in Potia at Nebti's house started to take him to Jokihat hospital for treatment in Nebti's cart of which the driver was Utam Hari P. W. 16 a boy of 11 or 12 years in the service of Nebti. At the hospital Paltanbati was met by her mother Bulni and Utam Hari took the cart back from there to Potia. Bulni, Paltanbati and Domra went from Jokihat to Khirda to the house of Agamlal. Domra's disease was

3. Emperor v. Hari Piari, (1926) 13 AIR All 737 =97 I C 44=49 All 57=27 Cr L J 1068=24 A L J 958.
4. In re Chinna Gangappa, (1930) 17 A I R Mad 870=1930 Cr C 1126=129 I C 230=54 Mad 68=59 M L J 677=32 Cr L J 263.

serious. The compounder of the dispensary has said that it was kala-azar and it was proposed to call in the services of an Ojha to treat him by spells. He inspected the child and said that the treatment would cost Rs. 2. Paltanbati then left Domra with Bulni while she herself went to Potia taking with her Agamlal's daughter Rama. It is said that on her asking for Rs. 2 she was told that she would get it after the harvest was sold. This answer was not satisfactory and on the next day she asked villagers to form a Panchayati to settle her claim for a partition in default of being given the money she asked for by Nebti. It is the prosecution case that the partition awarded to her and her son a half share in the property which had been joint property of the brothers Jukti and Nebti. Paltanbati on the Tuesday night 28th February 1939 had slept at the house of her relative Resamlal which is only two doors away from that of Nebti. On the Wednesday night 1st March 1939 Paltanbati slept at Nebti's house.

There is some contradiction between successive statements of Rama as to whether on the Wednesday night she slept at Resamlal's house or Nebti's. I shall return to that later. Be that as it may, during the night Rama according to her evidence heard Paltanbati cry out that she was murdered. Rama wished to go to Paltanbati but was prevented by her hostess. Paltanbati was not again seen alive. On Thursday 2nd March 1939, she was cremated at Sankhpokhar about a mile to the east of Nebti's house and one admittedly curious circumstance about this cremation is that the only persons present at it were the three accused. None of the villagers attended the cremation. On Friday 3rd March 1939, Agamlal, it is said, met Uchit at Jokihat and on his enquiring about Paltanbati was told that Paltanbati hanged herself. Agamlal returned to Khirda and informed Bulni of this. Agamlal went to Potia where he met Nebti, Uchit and Raj Kumar all of whom said to him that Paltanbati had committed suicide by hanging herself. He returned to Khirda without Rama. Foul play was suspected by Bulni and Agam as they had not been informed before cremation and Bulni thought it unsafe to allow Rama to remain in Khirda. The next morning, Saturday 4th March, Agam went to Potia, met Rama outside the house of the accused and took her home. On the road she told Agamlal of having heard the cry in the night. That afternoon the three accused came to Khirda and there was some sort of a Panchayati at which they told a number of Agamlal's co-villagers that the death of Paltanbati had been due to her hanging herself and asked Agamlal to hush the matter up. For this they offered a sum of Rs. 40; but Agamlal would not accept it.

On the next day, Sunday 5th March 1939 at 4 P. M. Agamlal made a statement at Araria police station which was recorded in the form of Fardbeyan as the occurrence related to the jurisdiction of police station Palasy and on the same day the village chaukidar of Potia made a report at his police station of the death of Paltanbati as having occurred on 28th February 1939 on account of fever. The Fardbeyan or the statement of Agamlal was sent from Araria police station to Palasy where it reached in the morning of Monday, 6th March 1939. The Sub-Inspector reached Potia at about 11 A. M. and made a search of the house of the accused without finding anything which appeared to him particularly incriminating or suspicious. He arrested Uchit, Raj Kumar and Nebti and sent them to Court. Investigation was continued on Tuesday 7th March 1939 when a second search was made of the house of the accused in the presence of the Inspector and Deputy Superintendent of Police. On this search articles were found bearing stains which to the eyes of the superior officers appeared suspicious. Accordingly charge was taken of one sari, one rezai, one mat, one khurpi, one kurta and scrapings of earth from the wall of a room of the house at a level of $1\frac{1}{2}$ cubits from the floor. Search was also made at the cremation ground and 29 pieces of burnt bones were found at the place where Paltanbati was supposed to have been cremated. The bones have been proved to be human, but that is all that the medical evidence can prove about them. Of the articles seized one kurta of red colour is supposed to have been the property of Uchit. The stains on it were found on chemical examination to be stains of blood, but owing to disintegration the source of the blood could not be positively determined. At the trial evidence has not been led to prove that this kurta in fact belonged to Uchit. It remains then that it is simply a shirt found on those premises. The mat has been identified by Bulni as the property of her daughter Paltanbati. The stains on it were found on chemical examination to be of blood which was proved to be human blood. The scrapings

of earth from the wall of the room were found on chemical examination to contain stains of human blood.

Mr. S. C. Chakravarty as amicus curiæ has taken us through the evidence and assisted us in the examination of the case. It is beyond dispute that on Tuesday 28th February Paltanbati and Domra went from Potia to Jakihat hospital. Thereafter they came to Khirda and Paltanbati returned that day to Potia. A question was however raised at the trial whether she was accompanied by Rama. For this we have not only the evidence of Rama, of Agamlal and of Bulni, but also the evidence in the committing Magistrate's Court of the boy Utam Hari, though he resiled from this statement at the trial. I shall have something to say later as to the use of a deposition put in under S. 288 to prove a fact which the witness denies at the trial. At present it is enough to state that I have no doubt that Paltanbati and Rama went to Potia and slept that night in the house of Resamlal. As to what happened on Wednesday the defence story is that all that day and even from Tuesday night Paltanbati was suffering from vomiting and stools which caused her death on the night of Wednesday. In support of this is the evidence of several defence witnesses, neighbours resident in village Potia ; but the prosecution case is that these persons are colluding with the accused to suppress the death and the Sessions Judge thinks that the failure of the prosecution to produce evidence from Potia village is due in part to the indiscretion of the police who without discrimination sent up as accused practically all the near neighbours who might have given valuable information but were at the time of the investigation unwilling to do so. The prosecution case that on Wednesday 1st March Paltanbati not having got the Rs. 2 for which she had asked went further and demanded a partition and that a panchayati was held, rests on the evidence of Rama together with a passage in the deposition of Utam Hari in the committing Magistrate's Court and the evidence of Agamlal as to the statement to him by Uchit that Paltanbati had hanged herself because she was dissatisfied with the award of the panchayats which while giving her and her son an eight annas share in the land gave them a smaller share in the moveables. The Sessions Judge disbelieved the evidence as to illness and believed the story that on Wednesday 1st March Paltanbati was pressing her claim to property. That as the Sessions Judge rightly points out provides a good motive for the accused to do away with the widow.

But the central point of the prosecution case as presented was that Rama heard a cry in the night. She was examined by the police, before the committing Magistrate and at the trial and throughout she has adhered to her story that she heard this cry. Agamlal too says that she told him the same when he saw her on the morning of Saturday 4th March ; but her evidence was challenged on the ground that she had prevaricated as to the place where she was sleeping on the night in question. In the earlier stages she said that she had been sleeping at the house of Resamlal. Before the committing Magistrate she changed her story and said that she was at Nebti's house. This is difficult to believe, for, if she was at Nebti's house she would have been practically an eye witness and would have had much more to say about the crime than she has. The Sessions Judge has rightly held that in fact she was sleeping at Resamlal's house. The change in her story may possibly be accounted for by the fact that Resamlal had been included in the list of accused persons sent up, but Agamlal, Bulni and Rama who are related to Resamlal perhaps did not wish him or his wife to be convicted of an offence in which they were not directly concerned. The change in Rama's statement seems to me to have been made more probably with a view to exculpating Resamlal and his wife than to bring the witness Rama nearer to the scene of occurrence so as to add credibility to her statement that she had heard a cry. The Sessions Judge has not accepted this statement because he says the room in Nebti's house occupied by the deceased and the room in Resamlal's house occupied by the girl Rama are so far apart that even if a cry was raised by Paltanbati, Rama could not have heard it.

Now there is a statement in the course of the evidence of Agamlal that any cry from the room occupied by Paltanbati would not be heard in the house of Resamlal; but if we suppose that Agamlal at this stage was not anxious to say anything that would go against Resamlal, too much importance must not be attached to this statement. It is more to the point to consider the map and the evidence of the Sub-Inspector regarding the distance. The map is to scale and the explanatory note shows that the

distance between the supposed place of occurrence A to the room where Rama slept F is only 51 cubits that is to say 76 feet or 25½ yards and the Sub-Inspector Ajit Kumar Kunar says in his evidence that Resamlal's house adjoins Nebti's house separated only by a lane. On this evidence I think that there is no improbability in Rama having been able to hear a cry raised by Paltanbati and I am more inclined to believe that she did hear a cry as deposed to by her. That cry is direct evidence that Paltanbati was suffering a violent death and the circumstances go to confirm the truth of that inference. The cremation was done by the male members of the household in the absence of any other villagers. The prosecution have placed the hour of this cremation earlier than the defence, but without going into that the very fact that no outsiders were present suggests that there was some reason for keeping it so quiet. The accused in their statements have not attempted to make out that any other villagers were present, but they said that villagers were invited to come but refused to do so in consequence of the fear of infection because Paltanbati had died of cholera. If however the story of cholera is itself a lie and an afterthought, the whole of this explanation completely falls to the ground and the cremation must be regarded as secret disposal of the body and a circumstance adding to the suspicion that the deceased had been violently done away with. As we have seen there is evidence that the theory of cholera was not the first explanation propounded to account for the death of Paltanbati which in the first instance had been attributed by the accused to suicide by hanging. The motive assigned for the suicide was not a motive which could reasonably be expected to have caused Paltanbati to commit suicide.

Other suspicious circumstances are the failure to advise Paltanbati's mother Bulni or son Domra either of her illness or of her death. Then there is the evidence of Utam Hari before the committing Magistrate in which he had told about the panchayati in the evening at which Paltanbati was present and had deposed that the body was removed for cremation before dawn. He says that he did not ask anyone how the Musammat had died, nor that any explanation was offered to him at that time. The Sessions Judge relied on this deposition in preference to the contradictory statement which he made during the sessions trial. His procedure was quite correct and in accordance with 3 Pat 781[5] where Bucknill J. laid down that:

> Evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Evidence Act; or in other words, that magisterial depositions can be utilised in a trial Court as of evidential value only if the matter contained therein is according to the rules of evidence laid down in the Evidence Act, of evidential value.

He further observed that the principle was settled,

> that unless there is clearly present besides the evidence given before the Magistrate evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge the evidence given before the Magistrate cannot be effectively utilised in support of a conviction.

These rules have since been followed and may be regarded as settling the practice for all Courts in Bihar. They are in accord with 41 C W N 741[6] a decision of the Judicial Committee of the Privy Council. That was a case in which a question arose as to the admission of evidence in the Sessions Court under S. 288, Criminal P. C., and their Lordships observed that:

> By the express provision of S. 288 of the Code the previous deposition is to be treated as evidence in the case for all purposes. The words 'subject to the provisions of the Evidence Act, 1872', cannot be read so as to limit the purpose for which it may be used.

The same principles have been followed in 16 P L T 730[7] where 3 Pat 781[5] was applied and a conviction was supported, the depositions under S. 288 being corroborated by previous statements recorded under S. 164, Criminal P. C., as well as by some other evidence. The use of previous statements recorded under S. 164 to corroborate a deposition put in under S. 288 was also supported as permissible in 60 Cal 1339.[8] But in this case the Sessions Judge found that there was corroborative material which inclined him to prefer the statement of Utam Hari made before the committing Magistrate to the evidence given by him in the Sessions Court. The corroboration available is in my opinion more ample than the Sessions Judge had thought because I would accept the evidence of Rama that she heard

5. Emperor v. Jehal Teli, (1925) 12 A I R Pat 51 =84 I C 334=26 Cr L J 270=3 Pat 781 = 6 P L T 53.
6. Fakira v. Emperor, (1937) 24 A I R P C 119= 167 I C 790 = I L R (1937) Bom 711 = 38 Cr L J 498 = 41 C W N 741 (P C).
7. Emperor v. Lalji, (1936) 23 A I R Pat 11 = 1936 Cr C 6=160 I C 181 = 36 Cr L J 235 = 16 P L T 730.
8. Manar Ali v. Emperor, (1934) 21 A I R Cal 124=1934 Cr C 169 = 147 I C 1203 = 60 Cal 1339=58 C L J 66=37 C W N 1066.

the death cry in the night. In connection with Rama's evidence, however as also that of Utam, it is to be mentioned that both these witnesses having made statements which the prosecution did not accept as correct, they as well as some others of the witnesses were by permission of the Court cross examined by the public prosecutor after a note had been made that they were "declared hostile" by the prosecution.

At one time it was thought that to declare a witness hostile had the effect of disqualifying the prosecution and even the defence from relying on the evidence of such a witness. This doctrine was developed in a series of decisions of the Calcutta High Court. But after a contrary view had been taken in this Court in the case in 11 P L T 148=9 Pat 474,[9] those decisions were overruled by a Full Bench in 58 Cal 1404[10] and the law as stated in 9 Pat 474[9] was followed and further explained in 14 P L T 494.[11] It is now settled that the evidence of a witness who is cross-examined by the party calling him is still evidence and can be relied on by either party; the credibility of the facts deposed to being a matter for the jury.

As a corollary to the earlier view, it was said in some cases that leave to declare a witness hostile should not lightly be given. There must first be good reason to believe that the witness had been "gained over." *See* observations in 7 P L T 567[12] and 16 P L T 95.[13] The former of these cases was considered and not followed in 14 P L T 494.[11] When it is no longer considered that by giving the permission to cross-examine, something adverse to the credit of the witness is decided, there is no necessity to put obstacles in the way of a party who has called an unwilling witness. The circumstances in which a witness may be cross-examined by the party calling him are not laid down in S. 154, Evidence Act, which leaves the matter entirely to the discretion of the Court and there is no legal objection to such permission being freely granted. Once we are rid of the mischief of considering the grant of permission to be equivalent to an adjudication or expression of opinion of the Court adverse to the veracity of the witness, it is harder to justify the refusal than the grant to any party of permission to cross-examine any witness who supports the case of his opponent. Thus, in 6 C W N 513,[14] when a party had by the trial Court been refused leave to cross examine their Lordships of the Judicial Committee expressed their regret that this course was adopted. "Common fairness" they said

> required that opportunity to test such statements by cross-examination should be given, if the evidence was to be relied on;

and that not having been done, they said that (in the case before them) the evidence was of no value. In the present trial, we find no error in the procedure followed by the Sessions Judge: though, as I said in 14 P L T 494[11] I consider it preferable to avoid the use of the words "declared hostile" which by association have come to carry by implication a misleading significance. The depositions of Rama and Utam are still evidence notwithstanding their cross-examination on behalf of the prosecution. So also are the depositions of P. W. 15 Kare, P. W. 17 Mahangu, P. W. 18 Sarfu and P. W. 19 Anoop Lal. These witnesses support the defence case that on the Wednesday Paltanbati was suffering from cholera which caused her death. These witnesses may be regarded as in effect defence witnesses. Their testimony did not favourably impress the Sessions Judge, and has in our view rightly been rejected. The prosecution theory receives very material corroboration from the recovery at the house search of the house of the accused of the articles I have referred to above of which Paltanbati's mat was found to be stained with blood and the scrapings of earth from the wall of the room were found to be stained with human blood. That being so, the inference cannot be in my opinion resisted that Paltanbati was murderously done to death in the house of the accused on the night of 1st March 1939 and the three accused persons all took part in causing the evidence of the crime whoever was its author to disappear. I would affirm the

9. Sohrai Sahu v. Emperor, (1930) 17 A I R Pat 247=1930 Cr C 515=124 I C 836=31 Cr L J 721=9 Pat 474=11 P L T 148.
10. Prafulla Kumar Sarkar v. Emperor, (1931) 18 A I R Cal 401=1931 Cr C 497=131 I C 575=53 C L J 427=35 C W N 731=58 Cal 1404=32 Cr L J 768 (F B).
11. Emperor v. Haradhan, (1933) 20 A I R Pat 517=1933 Cr C 1166=146 I C 993=35 Cr L J 240=14 P L T 494.
12. Parmeswar Dayal v. Emperor, (1926) 13 A I R Pat 316 = 94 I C 705 = 27 Cr L J 657 = 7 P L T 567.
13. Emperor v. Suar Gola, (1934) 21 A I R Pat 533 = 1934 Cr C 1189 = 152 I C 1021 = 36 Cr L J 262=16 P L T 95.
14. Suryanarayana v. Yarlagadda Naidoo, (1902) 6 C W N 513 (P C).

conviction. In awarding sentence the Sessions Judge has had regard to the ages of the accused persons and to what appeared in all probability to be their relative degress of responsibility. I see no reason to differ from the Sessions Judge's appreciation of these matters and I do not consider the sentence on either of the accused to be excessive. I would dismiss the appeal.

Chatterji J. — I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 295

HARRIES C. J. AND MEREDITH J.

Feroze Kazi and others — Appellants

v.

Emperor.

Criminal Appeal No. 187 of 1939, Decided on 15th December 1939, from decision of Magistrate, First Class, Purulia D/- 24th July 1939.

(a) Criminal P. C. (1898), S. 256—Accused asked to summon his witnesses and to produce them before all prosecution witnesses examined —Procedure is irregular and vitiates trial.

Section 256 makes it clear that the accused shall be called upon to enter upon his defence and produce his evidence after the case for the prosecution is over. Where the accused are asked to summon their witnesses and to be ready to produce them before all the witnesses for the prosecution have been examined, the procedure is irregular and vitiates the whole proceeding. [P 297 C 1, 2 ; P 298 C 1]

(b) Criminal P. C. (1898), S. 342—Accused is not bound to summon or produce his witnesses until he himself is examined—Accused examined after arguments in case heard—Procedure is illegal and vitiates trial.

An accused is not bound to summon his witnesses or to produce them until he himself has been examined. Under S. 342 it is too late to examine an accused when arguments in the case have been heard and when the Magistrate has either already written his judgment or is about to write the same. To examine the accused at such a late stage of the proceedings is worse than useless. The procedure is illegal and vitiates the whole trial : *A I R 1925 Cal 480 and A I R 1926 Pat 29, Rel. on.* [P 297 C 2 ; P 298 C 1]

S. M. Gupta and S. C. Chakravarty — *for Appellants.*

Asst. Govt. Advocate — *for the Crown.*

Harries C. J. — The three appellants Feroze Kazi, Mangal Bouri and Rabi Bouri, were tried by a learned Magistrate having powers under S. 30, Criminal P. C., upon a charge of rape. They were found gulity under S. 376, I. P. C. Feroze Kazi was sentenced to five years and six months' rigorous imprisonment and was also ordered to pay a fine of Rs. 60; Mangal Bouri and Rabi Bouri were each sentenced to a term of four years and six months' rigorous imprisonment. Against these convictions and sentences the appellants have preferred the present appeal. The case for the prosecution can be shortly stated as follows. Bhimi Bourin, a young girl of about fifteen years of age, was in her father's house in the late afternoon of 1st March 1939. Her father had gone to another village in connexion with some marriage, whereas her mother had gone out to sell milk. The only person in the house with Bhimi Bourin was a young child. According to the prosecution, the appellants, Feroze Kazi, Mangal Bouri and Rabi Bouri, entered the house, seized Bhimi Bourin and wanted to have sexual intercourse with her. She attempted to struggle, whereupon Rabi and Feroze stuffed a cloth in her mouth. Mangal, it is then alleged, threw her down on her back and Feroze Kazi had sexual intercourse with her by force. After that Rabi held the girl when Mangal ravished her and later Mangal held her so that Rabi could ravish her. After the appellants had left the house, this little girl managed to raise a cry which brought a number of villagers to the scene. She was found to be bleeding freely from her private parts and was obviously in a very distressed condition. Some time after, her mother arrived. According to the prosecution, the girl told Jainul (P. W. 4) that the three appellants had raped her, and according to the girl's mother, Peli Bourin (P. W. 11), the girl said that she had been raped by Feroze.

At about 10 P. M. Budhu Bouri, a cousin of the girl, made a report at the Para police station, and in that report he states that he had heard that his sister had been ravished by the people of Hariharpur and that these people were preventing the girl coming to the thana and were trying to settle the matter amicably. He mentions that the occurrence took place in the evening when the girl's father was away, and it is also said that he could not name the people who ravished the girl. A police constable was ordered to proceed to Hariharpur and to bring the girl to the police station. The constable went and later the girl, who was still in a very distressed condition, was brought to the police station where she made a statement. Police investigation began and in due course the three appellants were arrested and brought to trial. The case was heard by Mr. A. N. Chakravarty, a Magistrate of the First Class exercising

powers under S. 30, Criminal P. C. He eventually came to the conclusion that the case had been established against all three appellants and convicted and sentenced them in the manner in which I have already indicated.

Mr. S. M. Gupta, who has appeared on behalf of the appellants, has contended that the convictions cannot be maintained upon the merits, and in my view, there is certainly considerable force in this contention in the cases of Mangal and Rabi. The evidence against these two appellants is not very convincing. As I have stated, Budhu, a cousin of the girl, who made the first report at the thana, stated that he did not know the names of the persons who had ravished Bhimi. According to him, he went near the house and heard that the little girl had been raped by some of the villagers and without making any further inquiries he went to the thana. In evidence Budhu stated that before he went to the thana he had heard the name of Feroze Kazi mentioned as the person who had ravished Bhimi, but in my view it is quite impossible to accept this statement. His statement to the police at 10 P. M. on the evening of the occurrence makes it clear that at that time he did not know who had ravished this little girl. His statement in evidence that he knew before he went to the police station that Feroze was the ravisher, is obviously untrue. Budhu's evidence is corroborated by Yakub (P. W. 2) who accompanied Budhu to the police station. This witness also says that Budhu told him that Feroze had ravished the little girl; but in spite of that it is clear that Budhu told the police that he did not know who were the guilty persons. It is to be observed that even if the evidence of Budhu and Yakub was accepted, there is nothing in it implicating Mangal and Rabi. However, I am satisfied that when Budhu and Yakub went to the thana, they did not know who had raped this little girl.

Bhimi (P. W. 3) implicates all three accused; but it is very significant to note that her mother Peli (P. W. 11) states quite clearly that the little girl named only Feroze to her as her ravisher. It has been urged by Mr. Gupta that Mangal and Rabi have been introduced into this case because of enmity. It appears clear that Mangal and Rabi had been the cause of the family of this little girl being outcasted. It appears that Kafi one of the family, was being kept by Rakhal Musalman, and this had angered the Bouris. They had moved in the matter and consequently the family of this little girl had been outcasted. It may well be that there was ill-feeling against Mangal and Rabi and that might be the reason why they were implicated in this case. In any event the only evidence against them is the evidence of the little girl coupled with the evidence of Jainul (P. W. 4). The latter's evidence, in my view, cannot possibly be accepted. He says that shortly after the occurrence he came to the house and found the little girl weeping. She told him what had happened and named the three appellants. She asked Jainul to tell her mother and Jainul would have the Court believe that he immediately went home and did not mention a word to anybody. Jainul is the brother of one Rakhal who, it is alleged, is on terms of enmity not only with Mangal and Rabi but also with Feroze. Rakhal, it is said, took a very keen interest in this prosecution, and he was certainly consulted very soon after this occurrence. Jainul, therefore, can well be regarded as a person who is interested in the result. In any event his evidence is of such a nature that it cannot possibly be accepted. It is inconceivable that Jainul, finding this little girl in such a condition, would go to his home and do nothing and say nothing.

The only other evidence which tends to corroborate the girl is the evidence of Dugi (P. W. 7) who stated that the girl's mother had said that her daughter had been raped by a Musalman, and the evidence of Khadi (P. W. 10) who stated that the girl's mother had said that Feroze Kazi had raped her daughter. In my judgment, the evidence against Mangal and Rabi is of such a slight nature that it would be unsafe to convict them. It has been laid down time and again that in cases of this kind the evidence of the complainant must be corroborated. As I have stated, the only evidence which really corroborates the girl's evidence against Mangal and Rabi is the evidence of Jainul, which cannot possibly be accepted. There is evidence, however, against Feroze, though that evidence is open to criticism; but in my view, it is not necessary to come to a definite conclusion upon this evidence. The conviction of the three appellants cannot possibly be sustained by reason of the grave irregularities and illegalities committed during the course of the trial. A perusal of the order-sheet in this case makes it clear that the defence were asked to summon their witnesses

before all the witnesses for the prosecution had been examined. On 9th June 1939, there appears the following order :

Cross-examined after charge and discharged 13 P. W.'s and one P. W.'s cross examination declined after charge and discharged. To 12th July 1939 for doctor and lady doctor and defence witnesses. Summon D. Ws. for that date in sufficient time.

On 12th July 1939, there appears this order :

Examined and cross examined after charge and discharged lady Doctor and Assistant Surgeon. No defence witness cited. To 24th July 1939, for orders (Arguments on 22nd July 1939.)

The order passed on 22nd July 1939, is 'Heard arguments. To 24th July 1939, for orders.' On 24th July 1939, the order sheet shows that the accused were convicted and sentenced.

Nowhere in the order sheet does it appear that the accused were ever examined as required by S. 342, Criminal P. C. From the record, however, it appears that the accused were examined on 24th July 1939, that is on the day upon which they were convicted and two days after the arguments in the case had been closed. The judgment in this case is obviously a considered judgment and may have been written before 24th July 1939, when the accused were actually examined. In any event the accused were examined at such a late stage that there is a real danger that the learned Magistrate had made up his mind before he had examined the accused. In these circumstances, Mr. Gupta has urged that the trial was vitiated and that the convictions cannot possibly be maintained. It is abundantly clear that the accused cannot be called upon to produce witnesses until the case for the prosecution has been completed. S. 256, Criminal P. C., is in these terms :

(1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re examination (if any), they shall be discharged. The evidence of any remaining witnesses for prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

This Section makes it clear that the accused shall be called upon to enter upon his defence and produce his evidence after the case for the prosecution is over. In the present case, however, the accused were asked to summon their witnesses and to be ready to produce them before all the witnesses for the prosecution had been examined. As I have already stated, the medical witnesses had not been called, yet the accused were asked to summon their witnesses before they knew what the medical evidence against them was likely to be. It is to be observed that this was a case tried by a Magistrate with powers under S. 30, Criminal P. C. There had been no preliminary hearing and commitment to sessions, and, therefore, it was most important that the accused should know what the evidence against them was before they were called upon to produce their witnesses. The accused did not produce witnesses on the day upon which the medical witnesses were examined for the prosecution, and the learned Magistrate thereupon adjourned the case to 22nd July for arguments. In every criminal trial the Court must examine the accused. S. 342, Criminal P. C., provides :

(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence . . . .

From the very terms of the Section it is clear that the Court must examine the accused at the end of the case for the prosecution and before he is called upon for his defence. All that the learned Magistrate did in present case was to adjourn the case for arguments the moment the case for the prosecution was concluded. He made no attempt to examine the accused persons and never asked them if they wished to call any evidence on their behalf. When he found on the last day upon which prosecution witnesses were examined that no defence witnesses had been summoned, he adjourned the matter to hear arguments of counsel. On 22nd July 1939, he heard arguments and he adjourned the case to 24th July 1939, for judgment. Why counsel for the defence did not point out that the appellants had not been examined is not known ; but one thing, however, is clear that there was no examination of the three appellants until the day fixed for judgment in the case. They were then examined, and in my view, their examination

was of a most perfunctory nature. In any event, it was too late to examine the accused when arguments had been heard and when the learned Magistrate had either already written his judgment or was about to write his judgment. To examine the accused at this stage of the proceedings is worse than useless. In the examination the accused were asked two questions (1) " did you outrage Bhimi Bourin?" and (2) "where were you at that time?" Each of the accused denied that he had outraged the little girl and each of the accused set up an alibi. It is to be observed that not one of the accused was asked whether he wished to enter upon a defence and call witnesses. The answers of the appellants to the question "where were you at the time of the offence" make it clear that they were setting up an alibi yet the learned Magistrate never gave them any opportunity to establish that alibi when once they had set it up. The learned Magistrate had certainly asked the accused to summon witnesses at an earlier date; but in my judgment the accused were not bound to summon their witnesses or to produce them until they themselves had been examined.

In my judgment the irregularities or illegalities which I have pointed out in this trial vitiate the whole proceedings and make it impossible to maintain the convictions. It has been urged by the learned Assistant Government Advocate that at most the defects which I have pointed out, amount to irregularities and therefore curable by reason of the provisions of S. 537, Criminal P. C. It is true that irregularities are curable by the terms of that Section provided that such have not in fact occasioned a failure of justice.

It has been held that failure to comply with the provisions of S. 342, Criminal P. C., is an illegality which vitiates the trial and which is not cured by S. 537, Criminal P. C.: *see* 51 Cal 933[1] and 7 P L T 259.[2] There is however a Bench decision of this Court, 4 Pat 488[3] which suggests that failure to comply with S. 342, Criminal P. C., would not vitiate the trial if no miscarriage of justice had resulted from the same. It is unnecessary in this case to decide whether a failure to observe the provisions of S. 342, Criminal P. C., is merely an irregularity curable under S. 537 or is an illegality which vitiates the whole trial and which can never be cured. Even if what I have pointed out in this case only amount to irregularities, they are of such a serious nature that they must be held to have occasioned a failure of justice.

As I have pointed out earlier, the learned Magistrate heard arguments in this case before he knew what the accused would say by way of defence. That in itself is a very serious matter. How could a learned Magistrate give due weight to arguments addressed to him without knowing precisely what the accused wanted themselves to say? Further, I cannot understand how counsel for the defence could possibly put the case of his clients until his clients had been examined as required by law. After examination which as I have said, took place after the conclusion of the arguments in the case, the appellants were never asked whether they desired to call witnesses to support their alibi. Asking the appellants to summon witnesses during the progress of the case for the prosecution could, in no way, excuse the learned Magistrate from not asking the appellants when they were examined whether they desired to call witnesses or not to support their defence. In short, this case was decided without the appellants ever receiving an opportunity to adduce evidence to support their respective cases.

Lastly, the learned Magistrate must have made up his mind in this case before he ever examined the accused. He examined the latter on the day which he fixed to deliver his considered judgment, and there is a real danger in this case that due weight was not given to the statements of the accused. In these circumstances, it is impossible to hold that the omissions which I have pointed out, even if they amount only to irregularities, did not seriously prejudice the appellants. That being so, the convictions, in my view, must be set aside. It must now be decided whether his case should be re-heard. In my view the case against Mangal and Rabi is such a weak one that there is no real chance of these two appellants being convicted. The case against Feroze is somewhat stronger, though, as I have already pointed out, the evidence against this appellant can be subjected to

1. Surendra Lal Shaha v. Isamaddi, (1925) 12 A I R Cal 480=84 I C 325=51 Cal 933 = 26 Cr L J 261.
2. Ramcharan Singh v. Emperor, (1926) 13 A I R Pat 29=89 I C 153=7 P L T 259=26 Cr L J 1289.
3. Mohiuddin v. Emperor, (1925) 12 A I R Pat 414=86 I C 459=26 Cr L J 811=4 Pat 488=6 P L T 154.

considerable criticizm. There is undoubtedly enmity between the parties in this case, and I am very undoubtful as to the value of any evidence adduced upon a re-hearing of this case. Taking all the circumstances into consideration, I think it would be dangerous to order a re-hearing in the case of Feroze. That being so, I think the only course open to this Court is to set aside the convictions and acquit all the appellants. For the reasons which I have given, I would allow this appeal, set aside the convictions and sentences and acquit the appellants of the charge under S. 376, I. P. C. The appellants are on bail and their bail bonds are hereby discharged.

Meredith J. — I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 299

DHAVLE J.

Chokat Ahir and others—Petitioners.

v.

Suraj Singh—Opposite Party.

Criminal Revn. No. 621 of 1939, Decided on 8th December 1939, against order of Magistrate, First Class, Bettiah, D/- 13th October 1939.

(a) Criminal P. C. (1898), S. 439—Revision—Practice—High Court and Sessions Court having concurrent powers of revision — Application direct to High Court—Though it is not usual to entertain direct application still after it is admitted it must be disposed of on merits.

Where a petitioner makes an application for revision direct to the High Court without going to the Court of Session which has concurrent power of revision, although it is not usual to entertain such applications direct, still after they are admitted they must be disposed of on the merits. [P 299 C 2]

(b) Cattle Trespass Act (1871), S. 24—Finding of damage is essential for conviction.

A clear finding of damage done by the trespassing cattle is essential to a conviction under S. 24.

[P 300 C 1]

(c) Criminal Trial — Evidence — Application for permission by defence to cross examine prosecution witness — No orders passed by Magistrate who merely said "filed" on it—Procedure held is not proper.

Where in a criminal trial the Magistrate passed no orders on an application made by the defence for permission to cross-examine a prosecution witness but wrote "file" on it:

Held that it was not a proper way of disposing of the application. [P 299 C 2]

Rajkishore Prasad — *for Petitioners.*

A. K. Mitra — *for Opposite Party.*

Order.—This is an application in revision against the conviction of the petitioners under S. 24, Cattle Trespass Act, with a sentence of a fine of Rs. 15 each with 15 days' rigorous imprisonment in default. The petitioners seem to have come up direct to this Court without going to the Court of Session which has concurrent powers of revision. It is not usual to entertain such applications direct, but after they have been admitted, they must, I take it, be disposed of on the merits. The learned advocate for the petitioners has contended that substantial injustice has been done to the petitioners by the refusal of the trying Magistrate to allow an Assistant Sub-Inspector, who was examined as a witness for the defence, to be cross-examined by them. The circumstances in which permission to cross-examine him was asked for are these: The prosecution case was a case of cattle trespass and rescue at 8 o'clock in the morning on 12th May 1939. One of the defences was that the prosecution case was wholly false and that Suraj Singh, on whose complaint the prosecution case was started, was, at the time of the occurrence alleged by him, 8 miles away from the scene of the occurrence, lodging a sanha at the thana of Ramnaga, which was recorded by the Assistant Sub-Inspector, the defence witness in question. In his cross examination the Assistant Sub-Inspector stated that he did not "verify the authenticity of man who lodges sanha," and that complainant Suraj Singh, who was shown to him was not the man who had lodged the particular sanha in question. It appears that the same officer had 15 days before proved in a dacoity case the very sanha as lodged by Suraj Singh. It may be that there was some explanation of this peculiar circumstance, but Mr. Mitter, who appears for the opposite party has not been able to suggest any reason, why the defence should not have been allowed to cross-examine the Assistant Sub-Inspector in the circumstances. The point was important because if it was Suraj Singh that lodged the sanha with the Assistant Sub-Inspector, his present story of cattle trespass and cattle rescue could hardly be true. The learned Magistrate passed no orders on the application made by the defence for permission to cross-examine the witness, but merely said "file" on it, and this, it has been repeatedly held, is not a proper way of disposing of an application in the course of a criminal trial.

The learned advocate for the petitioners has also contended that the conviction is bad because there is no clear finding of

damage done by the trespassing cattle. It has been held in several cases that such a finding is essential to a conviction under S. 24, Cattle Trespass Act. Mr. Mitter has urged that the Magistrate may be taken to have accepted the prosecution story of cattle grazing in the field, but even the acceptance of this story does not necessarily imply damage, for, it is no part of this story as briefly referred to by the Magistrate that the cattle caused any damage by the grazing. Both the points urged on behalf of the petitioners must, in my opinion, be accepted. The result is that this application in revision is allowed and the conviction of the petitioners set aside. Any fines paid by them will be refunded on application.

G.N./R.K. *Application allowed.*

A. I. R. 1940 Patna 300

FAZL ALI AND CHATTERJI JJ.

Doman Sahu and another —
Plaintiffs — Appellants.

v.

Gangu Nayek — Defendant —
Respondent.

Appeal No. 588 of 1938, Decided on 11th October 1939, from appellate decree of Sub-Judge, Gaya, D/- 15th July 1938.

(a) Bengal Land Registration Act (7 of 1876), S. 78—Effect—S. 78 does not bar right to sue if rent is due—It only prevents liability for rent from being enforced until provisions of S. 78 are complied with.

The right to the rent of an estate being in the proprietor, although not registered, his right to sue for the rent is not taken away by S. 78, which merely puts an impediment in the way of his realizing the rent until he complies with the law by obtaining registration of his name under S. 78 as proprietor. [P 301 C 1]

Therefore a suit which is instituted within a year from the date of accrual of right to rent cannot be said to be time barred by the mere fact that the plaintiff was registered more than a year after the accrual of that right for, S. 78 does not bar the right to sue if the rent was due; its only effect is that the liability for rent cannot be enforced: *23 Cal 87 (F B) and A I R 1928 Pat 410, Rel. on*; *A I R 1931 Pat 417 and A I R 1938 Pat 35, Expl.*; *17 P L T 423, Disting.* [P 302 C 1]

(b) Bengal Land Registration Act (7 of 1876), S. 78—Rent suit by mortgagee dismissed under S. 78—Mortgagee getting himself registered during pendency of second appeal — Appellate Court is competent under O. 41, R. 33, Civil P. C., to pass decree on basis of registration.

Order 41, R. 33 applies not only to appeals from original decrees but also to appeals from appellate decrees and therefore a second Appellate Court is quite competent to pass a decree in favour of a mortgagee appellant who gets himself registered under S. 78 during the pendency of the second appeal, on the basis of the entry in register D evidencing that the bar imposed by S. 78 has been removed: *A I R 1928 Pat 410, Rel. on.* [P 302 C 2]

S. M. Mullick and P. Misra — *for Appellants.*

Raj Kishore Prasad — *for Respondent.*

Fazl Ali J.—This appeal arises out of a suit brought by the plaintiff-appellants to recover bhaoli rent for the years 1343 and 1344 Fasli. As the claim for the year 1343 Fasli is not pressed, the only question to be determined in this appeal is whether the appellants are entitled to recover bhaoli rent from the defendant for the year 1344 Fasli. The appellants base their claim upon a sadhaua-pataua deed executed in their favour by one Mt. Sona Dei on 11th December 1933, in respect of her proprietary share in the estate in which the respondent's holding is situated. Both the Courts below have held that this deed is a usufructuary mortgage and the appellant not having been registered in Register D are not entitled to recover rent from the respondent. The appellants however have tendered in evidence in this Court a copy of Register D which has been marked as Ex. A without objection. This document shows that the appellants were recorded as usufructuary mortgagees after the institution of the present appeal and on the basis of it they now claim a decree for the rent of the year 1344 Fasli.

Now the points which arise in this appeal are precisely those which arose in 7 Pat 690.[1] In that case there being a difference of opinion between Kulwant Sahay and Macpherson JJ., the following questions were referred to Mullick J.: (1) Whether a mortgagee, whose suit for rent had been rightly dismissed in appeal by reason of the provisions of S. 78, Land Registration Act, 1876, could secure a decree for rent sued for from the Court of second appeal, if he has during the pendency of the second appeal been registered under that Act, and (2) if he could do so, whether the rent was barred by limitation if his name was registered in the Collector's register after the expiry of the period of limitation for bringing a suit for rent and (3) whether having regard to the provisions of S. 100, the Court of second appeal could reverse the decree passed by the Courts below on the ground that the plaintiff had after the institution of the appeal got himself registered. Mullick J. agreeing with Kulwant Sahay J.

1. Umeshwardhari Singh v. Neman Singh, (1928) 15 A I R Pat 410=110 I C 469=7 Pat 690=9 P L T 357.

answered all these questions in favour of the plaintiff and it seems to me that in view of the decision in that case, there is hardly any room for argument in this appeal. It being suggested, however, that the decision of Mullick J. has not been followed in its entirety in two subsequent cases, I wish to examine briefly the arguments advanced by the respondent on this point. Dealing with the question of limitation, the first point to be considered is what is the effect of S. 78, Land Registration Act, 1876. That Section runs as follows:

> No person shall be bound to pay rent to any person claiming such rent as proprietor, or manager of an estate or revenue free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act.

It is contended on behalf of the respondent that by reason of this Section, the liability of the tenant to pay rent does not arise until the landlord claiming to be entitled to the rent is registered as such and consequently the appellants had no cause of action when they brought the suit. The argument is a plausible one, but it appears that the view which has been consistently taken in a number of cases which cannot now be dissented from is that under this Section the right to the rent of an estate being in the proprietor, although not registered, his right to sue for the rent is not taken away; but this Section merely puts an impediment in the way of his realizing the rent until he had complied with the law by obtaining registration of his name as proprietor. This view was set out very clearly in the Full Bench decision of the Calcutta High Court in 23 Cal 87[2] and was accepted as the correct view by Kulwant Sahay J. and Mullick J. in 7 Pat 690.[1] It is suggested on behalf of the respondents that a contrary view has been expressed in at least three subsequent cases of this Court The first case is that in 12 P L T 693,[3] which was decided by Jwala Prasad and Wort JJ. It appears that both the learned Judges did not agree in that case with the view of Mullick J. (which they characterised as obiter dictum) that even where the plaintiff landlord has not got his name registered in Register D, a conditional decree can be passed in his favour imposing a condition that he will be able to execute it upon his name being registered. The learned Judges however have nowhere suggested in their judgment that the case was not correctly decided on its own facts, which it is conceded were quite similar to those of the present case. On the other hand, the distinction which they drew between that case and the case before them was that whereas in the first case the proprietor had been registered before the second appeal was heard, in the case before them no such registration had taken place. It was pointed out to us that one of the observations made by Wort J. in his judgment was that where a proprietor was not registered under the Bengal Registration Act, such non registration "would be a bar to the plaintiff's cause of action;" and, it was contended that this observation supports the view propounded on the respondent's behalf that the plaintiffs had no cause of action until their names were registered. Now, the actual observations made by Wort J. are these:

> Consequently no action by a person not registered under the Act can succeed; in other words, it is a bar to the plaintiff's cause of action.

If we bear in mind the first part of the observation, it is quite clear that what his Lordship really meant was that the plaintiffs could not sue successfully if their names were not registered under the Bengal Registration Act. The next case which was relied on by the respondent was that in 18 P L T 925.[4] In that case also the name of the plaintiffs who sued as proprietors of a village for recovery of rent had not been recorded as such and Wort J. observed at the end of his judgment:

> I should have mentioned that they were precluded from suing by reason of S. 78 of the Land Registration Act.

In my opinion if these remarks are construed in the light of the remarks made by Wort J. in the previous case, the expression "suing" must be interpreted in the above sentence also to mean "suing successfully," this view being consistent with the view expressed in a number of cases of the Calcutta High Court which have never been dissented from by this Court. It must be observed that in none of the two cases referred to above, the question as to whether the plaintiff had a cause of action at the time of the suit properly arose, because the plaintiff not being registered even at the time when the second appeal was heard, his suit had to be dismissed in any event;

2. Alimuddin Khan v. Hira Lal Sen, (1896) 23 Cal 87 (F B).
3. Sharafat Karim v. Harangi Singh. (1931) 18 A I R Pat 417 = 134 I C 624=11 Pat 30=12 P L T 693.
4. Dildar Hussain v. Sheikh Saddiq, (1938) 25 A I R Pat 35=172 I C 935=18 P L T 925.

and in the first case Jwala Prasad J. who was of the same opinion as Wort J. made the following remarks:

Neither S. 78, Land Registration Act, nor S. 60, Ben. Ten. Act, prohibits a suit being instituted for rent by a plaintiff without having his name registered under the Land Registration Act. These Sections prohibit recovery of rent unless the plaintiff has his name registered. Therefore although the plaintiff is entitled to bring a suit without his name having been registered, he is not entitled to recover rent unless he gets his name registered.

The last case cited on behalf of the respondent was that in 17 P L T 423[5] in which James J. while dealing with the effect of S. 78, Bengal Registration Act, incidentally observed that under that Section no person whose name is not entered in the register can maintain a suit for recovery of rent. This Section was referred to by the learned Judge only to show that the entry in the Register D was evidence of the fact that the person whose name appears in the register is the person who is in possession of the property and in the case before him the question as to whether S. 78 bars a suit or merely bars the right to recover rent was not raised at all. Thus, the view expressed by this Court in 7 Pat 690[1] still stands good and I am unable to hold that the appellant's suit is barred by limitation. This suit was instituted on 22nd September 1937, within a year of the date when the plaintiffs' right to rent accrued and the mere fact that the plaintiff was registered more than a year after the accrual of that right will not affect the position. S. 78 does not bar the right to sue if the rent was due; its only effect is that the liability for rent cannot be enforced.

The second point raised on behalf of the respondent is also concluded by the decision of this Court in 7 Pat 690.[1] In that case the question as to whether the Court of second appeal was entitled to take into consideration the effect of the registration of the plaintiff's name during the pendency of the second appeal was expressly referred to Mullick J., and he substantially agreed with the view taken by Kulwant Sahay J. The point was not dealt with fully by Mullick J., but as was pointed out by Kulwant Sahay J. the provisions of O. 41, R. 33, are wide enough to enable the Court to take into consideration the entry in the Land Registration Record made since the institution of the second appeal. It has been held in a number of cases that in special circumstances the Court of second appeal can take notice of facts material to the decision of a case which have arisen subsequent to the decision of the suit: *see* 4 P L J 312[6] and A I R 1935 Lah 32.[7] It is true that it is stated in S. 100, Civil P. C., that an appeal shall lie to the High Court from a decree passed in appeal by any Court subordinate to it on certain specified grounds only and S. 101 provides that no second appeal shall lie except on grounds mentioned in S. 100. This Section however must be read with O. 41, R. 33, which provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The only limitation which has been put upon the powers of the Court in this Section is that

the Appellate Court shall not make any order under S. 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

This provision applies not only to appeals from original decrees but also to appeals from appellate decrees, and so, in my opinion, this Court is quite competent to pass a decree in favour of the plaintiffs on the basis of the entry in Register D which shows that the bar imposed by S. 78 has now been removed. The only other point which was put forward before us on behalf of the appellant was that the document upon the basis of which the plaintiffs have instituted the suit is in essence not a usufructuary mortgage but a lease. In my opinion, it is unnecessary to discuss this question in view of the fact that the plaintiffs themselves have obtained an entry in Register D on the footing that they are the usufructuary mortgagees of the property. I would therefore allow this appeal, set aside the decrees of the Courts below and direct that a decree be made in favour of the plaintiffs for the produce rent of the year 1344 Fasli in accordance with the decision of the Munsif as to the quantity of produce which is not challenged by either

5. Saiyid Ekram Hussain v. Saiyid Ali Hussain, (1936) 17 P L T 423.

6. Hill v. Satan Singh, (1920) 7 A I R Pat 559=50 I C 857=4 Pat L J 312.

7. Sawan Singh v. Haveli Shah Sardari Lal, (1935) 22 A I R Lah 32=152 I C 611.

party. The produce of the holding is to be calculated at the rate of ten kachcha maunds of paddy per bigha and the price of the produce should be calculated on the basis of the rates published in the Gazette and if such rates are not available or are less than the rate admitted by the defendant, then at the rate of ten kachcha pasuris per rupee as admitted by the defendant in his written statement. The plaintiffs will not be entitled to any damage and the parties will bear their costs throughout.

Chatterji J. — I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 303

AGARWALA AND ROWLAND JJ.

Rajendra Prasad—Judgment-debtor — Petitioner.

v.

Debi Parsad and others — Opposite Party.

Civil Revn. No. 638 of 1938, Decided on 3rd January 1940, from order of Sub-Judge, Bhagalpur, D/- 20th July 1938.

Civil P. C. (1908), O. 21, R. 22 — Death of defendant pendente lite — His major son holding himself out as minor in substitution proceedings — Guardian-ad-litem appointed — On suit being decreed notice of sale in execution of decree served on guardian-ad-litem — Sale is not invalid merely because minor who was in fact major was not personally served.

During the pendency of a suit the defendant died and his son though major held himself out to be minor in the substitution proceedings and consequently a guardian-ad-litem was appointed to represent his interests. On the suit being decreed, a notice of sale in execution of the decree was served on the guardian-ad litem under O. 21, R. 22 :

Held that the son having held himself out to be minor the notice to the guardian ad litem must be deemed to have been properly served under O. 21, R. 22 and the fact that no separate notice was served on him personally did not render the sale invalid : *21 Mad 167 ; A I R 1934 Pat 274 ; A I R 1917 Mad 318 and A I R 1929 Pat 79, Rel. on; A I R 1914 P C 129, Expl.* [P 304 C 1, 2]

K. Sahai — *for Petitioner.*

Sarjoo Prasad, Ch. Mathura Prasad and Ramnandan Prasad —

for Opposite Party.

Agarwala J.—This matter arises out of an application to set aside a sale held in execution of the decree passed in a suit for rent against Bhagbat Prasad, the father of the petitioner. Bhagbat Prasad died pending the disposal of the suit on 13th November 1935. Steps were taken to substitute in his place his sons who were described as minors and to appoint a guardian-ad-litem for the minors. The suit was eventually decreed and in due course execution was applied for on 23rd December 1936. Sale in execution of the decree was held on 4th April 1937, the purchaser of the property put up for sale being the uncle of the petitioner. On 15th September 1937, the petitioner applied to set aside the sale alleging that he had no notice of it until 8th September. The Court below has disbelieved the petitioner's allegation that he did not hear of the sale until 8th September. The Munsif set aside the sale and ordered the petitioner to deposit the decretal amount. This order was complied with on 31st January 1938. In appeal by the auction-purchaser against the order the Appellate Court held that there was no sufficient ground for setting aside the sale and confirmed it. The ground on which the petitioner challenged the sale was the absence of notice to him under O. 21, R. 22, Civil P. C. The question that arises now is whether the application is barred by limitation. If the sale was void the period of limitation applicable is that prescribed by Art. 181, Limitation Act of 1908: *see* 1936 P W N 527.[1] If, on the other hand, the sale was not void but voidable the period of limitation applicable is that prescribed by Art. 166, namely 30 days from the date of sale. As the petitioner's application was more than five months from the date of sale it is necessary for him to show that the sale was a nullity in order that his application should succeed.

The petitioner attempts to do this by showing that the notice that was issued in this case under O. 21, R. 22, was not issued to him but to the guardian-ad-litem who had been appointed in the suit on the death of his father. Reliance is placed on the decision of their Lordships in the Privy Council in 42 Cal 72[2] in which it was held that notice under S. 248, Civil P. C. of 1882 was the basis of the executing Court's jurisdiction to proceed in execution. That decision has been dealt with by this Court in 13 Pat 467[3] in which Dhavle J. pointed out that what the Privy Council in effect decided in 42 Cal 72[2] was that a former decision of the Calcutta High Court

1. Ramanand Ganpat v Rakhal Mandal, (1936) 23 AIR Pat 496=163 IC 34=1936 PWN 527.
2. Raghunath Das v. Sunder Das Khetri, (1914) 1 A I R P C 129=24 I C 304=41 I A 251=42 Cal 72 (P C).
3. F. E. Chrestien v. Jaideo Prasad Rai, (1934) 21 A I R Pat 274=149 I C 828=13 Pat 467=15 P L T 273.

with reference to the provisions of S. 248 of the Code of 1882 was a correct decision; but Dhavle J. went on to point out that the law has been altered by the present Code of 1908, which, in sub-r. 2 of R. 22 has introduced a statutory exception to the general rule mentioned in the Privy Council decision. The case before Dhavle and Macpherson JJ. was a case in which notice under R. 22 had in fact been issued but the address of the person proceeded against had been incorrectly given with the result that notice had not been served in accordance with law, and the question was whether in these circumstances the sale was a nullity. It was held that where there was only an irregularity in the service of notice under R. 22 the jurisdiction of the executing Court is not affected merely by reason of such irregularity and the sale held can be set aside only on proof of substantial loss to the judgment-debtor by reason of the irregularity.

A further limitation to the proposition that a sale is always void in the absence of a notice properly served under R. 22 is indicated in 7 Pat 790.[4] In that case a notice under R. 22 had been issued to the judgment-debtor but had not been served on him. In spite of this he appeared and contested the execution proceedings. It was held that the omission to serve the notice did not render the sale void. In the present case a notice under O. 32, R. 3 must be presumed to have been served on the petitioner at the time when the guardian ad litem for the minor sons of Bhagbat Prasad was appointed. The petitioner apparently did not object to the appointment of a guardian ad litem and permitted the Court to proceed as if he were in fact a minor although it appears that he had attained majority on 3rd March 1935, some eight months before the death of his father. The notice under R. 22 was directed to the sons of Bhagbat Prasad under the guardianship of the guardian appointed by the Court. There was therefore a notice issued to the persons against whom execution was applied for as required by R. 22 in its present form. The fact that in the case of the petitioner it was not sent direct to him but to the guardian is due solely to the fact that the petitioner himself led the Court to believe that a notice so directed would be properly served as he held himself out to be a minor in the substitution proceedings.

4. Fakhrul Islam v. Bhubaneshwari Kuer, (1929) 16 A I R Pat 79=117 I C 648=7 Pat 790.

In these circumstances I am not prepared to hold that there was any non-compliance with the provisions of R. 22. The decision in 21 Mad 167[5] is relevant to this point. There the managing member of a Hindu joint family consisting of himself and two minor brothers mortgaged ancestral property. The mortgagee brought a suit on the mortgage joining the three brothers as defendants. The two younger brothers were sued through the elder brother as their guardian ad litem. A decree was passed in the suit and the mortgaged lands were sold in execution. Thereafter the two younger brothers sued to have the decree and sale set aside on the ground that they had attained majority at the date of the suit and had accordingly been wrongly impleaded as minors. One of the two younger brothers was in fact a major at the date of the institution of the mortgage suit but it was found as a fact that he was aware of the suit and the execution proceedings and that he permitted his eldest brother to conduct the defence on his behalf. In these circumstances it was held that both the younger brothers, who sued to set aside the mortgage decree and the sale held in execution of it, were bound by the decree passed in the mortgage suit. That decision has been followed by the Madras High Court in 39 Mad 1031.[6] I would therefore dismiss this application with costs. Hearing fee two gold mohurs.

Rowland J. — I agree.

G.N./R.K. *Application dismissed.*

5. Ramachari v. Duraisami Pillai, (1898) 21 Mad 167.
6. K. Seshagiri Rao v. Tanguturi Jagannadham, (1917)4 AIR Mad 318=32 IC 391=39 Mad1031.

A. I. R. 1940 Patna 304

FULL BENCH

HARRIES C. J., DHAVLE AND ROWLAND JJ.

Chaudhuri Bamdeb Das — Petitioner.

v.

Collector of Cuttack — Opposite Party.

Civil Revn. No. 50 of 1937, Decided on 28th March 1940, from order of the Dist. Judge, Cuttack, D/- 12th April 1937.

(a) Orissa Tenancy Act (2 of 1913), S. 104— Co-shebaits are co-owners for purposes of S. 104.

Though the co-shebaits to whom a property dedicated to a single idol has descended are not 'co-owners' of the endowed property in the strict sense of the word, they ought to be regarded as such for the purposes of S. 104 : *32 Cal 129 (P C) and 2 C L J 377, Rel. on; A I R 1922 P C 123, Ref.; 29 Mad 283 and A I R 1916 P C 256, Expl.*

[P 308 C 2]

(b) Orissa Tenancy Act (2 of 1913), S. 105— Order under S. 105 without notice to other party is illegal.

A Judge in passing an order under S. 105 without notice to the party to be affected thereby and without giving him an opportunity to show cause why a common manager should not be appointed acts in the exercise of his jurisdiction with material irregularity. [P 309 C 2]

(c) Orissa Tenancy Act (2 of 1913), S. 104— Group of properties jointly managed by co-shebaits of one "debottar fund" can be dealt with in one case.

A group of properties jointly managed by the co-shebaits of one "debottar fund" can be dealt with by the Court in one case on a single application under S. 104: *11 C W N 1143, Rel. on.* [P 309 C 2]

B. K. Ray and G. C. Das—*for Petitioner.*

Dr. D. N. Mitter, G. P. Das and S. C. Bose — *for Opposite Party.*

Dhavle J. — This is an application in revision against an order of the District Judge of Cuttack, directing certain co-shebaits of dedicated properties, under S. 105, Orissa Tenancy Act, to appoint a common manager. These properties were dedicated by the well-known Chaudhuri family of Bhingarpur (in the Cuttack District) to their family gods, and twenty-three members of the family are recorded in the Collector's Registers as the co-shebaits. On an application made by the Collector under S. 104 of the Act, the District Judge issued notices to them. Twenty-one of the shebaits said in response to the notices that a common manager should be appointed, but the remaining two raised objections, which were overruled by the District Judge. These two shebaits then made the present application to this Court. It came in the first instance before my Lord the Chief Justice and Rowland J., when it was argued for the petitioners that the District Judge had no jurisdiction to pass any order under S. 105 of the Act because the co-shebaits cannot be regarded as the co-owner — within the meaning of Ss. 104 and 105 — of the properties vested in the various idols. As the point was of public importance, it was directed that the matter should be laid before a Bench of three Judges for disposal.

The case thus came before this Bench, and when it was first argued before us, the Advocate-General of Orissa who appears for the petitioners stated that none of the dedicated properties was held by more than one idol. D. N. Mitter who appears for the opposite party contended on the other hand, that we had here a group of family deities with a common fund; and this seemed to be supported by the fact that the person appointed by the District Judge had, in fact, executed a security bond on his appointment as a common manager of "the Bhingarpur debottar estate." It thus became necessary to know precisely how the properties are owned, as the case would present little difficulty if the properties are owned jointly by more than one deity. We were informed by counsel that there were three documents relating to the dedication of these properties, one in the possession of the petitioners and two in the possession of the opposite party; and in order to ascertain the true position, we directed that these documents should be translated and copies prepared for the use of the Bench. When this was done, the parties were heard finally.

The earliest of these documents purports to be a deed of partition executed in 1847 by Choudhuri Lokenath Das of Bhingarpur and his three brothers. It does not however effect any partition of the family, but provides that in the event of a partition of the secular property of the family, an extra share (Jesthansa) should be provided for the eldest branch and that certain properties should not be partitioned because their profits (munafa) have been "dedicated" the profits of one mauza for the bhog of Sri Jagannath Mahaprabhu, the profits of a mukuddami share in another mauza for the jani-jatra (festivals) etc., of Sri Bakreshwar Deb, the profits of one mauza for the bhog etc., of the family deity Sri Gopinath Deb and the profits of two taluks for the expenses of jani-jatra of the same deity and of guests and wayfarers, the balance to be deposited "in the fund of the installed deity" for the purchase of lakheraj land, mukuddamis and zamindaris in the name of the said deity. Whether the dedication of these properties for religious and charitable purposes was of a complete character may possibly be doubted on the terms of this ancient document, for it also provided for allowances to the poor members of the family in certain events. The seba and management of Sri Gopinath Deb, apparently the principal deity, was not to be partitioned at any time, and on a partition of the secular properties of the family, the deity Kanak-Durga Thakurani, then in the temple of Sri Gopinath Deb, was to be installed in a separate building in the same compound. A deity of this name appears later on as the separate proprietor of a small property—a lakheraj bajiafti—in a taluk of Sri Gopinath Deb. The

next document is called a deed of agreement for partition and was executed in 1900 by 15 members of the family, including four minors represented by their guardians. It is stated in para. 4 of this document that some of the properties shown as dedicated in the deed of 1847 had by mistake been entered in the Collector's registers in the names of the ancestors of the executants, but that the executants had "only joint shebaiti and marfatdari right in the debottar properties." The deed provided for the partition of 20 mauzas out of the joint secular properties, and stated in para. 9 that:

> The debottar properties dedicated to any god or goddess will be confirmed as dedicated to him or her and will be included in one debottar fund.

Provision was made for the management of those secular properties that were to remain joint for the time being; and then para. 36 dealt with the executants' "joint debottar properties," an expression on which some stress has been laid by the opposite party but which does not really throw any doubt on the dedicated character of the properties: *see*, for example, 47 I A 140.[1] The debottar moneys were under para. 37 to remain in the charge of a mukhtearkar and a naib in the temple of Sri Gopinath Deb and were referred to in paras. 40 and 46 as "the fund" and "the said fund." Para. 44 provided that if out of the money, deposited in "the said fund," anybody took a loan, the bonds thereof, and if any property is purchased, the documents thereof, in the names of the gods and goddesses for whom purchase is made, "will form the joint properties of all shebaits and marfatdars,"—a provision which seems to mean no more than that the income of the dedicated properties was also to remain joint in the hands of the executants as shebaits and marfatdars, whereas the secular properties were liable to partition. Except for the references to the debottar fund, this document does not seem to me to suggest that any of the dedicated properties were held by more than one idol; and the provision that all the moneys of the various deities—the petition before us puts the number at 25—shall be kept in one fund in the temple of Sri Gopinath Deb does not preclude the separate ownership of these deities and make them joint owners of the fund.

The third and last document to which we have been referred purports to be a deed of declaration of trust, and was executed in November 1912, by 18 members of the family (including three minors) in favour of 15 deities. It recites the dedication to these deities and declares more than once that the "debottar property will remain under debottar khanja (dedication)," and that the deities are the "rightful owners" of the properties while the executants are "only shebaits and marfatdars." It provides for the management of what in para. 5 is called the debottar estate. By para. 15 the properties of all the gods and goddesses are named the "Bhingarpur debottar estate property," and the koth (joint) treasury and papers of the dedicated properties are to remain in the temple of Sri Gopinath Deb. In the next paragraph, however, it is provided that separate papers and accounts, etc. will be kept of the income and expenses of the respective properties of the aforesaid installed deities. Dr. Mitter has stated that this was, in fact, never done, and the Advocate General has pointed out that this deed of 1912 was itself never given effect to as the Bhingarpur properties, dedicated as well as secular, came under common management under Chap. 10, Orissa Tenancy Act, in 1913 and were only released in 1928. Although in para. 22 of the deed provision is made for a koth bhog (joint offering) instead of duar bhog at separate places at different times in connexion with the janijatra of the installed deities, this appears to be too slight a circumstance to establish such a mingling of the funds of the various deities as to entitle us to deal with the dedicated properties on the footing that they were, any of them, really vested in more than one deity. For the detailed schedules attached to this deed do not indicate the dedication of any property to more than one deity, while para. 16 points to an intention at any rate to keep the dedications to each deity separate from those of others. It is true that in their application for revision the petitioners have themselves spoken of "Sri Gopinath Deb, Sri Dadhibaban Deb and 23 other deities," and that this number is much in excess of what is specified in the deed of 1912. But the excess may quite possibly be due to some minor deities being placed by the side of the principal deities and counted among the rightful owners of the dedicated properties. No oral evidence has yet been taken, and the actual number of the family deities is not known. Upon the whole there is, in my opinion, no real ground for holding on present materials

1. Asita Mohan Ghosh v. Nirode Mohan Ghosh (1920) 7 A I R P C 129=47 I A 140 (P C).

that any of the dedicated properties are held by more than one deity; the bulk of them certainly are not. The question must therefore be answered whether co-shebaits of dedicated properties can be dealt with under S. 104 and succeeding Sections of the Orissa Tenancy Act. S. 104 runs as follows:

> When any dispute exists between co-owners of an estate sub-proprietary interest or tenure as to the management thereof and in consequence there has ensued or is likely to ensue,
> (a) inconvenience to the public, or
> (b) injury to private rights,
> the District Judge may, on the application in case (a) of the Collector, and in case (b) of any person having an interest in the estate, sub-proprietary interest or tenure, direct a notice to be served on all co-owners, calling on them to show cause why they should not appoint a common manager. . . .

The next Section provides:

> If the co-owners fail to show cause as aforesaid within one month after service of a notice under S. 104, the District Judge may make an order directing them to appoint a common manager. . . .

The jurisdiction of the District Judge is thus based in the first place on the existence of a dispute " between co-owners of an estate, sub-proprietary interest or tenure as to the management thereof." The word "co-owners," or "owner," is not defined either in the Orissa Tenancy Act or in the Bihar and Orissa General Clauses Act, Act 1 of 1917. The word "proprietor," however, of which "owner" is a synonym according to the dictionaries, is defined in cl. 14 of S. 3, Orissa Tenancy Act, as meaning "a person owning, whether in trust or for his own benefit, an estate or a part of an estate," and including also the sub-proprietary interests referred to in cl. 2 of the Section. In the present case there is no dispute that the dedicated properties are recorded in the names of the deities, while the petitioners and the opposite party are recorded as their shebaits and marfatdars. Entries of this kind prima facie do not show any separation of the legal from the equitable title, and the recorded shebaits and marfatdars, whatever their rights may be, cannot, in the strict and precise sense which the word conveys in law, be said to "own" the dedicated properties, whether in trust or for their own benefit. Dr. Mitter has endeavoured to make out that shebaits are trustees in the general sense, and he has referred in support to such cases as 29 Mad 283,[2] where Lord Macnaughten observed that

> the manager of the temple is by virtue of his office the administrator of the property attached to it; as regards the property the manager is in the position of a trustee,"

and 43 Cal 707,[3] in which Lord Shaw spoke of the whole assets of an asthal being vested in the mahant "as the owner thereof in trust for the institution itself." But such observations were explained by their Lordships of the Judicial Committee in the later case in 44 Mad 831,[4] when Mr. Ameer Ali said that in 43 Cal 707[3]

> the decision related to the office of mahant, but in the course of their judgment their Lordships conceived it desirable to indicate inter alia what, upon the evidence of the usages and customs applicable to the institution with which they were dealing and similar institutions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense as in previous decisions of the Board by way of a compendious expression to convey a general conception of those obligations (p. 838) . . . . Called by whatever name, (i. e. mahant, shebait, etc.) he is only the manager and custodian of the idol or the institution . . . . In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties residing on him, he is answerable as a trustee, in the general sense, for maladministration (p. 840).

Later on, dealing with the Religious Endowments Act, 20 of 1863, Mr. Ameer Ali pointed out that

> the Act contains no definition of the word 'trustee'; it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management.

Finally, it was definitely laid down in that case that

> neither under the Hindu law nor in the Mohammedan system is any property "conveyed" to a shebait or a mutwalli in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage.

Dr. Mitter has endeavoured to distinguish this as a decision with reference to Art. 134 of Sch. 1, Limitation Act, and has argued that being a trustee in the general sense, the shebait should be regarded as the owner of the dedicated property for the purposes of S. 104, Orissa Tenancy Act. The entry of the deities in the Collector's registers as proprietors, when read with the definition of "proprietor" in S. 3 (8), Bengal Land Registration Act, 1876, imports their possession as owners, while it is clear from such Sections as 38, 42 and 46 of the same Act

2. Ramanathan Chetti v. Murugappa Chetti, (1906) 29 Mad 283=33 I A 139 = 16 M L J 265 (P C).

3. Ram Parkash Das v. Anand Das, (1916) 3 A I R P C 256=33 I C 583 = 43 I A 73 = 43 Cal 707 (P C).

4. Bidya Varuthi Thirtha Swamigal v. Balusami Ayyar, (1922) 9 A I R P C 123=65 I C 161 = 48 I A 302=44 Mad 831 (P C).

that the co-shebaits must be recorded only in the capacity of managers of the estates. S. 104, Orissa Tenancy Act, however, does not speak of proprietors. S. 93, Bengal Tenancy Act, from which the Section was borrowed, was an adaptation of S. 26 of Regln. 5 of 1812, which provided for the appointment of managers of joint undivided estates on sufficient cause shown because inconvenience to the public and injury to private rights had been experienced from disputes subsisting among the 'proprietors' of such estates. Like our S. 104, S. 93 of the Bengal Act speaks not of "proprietors" but of "co-owners of an estate or tenure," but the change from "proprietors" to "co-owners" was merely due to the fact that while the former word refers to estates, the appointment of a manager was extended to disputes regarding the management of tenures as well as estates. Even so, the word "owner," or rather "co-owners," used in S. 93, Ben. Ten. Act, or S. 104 of our Act is not a term of art, and the verb to "own," according to Webster's Dictionary and the Oxford English Dictionary, is not confined to the sense of "be proprietor of" but also means "possess."

Though there is a distinction in the language of jurisprudence between mere possession and ownership, possession is taken to follow the title, where nothing else is known, and this tends to reduce the practical distinction between ownership and possession, especially in the case of persons with a hereditary right to manage property on behalf of juristic entities like idols. The property dedicated to an idol, strictly speaking, is vested in the idol, though it is only in an ideal sense that the property is held by the idol,

it still remains that the possession and management of the dedicated property belongs to the shebait, and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol.

It was for this reason that their Lordships of the Judicial Committee held in 32 Cal 129[5] that a shebait suing to recover possession of property on behalf of the idol was entitled to the benefit of S. 7, Limitation Act. The shebait's right of management of dedicated property on behalf of the idol, coupled with the incapacity of the idol itself to manage the property, has also given rise to peculiar problems under the Tenancy Act. In 2 C L J 377,[6] the question arose whether a suit brought by a shebait for rent of a holding situated within a dedicated patni was liable to be dismissed under S. 16, Ben. Ten. Act, because the shebait had not on her succession as shebait given the notice prescribed by S. 15. S. 16 (with which we may compare S. 16 (4) Orissa Tenancy Act), provides that a person becoming entitled to a permanent tenure by succession shall not be entitled to recovery by suit any rent payable to him as the holder of the tenure in default of such notice. Reading the word 'holder' with the word 'entitled' in this Section, it would seem that the Section deals with the owner in possession of the tenure. The shebait was not the holder of the patni tenure, in the strict sense, for the tenure was the legal property of the idol. And yet, relying on 32 Cal 129[5] and after referring to earlier Privy Council decisions in which it was laid down that the shebait has not the legal property but title as manager of the religious endowment, Rampini and Mookerjee, JJ. held that S. 16 was a bar to the recovery of the rent claimed, since the right to bring the suit for rent was vested in the shebait and not in the idol. This decision thus, in effect, treated the shebait as a person who for the purpose of S. 16 had become "entitled" to the patni and was "the holder" of it. The learned Judges referred to the reason of the rule requiring the notice, and observed that there ought not to be any distinction between secular and dedicated properties in this respect, and they considered that "the language of S. 16, Bengal Tenancy Act, and the reason for the rule contained therein were both in favour of the view" that S. 16 applied to the shebait no less than to the ordinary holder i. e. owner of secular tenures.

Where, as in the present case, a property dedicated to a single idol has descended to a number of co-shebaits, a similar line of reasoning leads to the conclusion that these co-shebaits, though they are not "co-owners" of the endowed property in the strict sense of the word, ought to be regarded as such for the purpose of S. 104, Orissa Tenancy Act. While on the one hand, the proprietor idol being a mere "juristic entity," the management is necessarily in the hands of the co-shebaits, we have on the other hand in S. 104 a public

5. Jagadindra Nath Roy v. Hemanta Kumari Debi, (1905) 32 Cal 129=31 I A 203=8 C W N 809=8 Sar 698 (P C).

6. Mabatulla Nasya v. Nalini Sundari Gupta, (1905) 2 C L J 377=10 C W N 42.

means of dealing with disputes not as to title but as to the management of the property, in the shape of appointment of a common manager under the District Judge, and as such appointment is to be made in cases of inconvenience to the public no less than of injury to private rights, there is even less reason to construe the word "co-owners" strictly so as to exclude these hereditary co-shebaits than in 2 C L J 377.[6] The Section deals with disputes as to management among those who are entitled to manage the endowed property (whether an estate, sub-proprietary interest or a tenure) as distinguished from those who pay rents to them, and the co-shebaits certainly pay no rents except what may be payable by the deities.

The principal ground on which the order of the District Judge has been assailed, namely that the District Judge had no jurisdiction because co-shebaits are not within the Section, must therefore, in my opinion, be overruled. It has also been contended on behalf of the petitioners that no order should have been made under S. 105 of the Act without giving them an opportunity of showing that there was no inconvenience to the public nor injury to private rights on account of any dispute between co-shebaits. It appears that this objection was specifically taken in the lower Court by at least one of the petitioners before us. The learned District Judge however dealt with the question "whether the appointment of a common manager is warranted by the circumstances of the present case" entirely on the basis of a report submitted to the Collector by a Deputy Collector after making an enquiry on the spot. It has been urged that the petitioners were no parties to this enquiry and had no notice of it. The learned District Judge treated the report of the Deputy Collector as if it was evidence in the case like the report of a Commissioner for local investigation, appointed under R. 9 and submitting a report under R. 10 of O. 26, Civil P. C. But the Deputy Collector had no such authority, and the District Judge ought to have had before him materials which could properly be taken into account as against these petitioners before coming to the conclusion that they had failed to show cause within the meaning of S. 105, Orissa Tenancy Act. The application of the Collector under S. 104, which was based on this report of the Deputy Collector, gave the District Judge jurisdiction to proceed under the Section and call on the co-shebaits to show cause why they should not appoint a common manager; but he arrived at the conclusion that the petitioners had failed to show cause, without giving the petitioners an opportunity to show that the report was wrong, and in doing so, he plainly acted in the exercise of his jurisdiction with material irregularity. On this ground therefore I would set aside the order complained of and remand the case to the District Judge for dealing with in accordance with the law.

The Advocate-General also urged that the proceedings below were irregular, in that the separate properties of so many idols were dealt with on one application made to the District Judge by the Collector. The point does not appear to have been taken below, and in any case it will not be wrong in the view that I have taken of the position of these co-shebaits, with their one "debottar fund," to deal in one case with a group of properties jointly managed by them : *see* 11 C W N 1143[7] for an instance where the appointment of a common manager for a group of properties was contemplated. It has also been urged that some of the dedicated properties are outside the jurisdiction of the District Judge of Cuttack. This point does not appear to have been pressed below; but the petitioners should, in my opinion, be at liberty to take it in the lower Court when the case is dealt with there on remand. The only other point urged before us is that there are 64 co-shebaits, though only 23 are recorded in the Collector's registers. It does not seem to me however that the petitioners can now be allowed to make any grievance of this point in revision. I would however leave it open to the District Judge, if he should think fit, to have the minor members of the family brought on the record under proper guardianship before proceeding further, in case any adult members should appear to be bent upon creating needless difficulties, whatever the cost to themselves, in order to harass the enemy or hamper the authorities.

Rowland J. — I agree.

Harries C. J. — I agree with Dhavle J. that in the strict sense of the terms a shebait is neither the owner nor trustee of dedicated property. S. 104, Orissa Tenancy Act, is concerned with the management of property and there can be no doubt that the powers of management of property are vested in the shebaits. For the purposes of

7. Kumar Saradindu Roy v. The Collector, Rungpur, (1907) 11 C W N 1143.

management co-shebaits are in the position of co-owners and I also agree with Dhavle J. that they must be regarded as such for the purposes of this Section.

G.N./R.K. *Order accordingly.*

✻ A. I. R. 1940 Patna 310

FAZL ALI AND CHATTERJI JJ.

Mt. Daulat Kuar and another — *Plaintiffs* — Appellants.

v.

Bishundeo Singh and others — *Defendants* — Respondents.

Appeal No. 708 of 1938, Decided on 22nd December 1939, from appellate decree of Dist. Judge, Patna, D/- 14th April 1938.

(a) Civil P. C. (1908), S. 100 — Finding that plaintiffs are half-sisters is binding in second appeal.

Finding by the lower Court that plaintiffs are half sisters is a finding of fact and therefore is binding in second appeal. [P 310 C 2]

(b) Civil P. C. (1908), S. 100 — Evidence — Appreciation of, by lower Appellate Court cannot be questioned in second appeal.

Where a sale deed constituting a piece of evidence has been duly considered by the lower Appellate Court, the appreciation of evidence by it whether right or wrong cannot be questioned in second appeal. [P 311 C 1]

✻(c) Hindu Law of Inheritance (Amendment) Act (2 of 1929), S. 2 — Act should be strictly construed — Word "sisters" in S. 2 does not include half-sisters.

The Act alters the Mitakshara law of succession to a certain extent. That being so the Act must be strictly construed and words must not be read into it which are not there. While passing the Act the Legislature must be presumed to have been aware of the well-recognized distinction existing under the Hindu law between a sister and a half-sister; and if it was their intention to include half-sisters also within the new class of heirs she would have been specifically mentioned in S. 2. The Act proceeded on the principle of affinity and the Legislature might have advisedly left her out of consideration. The position of a half-sister being distinct from that of the sister even under those schools of Hindu law which recognize them as heirs, there is no justification for reading the word "sister" in S. 2 as including half-sister : *A I R 1933 All 491 (F B); AIR 1938 Mad 364 and AIR 1935 Oudh 332, Rel. on; A I R 1938 Nag 134 and A I R 1938 Nag 97, Dissent.; A I R 1936 Lah 662, Expl.* [P 312 C 2; P 313 C 1]

K. Husnain and Girja Nandan Prasad — *for Appellants.*

L. K. Jha, G. Sharma and M. Rahman — *for Respondents.*

Chatterji J. — This appeal arises out of a suit brought by Mt. Daulat Kuar and Mt. Besar Kuar, daughters of Jaglal Singh deceased, who was governed by the Mitakshara school of Hindu law, for a declaration that a sale deed dated 20th May 1932, executed by their mother Mt. Sulachan Kuar, defendant 5 in favour of defendants 1 to 4 is not binding on them. Admittedly the last full owner of the disputed property was Ramasre Singh son of Jaglal Singh. The plaintiffs as sisters of Ramasre Singh claimed to be his next reversionary heirs. The suit was contested by defendants 1, 3 and 4 on the grounds inter alia (1) that the plaintiffs were half-sisters of Ramasre Singh and as such could not be his heirs and had therefore no locus standi to bring this suit and (2) that the sale deed was justified by legal necessity. The learned Munsif who tried the suit held that legal necessity was not proved for the sale, but he dismissed the suit on the finding that the plaintiffs were half-sisters of Ramasre Singh and were therefore not his heirs. On appeal to the District Judge this decision has been affirmed. Hence this second appeal by the plaintiffs. Mt. Dault Kuar having since died, Mt. Besar Kuar is now the sole appellant.

Two questions have been raised in this appeal, first, whether the plaintiffs were full sisters of Ramasre Singh as alleged by them; and second, even if they were his half-sisters whether they were his heirs.

On the first question both the Courts below have found as a fact that the plaintiffs who were admittedly born of the womb of Sulachan Kuar, defendant 5 were half-sisters of Ramasre Singh. This being a finding of fact would be binding in second appeal. But Mr. Khurshaid Husnain for the appellant contends that this finding is vitiated by error of law. In the first place, he argues that in the sale deed in question Sulachan Kuar, the vendor, is described as mother and heir of the deceased Ramasre; so defendants 1 to 4, the vendees, would be estopped from disputing her title and consequently from denying that she was the mother of Ramasre, because her title depended upon her status as mother of Ramasre. Necessarily they would also be estopped from denying that the plaintiffs were full sisters of Ramasre. But in order that estoppel may be used against defendants 1 to 4 it must be shown that they made some representation which induced defendant 5 to execute the sale deed. Of this there is no proof whatever. On the contrary defendants 1 to 4 might have honestly believed that their vendor, defendant 5 had good title to the property she was conveying. Again the plaintiffs do not claim through defendant 5, but claim in their independent right; and so far as they

are concerned it cannot even be suggested that they were induced to do anything by any representation made by defendants 1 to 4. The question of estoppel therefore does not arise. Mr. Khurshaid Husnain then contends that even if the recital in the sale deed does not create any estoppel it must at any rate be regarded as a strong piece of evidence. It may be so, but it is after all a piece of evidence and the learned District Judge in appeal has duly considered it. His appreciation of this evidence may be right or wrong, but it cannot be questioned in second appeal. Mr. Khurshaid Husnain next complains that the Courts below have not attached due importance to the plaint, Ex. 1, in Suit No. 66 of 1935, which was brought by a mortgagee to enforce a mortgage executed by Ramasre Singh, deceased. In that plaint Mt. Sulachan Kuar, who was defendant 1, was described as the mother and the present plaintiffs, who were also defendants, as full sisters of Ramasre. But these assertions were not denied in their written statement by the present defendants 1, 3 and 4 who also were defendants in that suit. The learned District Judge has pointed out that in that mortgage suit in which the present defendants 1, 3 and 4 were impleaded as transferees from Sulachan Kuar the question whether Sulachan Kuar was the mother or the present plaintiffs were full heirs of Ramasre was irrelevant, and therefore no inference can be drawn against the defendants from their not having denied those assertions. This view of the learned Judge seems quite right.

Mr. Khurshaid Husnain in the next place contends that the learned District Judge has not at all considered the oral evidence adduced by the parties on the point under consideration. This is no doubt true to some extent, but the learned Judge has referred to certain facts disclosed by the evidence which in his opinion are sufficient to prove that the plaintiffs could not be the full sisters of Ramasre. In the present plaint it is stated that Ramasre who died in Bhado 1338 was at the time of his death aged only 26 years. The present age (at the time of hearing of the suit) of Daulat Kuer, plaintiff 1, is about 18 or 20 years. Ramasre was therefore more than 10 years older than Daulat Kuar. Sulachan Kuar in her evidence says that Daulat was born three years after her marriage and Ramasre was 10 years older than Daulat. The learned District Judge considers that these two statements are sufficient to disprove the claim of Daulat Kuar and Besar Kuar to be full sisters of Ramasre.

We have looked into the oral evidence adduced by the parties which is conflicting. In my opinion no useful purpose will be served by remanding the case for recording a finding after consideration of the oral evidence because the above statements relied on by the learned Judge fully justify his finding.

The next question turns on the meaning of the word "sister" in S. 2, Hindu Law of Inheritance (Amendment) Act 2 of 1929. Under the Hindu law as it stood before this Act was passed in 1929, sister was not an heir at all except in the Presidencies of Bombay and Madras. It is under this Act that the plaintiffs as sisters of Ramasre Singh claimed to be his heirs. S. 2 of the Act runs as follows:

> A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother:
>
> Provided that a sister's son shall not include a son adopted after the sister's death.

Mr. Khurshaid Husnain contends that sister in this Section includes a half-sister. According to Murray's Oxford Dictionary "sister" means "a female in relationship to another person or persons having the same parents." This is however followed by a note that it is "sometimes loosely used in the sense of half-sister and in that of sister-in-law." This suggests that strictly speaking sister does not mean half-sister. In the Concise Oxford Dictionary the meaning of 'sister' is given as "daughter of same parents (also sister german) or strictly half-sister parent as another person." According to Webster's Dictionary 'sister' means

> a female person, or by extension, animal, considered in her relation to another person or animal, having the same parents (whole sister) or one parent in common (half-sister).

Though Webster gives a much wider meaning, the preponderance of opinion seems to be that sister does not include half-sister in the strict sense of the term. In Stroud's Judicial Dictionary relied upon by Mr. Khurshaid Husnain there is no separate meaning given for the word "sister," but it occurs with brother where it is stated that "a gift to brothers; sisters includes the half-blood" and reference is made to the case in 68 E R 840[1] from which the following passage in the judgment of Turner V. C. is quoted:

> I think that, in general, when a man speaks of his brothers and sisters he speaks of them, not

1. Grieves v. Rawley, 68 E R 840.

with reference to the definition of the word in the dictionary, but as a class standing in the same relation to one or both of his parents in which he himself stands.

This passage itself shows that the dictionary meaning of the words 'brother' and 'sister' is otherwise. In the aforesaid case, however which related to the construction of a will it was held that the description of "nephews and nieces" in the will included the children of brother or sister of half-blood of the testator. In (1903) 1 Ch D 138[2] cited by Mr. Khurshaid Husnain which also was a case of a will, it was held that the words "nephews and nieces" mean prima facie the children of brothers and sisters including those of the half-blood. Neither Stroud nor these cases therefore are of any assistance to the appellant. There appears to be no reason why the dictionary meaning as given by Murray should not be accepted. Mr. Khurshaid Husnain then contends that whatever may be the dictionary meaning of the word "sister" we must construe it with reference to the subject-matter with which the Act 2 of 1929 deals. He has referred to the following passage in Maxwell on the Interpretation of Statutes, Edn. 7, p. 46 :

> Whenever a statute or document is to be construed, it must be construed not according to the mere ordinary general meaning of the words but according to the ordinary meaning of the words as applied to the subject-matter with regard to their use unless there is something which renders it necessary to read them in a sense which is not their ordinary sense in the English language as so applied.

It is argued that the Hindu law of succession recognises no difference between relations of full blood and those of half-blood except that among themselves precedence is given to the former over the latter, and this conception of Hindu law must be kept in view in construing the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Now, this Act, as S. 1, cl. (2) shows, applies to persons subject to the law of Mitakshara. Under that law as applied in different parts of India except in the Presidencies of Bombay and Madras sister was not recognized as an heir at all. According to the Bombay School, she is an heir as a Gotraja Sapinda, being the father's daughter, while according to the Madras School she comes in as a bandhu. Half-sister is also an heir under both these Schools but comes next after sister. Even in the Bombay Presidency in cases governed by the Mayukha half-sister does not come immediately after full sister but father's father and half-brother intervene between them. According to Mayukha even a half-brother is removed from the full brother by several places, the intervening heirs being (1) full brother's son (2) father's mother and (3) full sister. The position of a half-sister being thus distinct from that of the sister even under those Schools of Hindu law which recognize them as heirs, there is no justification for reading the word 'sister' in S. 2 of the Act in a sense different from its ordinary meaning in the English language. Let us then look to the scheme of the Act. It refers to certain specified near relations, namely, (1) son's daughter, (2) daughter's daughter, (3) sister and (4) sister's son. The first three, being females, were not recognized as heirs at all under the Hindu law except only in the Presidencies of Bombay and Madras, and even in those Presidencies these females, rather the first two of them, were postponed to many remotely connected heirs. The fourth, that is sister's son, though already an heir, ranked as a bandhu and thus occupied a much inferior position. By the new Act the claims of these four relations on the ground of propinquity were recognized and they were brought in within the nearer group of heirs, namely the Gotraja Sapindas and were assigned their place between the father's father and father's brother.

The Mitakshara law of succession was thus altered to a certain extent by legislative enactment. That being so, the Act must be strictly construed and words must not be read into it which are not there. While passing the Act, the Legislature must be presumed to have been aware of the well-recognized distinction existing under the Hindu law between a sister and a half-sister, and if it was their intention to include half-sister also within the new class of heirs she would have been specifically mentioned in S. 2. The Act proceeded on the principle of affinity and the Legislature might have advisedly left her out of consideration. Mr. Khurshaid Husnain suggests that 'sister' is a generic term and should be interpreted as 'father's daughter' in which case half-sister would be included in the term. This suggestion is based on the following passage from Nanda Pandit's commentary on placitum 5 in S. 5 of Chap. 2 of the Mitakshara :

> **The daughters of the father and other ancestors must be admitted, like the daughter of the man himself, and for the same reason.**

2. Cozens Miles v. Wilson, (1903) 1 Ch D 138=72 L J Ch 39=87 L T 581=51 W R 220.

Following this text the Bombay School recognised the sister to be an heir as a gotraja sapinda. The text expressly says "the daughters of the father". This cannot afford any guide for interpreting the plain word 'sister' used in the Act. Again if 'sister' be read to mean 'father's daughter', sister and half-sister would both come under the same category and would inherit together. This would be opposed to the spirit of the Act itself which is based on considerations of propinquity. It is said that in such a case the general principles of Hindu law will apply so that full blood will exclude the half-blood. But the Act is enacted, as the Preamble shows,

to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate.

These heirs are specified in S. 2 and the order in which they are entitled to rank is fixed by it. The Act supersedes the Hindu law in certain respects and in matters governed by the Act there is no scope for the operation of the general principles of Hindu law. If half-sister is to come in, she will have to be placed after sister and before sister's son in the Section. But is this permissible under the Section as it stands ? In my view it is difficult to hold that sister as contemplated by the Section includes a half-sister. This view is supported by the Full Bench decision of the Allahabad High Court in 55 All 725[3] and the decision of a Division Bench of the Madras High Court in A I R 1938 Mad 364.[4] The same view is also taken by the Oudh Chief Court in 11 Luck 148.[5] A contrary view however has been taken by the Nagpur High Court in the Full Bench case in A I R 1938 Nag 134[6] which follows an earlier decision of the same Court in A I R 1938 Nag 97.[7] In these cases the learned Judges of the Nagpur High Court proceeded on the view that

to exclude a half blood where the full blood is entitled to succeed would be contrary to the general principle of Hindu law and S. 2 of Act 2 of 1929 should be interpreted so far as it is possible in accordance with the notions of Hindu law.

But their Lordships had to recognise the distinction between full sister and half-sister in case of competition inter se. In case of such competition the full sister would exclude the half-sister. What would then be the position of a half-sister in the order of succession specified in S. 2 of the Act ? The Act itself makes no such provision. Are we to supplement the Act and declare that half-sister would come after sister ? To do so will be importing into the Act something which is not there. In 18 Lah 525[8] the learned Judges of the Lahore High Court referring to the decision of the Full Bench of the Allahabad High Court in 55 All 725[3] observed as follows :

The decision of the Full Bench however proceeded on the general grounds and laid down categorically that the word 'sister' in S. 2 of the Act 2 of 1929 does not include a half-sister. With great respect I think that the conclusion of the learned Judges is expressed too broadly and I confess I have great doubts as to the soundness of the reasons on which it is based. But as already stated it is not necessary to express a final opinion on this point in this case.

Thus, there was no express decision on the point in this Lahore case. In the view I take the plaintiffs were not the heirs of Ramasre Singh and had no right to bring the suit for a mere declaration. I would therefore dismiss the appeal but in the circumstances, without costs.

Fazl Ali J. — I agree.

G.N./R.K. *Appeal dismissed.*

3. Ramadhar v. Mt. Sudesra, (1933) 20 A I R All 491=145 I C 529=55 All 725=1933 A L J 680 (F B).
4. Angamuthu v. Sinnapennammal, (1938) 25 AIR Mad 364=182 I C 734.
5. Kabootra v. Ram Padarath, (1935) 22 A I R Oudh 332=155 I C 94 = 1935 O W N 545= 11 Luck 148.
6. Amrut v. Mt. Thagan, (1938) 25 A I R Nag 134 =174 I C 211=I L R (1938) Nag 115 (F B).
7. Shankar v. Raghoba, (1938) 25 A I R Nag 97 =172 I C 858.
8. Rameshwar v. Mt. Ganapati Devi, (1936) 23 A I R Lah 652=166 I C 753= I L R (1937) 18 Lah 525=39 P L R 529.

A. I. R. 1940 Patna 313

ROWLAND J.

Muzafferpur Municipality

v.

Tara Prasad and others.

Criminal Ref. No. 41 of 1939, Decided on 7th November 1939, made by District Magistrate, Muzafferpur, D/- 18th September 1939.

(a) Bihar and Orissa Municipal Act (7 of 1922), Ss. 259 and 354 —Orders fixing local limits under S. 259 (1) and fee in respect of licences under S. 259 (3) are not rules or bye-laws — Confirmation by Local Government under S. 354 is not condition precedent to their taking effect.

The fixing of local limits under S. 259 (1) is not the making of a rule. It is more of the nature of an order applying a Section of the Act. The nature of a rule under the Act can in general be gathered from a reference to the various Sections in which the rule making power is conferred. An order under S. 259 (1) making a licence necessary for owners of surkhi mills is not in any way analogous to any of the rules which either the Local

Government or the Commissioners at a meeting are authorized by the Act to make. Such an order is not a rule at all. [P 315 C 1]

The scheme of the Act in the matter of empowering the Commissioners to make bye-laws is somewhat similar to that in the matter of the powers to make rules. [P 315 C 1]

Therefore orders requiring licences to be taken out under S. 259 (1) and fixing a fee in respect of the licences under S. 259 (3) can no more be regarded as bye laws than they can be regarded as rules. That being so, these orders do not require under S. 354 to be confirmed by the Local Government as a condition precedent to their taking effect. [P 315 C 2]

(b) Bihar and Orissa Municipal Act (7 of 1922), Ss. 264 and 259—Orders passed by Commissioners under S. 259 (1) and (3) are not matters of same nature as contemplated by S. 264 and are not bye-laws.

The power to make bye-laws in connection with offensive or dangerous trades, occupations or processes is conferred by S. 264 and the bye-laws which may be made under this Section may provide for inspection and regulation of the conduct of business in a place used for any of the purposes mentioned in S. 259 and also generally for prevention of nuisance affecting the public health, safety or convenience. The orders under S. 259 (1) and (3) do not relate to matters of the same nature as the matters to be provided for by bye-laws under S. 264 and therefore the orders can no more be regarded as bye-laws than they can be regarded as rules. [P 315 C 2]

(c) Bihar and Orissa Municipal Act (7 of 1922), Ss. 263 and 259—Prosecution under Ss. 263 and 259, accused not having applied for licence—Fact that he applied for reduction of licence fee and had not received orders is of no avail — But it may in event of conviction be considered in extenuation of sentence.

Where a person fails to comply with the provisions of S. 259 and is consequently prosecuted under S. 263 read with S. 259, the fact that although before prosecution he had not applied for a licence, he had presented a petition for a reduction of licence fee and had not received orders thereon cannot alter the legal position, though it is open to him in the event of a conviction to put it forward as a matter to be considered in extenuation of the sentence to be passed. [P 316 C 2]

Baldeva Sahay — *for Reference.*

Hareshwar Prasad Sinha —

against Reference.

Order. — This is a reference by the District Magistrate of Muzafferpur under S. 438, Criminal P. C., asking this Court to revise the judgment and order of a Magistrate of the Third Class in Muzafferpur whereby the accused Tara Prasad was acquitted of an offence, punishable under S. 263 read with S. 259, Bihar and Orissa Municipal Act, consisting in the keeping without a licence within the Muzafferpur Municipality of a place used for the trade or business of a surkhi mill. It is not denied that the opposite party had been for some time past working a surkhi mill within the Municipality and was operating his surkhi mill in the month of March 1939, in which the present complaint was presented. There was formerly no prohibition under S. 259, of the keeping of a surkhi mill within the Municipality without a license. It is not one of the trades or businesses referred to in S. 259, sub-s. (1), cls. (i) to (xiii) but the Section can be made applicable to other manufactures, processes or businesses which are declared by the Local Government by notification to be dangerous or offensive under cl. (xiv). In pursuance of this clause the Local Government by Notification 1181 L. S. G. dated 15th March 1937, declared that the running of surkhi mills was offensive. The notification was duly published. As a result of this the provisions of S. 259, sub-s. (1) became operative, that is to say, it was now within the power of the Commissioners at a meeting to fix local limits within which no place might be used for the purpose mentioned without a license. In that connexion sub-s. (3) of S. 259 also became operative whereby the Commissioners at a meeting became empowered, subject to a maximum to be fixed by the Local Government to levy a fee. The Local Government fixed as maximum fee for such a license the sum of Rs. 100 by Notification 1182 L. S. G., dated 15th March 1937. The Commissioners at a meeting held on 29th July 1938, resolved that within the whole area of the Municipality no place was to be used for a surkhi mill without a license. They also resolved that the fee for a license for a surkhi mill should be Rs. 100. These proceedings of the Municipal Commissioners are said to have been published and it is certain that the opposite party, the present accused, had knowledge of them, for there are on the record two petitions by way of protest, one presented by this opposite party alone and one by himself and some other owners of surkhi mills, against the magnitude of the fee.

The point raised in the trial Court which succeeded there was that the resolutions of the Municipality which require licenses to be taken out for running surkhi mills and which fixed the fee to be levied are rules framed by the Municipal Commissioners to which S. 354, Municipal Act, is applicable. In this Court for the respondent it has been contended that they are rules or by-laws, and in either case subject to the provisions of S. 354. That Section enacts in two sub-sections that the power of the Commis-

sioners to make rules and to make bye-laws shall be subject to the condition of such rules not taking effect until they have been confirmed by the Local Government. In the case of bye-laws, previous publication and Gazette publication are also conditions precedent to the taking effect of the bye-laws.

But the fixing of local limits [Sec. 259, sub-s. (1)] is not the making of a rule. It is more of the nature of an order applying a Section of the Act. The nature of a rule under the Act can in general be gathered from a reference to the various Sections in which the rule making power is conferred. Such Sections occur in various parts of the Act which is thus arranged that power to make rules governing a particular subject is placed at the end of that part or chapter of the Act dealing with the particular subject. Thus, we find the Local Government is given power to make rules regulating municipal fund and accounts in S. 81 which is at the end of Chap. 3, power to make rules in connexion with assessment and collection of taxes under S. 163 which is at the end of Chap. 4, power to make rules regarding drainage schemes, water works, etc., under Sec. 325 which is at the end of Chap. 9, and so on. The Commissioners are given power to make rules in Ss. 38, 42 and 52, and these rules deal with limited matters affecting the internal administration of the Municipality and its office. Thus, S. 38 authorizes rules for pensions and provident funds of municipal servants. S. 42 authorizes rules as to the duty, appointment, punishment and removal of municipal officers and servants, and S. 52 authorizes rules governing the election of Chairman, Vice-Chairman and President of Municipal meetings and the conduct of business. So the order making a license necessary for owners of surkhi mills is not in any way analogous to any of the rules which either the Local Government or the Commissioners at a meeting are authorized by the Act to make, and I am quite clear that such an order is not a rule at all.

Now I turn to the alternative submissions put forward here that the order is to be regarded as a bye-law. The scheme of the Act in the matter of empowering the Commissioners to make bye-laws is somewhat similar to that in the matter of powers to make rules; that is to say, at a number of places in the Act power is given to make bye-laws dealing with a particular subject such as in S. 153 for the registration of dogs, in S. 195 to make bye-laws for the regulation of buildings, in S. 234, to make bye-laws regulating the use of public water supply, and so on. The power to make bye-laws in connexion with offensive and dangerous trades, occupations or processes is conferred by S. 264, and the bye-laws which may be made under this Section may provide for inspection and regulation of the conduct of business in a place used for any of the purposes mentioned in S. 259 and also generally for the prevention of nuisance affecting the public health, safety or convenience. The order requiring licenses to be taken out and the order fixing a fee in respect of the licenses are not matters of the same nature as the matters to be provided for by bye-laws under S. 264, and in my view these orders can no more be regarded as bye-laws than they can be regarded as rules. The resolutions were passed not under the powers conferred by S. 264 but under the powers conferred by S. 259, sub-s. (1) and S. 259, sub-s. (3). That being so, these orders did not require under S. 354, Municipal Act, to be confirmed by the Local Government as a condition precedent to their taking effect. It follows from this that to use any place without a license for the purposes of a surkhi mill within the Muzafferpur Municipality is an offence within S. 263, sub-s. (1), Bihar and Orissa Municipal Act. This may be sufficient to dispose of the point of law directly raised in the reference so far as the requirement of taking out a license was concerned and the contention that this requirement had not become effective in law for want of confirmation by the Local Government.

A further point has been argued with reference to a resolution taken at the same meeting of the Municipal Commissioners imposing certain conditions on the grant of a license. It was resolved by the Municipal Commissioners that conditions be imposed on the grant of licenses to the effect that no mill of the aforesaid nature shall be erected within the Municipal limit if it lies within a distance of 300 yards from the nearest habitation. Other conditions included provision for proper arrangements for effective removal of all offensive or unwholesome matter for inspection by Municipal Officers and for keeping raw materials safe from damp or rain. These are matters of the kind which S. 264 empowers the Commissioners to regulate by bye-laws : and had this been a prosecution for breach of those conditions under S. 263 (2) the

question might arise whether their confirmation by the Local Government was necssary to make them effective. But this being a prosecution under S. 263 (1) the question does not arise.

It is represented that the respondent, who in May 1939 in pursuance of an application by him for a license remitted by money order, the license fee of Rs. 100 has been treated as ineligible for such a license on the ground that the position of his mill is not beyond the distance of 300 yards from the nearest habitation, and I am asked to pronounce that the conditions laid down for the grant of license are of the nature of rules or bye-laws, that they are ineffective unless and until confirmed by the Local Government and that this point is not unsubstantial because the Local Government itself in recommending the Municipalities to introduce licensing of oil, flour and surkhi mills had expressly cautioned Municipalities that the requirement of 300 yards clear distance from the nearest habitation ought to be enforced in the case of mills already existing. It is also suggested that to attach such a condition precedent to the grant of a license is in contravention of sub-s. (2) of S. 259 which enacts that a license for any of the purposes mentioned in sub-s. (1) is not to be withheld unless the Commissioners have reason to believe that the business which it is intended to establish or maintain would be offensive or dangerous to persons residing in or frequenting the immediate neighbourhood. The question of the propriety of a prosecution might arise if at the date of the institution of the proceedings before me the respondent's position had been that of a person who had applied and paid the fee for a licence which the Commissioners were not legally justified in withholding from him, on the ground that any restriction on the grant of licenses in contravention of S. 259, sub-s. (2) would be ultra vires of the Commissioners. Had that been the position of the respondent, the argument might require serious consideration. But the respondent's application for a licence was not presented till after these proceedings against him had commenced and the present reference is to be decided on the basis of the position as it was on the date when the proceedings began. On that date if the respondent without having a licence and without having applied for a licence was carrying on the business of the surkhi mill, his legal liability under S. 263, sub-s. (1) cannot be negatived on the grounds given by the trial Magistrate.

It is further represented that though the respondent had not, before these proceedings started, applied for a licence, he had presented a petition for a reduction of the licence fee, and had not received orders on that petition. This fact does not alter the legal position, though it is open to him in the event of a conviction to put it forward as a matter to be considered in extenuation of the sentence to be passed. The reference is accepted, the acquittal of the respondent is set aside, and the case remanded to the Sub-Deputy Magistrate, who will dispose of it according to law after giving the parties an opportunity of being heard and either party who may wish it, an opportunity of adducing further evidence.

G.N./R.K. *Reference accepted.*

A. I. R. 1940 Patna 316

HARRIES C. J. AMD MANOHAR LALL J.

Capt. M. O. Angelo — Petitioner.

v.

Kandan Manjhi and another — Opposite Party.

Criminal Ref. No. 31 of 1939, Decided on 11th October 1939, made by Deputy Commissioner, Hazaribagh, D/- 14th August 1939.

(a) Chota Nagpur Tenancy Act (8 of 1908), S. 63, as amended by Act 2 of 1938—Demand for commodities and animals over and above rent constitutes offence under S. 63.

Demand for commodities such as rice, dal, milk, ghee and oil and animals such as fowls and goats over and above the rent lawfully payable constitutes offence under S. 63. [P 318 C 2]

(b) Chota Nagpur Tenancy Act (8 of 1908), S. 63, as amended by Act 2 of 1938—Scope—S. 63 applies to landlord or his agent and not to third person.

An offence under S. 63 is only committed if the landlord or his agent levies or makes demands for commodities or animals in excess of the rent. There is no offence if anybody other than the landlord or his agent makes such demands from persons who are not his tenants. [P 318 C 2]

(c) Bengal Court of Wards Act (9 of 1879), Ss. 59-A and 70—Rules under S. 70, R. 115 (Bihar)—Under S. 59-A, Manager of Court of Wards is public servant within the meaning of Penal Code—Where his salary exceeds Rupees 200 he must be deemed to be public servant under R. 115 — Provisions of S. 197, Criminal P. C., must be complied with before Court can take cognizance of offence by him.

A manager of an estate under the Court of Wards in Chota Nagpur must be deemed to be a public servant within the meaning of Penal Code, by the operation of S. 59-A. By R. 115 framed by the Court of Wards under S. 70 a manager who

draws a salary of over Rs. 200 per month cannot be appointed without the previous sanction of the Local Government. It therefore necessarily follows that he cannot be dismissed without the sanction or approval of Government, and therefore he must be deemed to be a public servant, and sanction of Local Government under S. 197, Criminal P. C., must be obtained before a Court can take cognizance of an offence alleged to be committed by him.
[P 318 C 2; P 319 C 1, 2; P 320 C 2]

(d) Bengal Court of Wards Act (9 of 1879), Ss. 20 and 70 — Rules under S. 70, R. 115 (Bihar)—R. 115 is not ultra vires—It is not inconsistent with S. 20 or any provision of the Act.

Rule 115 framed under S. 70 is not inconsistent with any of the provisions of the Act or for the matter of that S. 20. The power given to the Court to appoint and remove managers is not taken away by R. 115 which only requires previous sanction of the Government. Sections 69 and 70 empower the making of R. 115 and it is not ultra vires.
[P 319 C 2]

(e) Chota Nagpur Tenancy Act (8 of 1908), S. 63 (3), as amended by Act 2 of 1938—S. 63 (3) does not give Deputy Commissioner exclusive jurisdiction to try offences under S. 63—Jurisdiction of Criminal Courts is not barred.

Section 63 (3) does not give the Deputy Commissioner exclusive jurisdiction to try offences under S. 63. It merely enjoins all Courts who have reason to believe that an offence has been committed under S. 63 to report the matter to the Deputy Commissioner. There is nothing in S. 63 which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that Section.
[P 320 C 1]

(f) Chota Nagpur Tenancy Act (8 of 1908), S. 258 — Interpretation — Effect—S. 258 contemplates civil proceedings and makes them final—It does not deprive Criminal Court of jurisdiction to try criminal offences under the Act.

All that S. 258 does is to bar suits in certain cases. In other words it makes the decision of the Tribunal contemplated in the Act final in certain types of proceedings. The wording of S. 258 makes it clear that only proceedings of a civil nature were in contemplation of the Legislature and such only are made final. It cannot deprive Criminal Court of its jurisdiction to try a criminal offence.
[P 320 C 1]

(g) Chota Nagpur Tenancy Act (8 of 1908), S. 63, as amended by Act 2 of 1938—S. 63 (1) (a) creates offence but does not prescribe mode of investigation or trial—Provisions of Criminal Procedure Code therefore apply by reason of S. 5 (2), Criminal P. C.

Section 63 (1) (a) creates an offence and that offence is described in cl. (b) of that sub-section as a bailable offence which can be compounded with the leave of the Court. The Section is silent as to how the offence is to be tried. There is nothing in S. 63 which deprives ordinary Criminal Courts of jurisdiction to try all offences under that Section. The offence under S. 63 is not an offence under the Penal Code but under a different Act. By reason of S. 5 (2), Criminal P. C., it must be investigated into and tried according to the provisions of the Code because there is nothing in the statute, creating the crime, dealing with the method in which investigation is to be made and the trial to be held. Therefore though the Act is a local law within the meaning of S. 1 (2), Criminal P. C., the provisions of Criminal P. C. must apply.
[P 320 C 1, 2]

(h) Chota Nagpur Tenancy Act (8 of 1908), S. 63 as amended by Act 2 of 1938—Manager of Court of Wards committing offence under S. 63 as agent of landlord—He must be deemed to have committed it in his official capacity within the meaning of S. 197 (1), Criminal P. C. —Sanction of Local Government under S. 197 is necessary.

In order that an act committed by a public servant should fall within the purview of S. 197 (1) there must be something in the nature of the Act complained of that attached it to the official character of the public servant. [P 321 C 1]

Therefore where a manager of Court of Wards commits an offence as agent of the landlord whose estate is under the management of the Court of Wards, the offence must be regarded as having been committed in his official capacity within the meaning of S. 197 (1) and that being so, previous sanction of the Local Government is necessary under S. 197 before a Magistrate can take cognizance of the offence : *A I R 1939 F C 43, Rel. on.*
[P 321 C 2]

B. P. Sinha — *in support of Reference.*

Basanta Chandra Ghosh — *against the Reference.*

Harries C. J.—This is a reference made by the learned Deputy Commissioner of Hazaribagh recommending that certain criminal proceedings against one Capt. Angelo which were commenced without the previous sanction of the Provincial Government be quashed.

On 3rd February 1939, one Kundan Manjhi filed a petition before the Sub-divisional Officer of Giridih alleging that on the previous Friday, namely 27th January 1939, the Manager of the Court of Wards of the Ganwan Estate had demanded various commodities from the tenants who resided in the village of Chattarmar. Amongst these commodities were rice, dal, milk, ghee and oil, and two fowls and one goat were also demanded. It was alleged that these commodities, fowls and goat were taken to the manager. The petitioner alleged that other goats had been received by the manager and that he had been directed to take them to Ganwan, the headquarters of the estate. The petitioner stated that he set out with two goats to Ganwan accompanied by a peon. On the way, it is said that he met some Congress people including a lawyer who induced him to file a complaint before the Second Officer who was at Satgawan. The Second Officer directed him to file a complaint before the Sub-divisional Officer at Giridih and this was done. The Sub-divisional Officer ordered a Magistrate to

make an inquiry, and the learned Magistrate found that presents of small value had been given by certain persons such as are usually given to the landlord or his employees whenever they visited the village. The Sub-divisional Officer then called upon the manager and the peons to show cause why action under S. 63, Chota Nagpur Tenancy Act, should not be taken against them. Cause was shown, and it was urged on behalf of Capt. Angelo that he was a public servant and, therefore, no cognizance of the offence alleged to have been committed by him could be taken without the previous sanction of the Provincial Government. The learned Sub-divisional Officer, after hearing argument on this point, came to the conclusion that Capt. Angelo was a public servant; but he further held that the acts could not be said to have been done by Capt. Angelo in discharge of his official duties. In the result he held that the sanction of the Provincial Government for the prosecution of Capt. Angelo was not necessary and directed the proceedings to continue. A petition was then filed on behalf of Capt. Angelo before the learned Deputy Commissioner who came to the conclusion that the sanction of the Provincial Government was necessary for the prosecution of Capt. Angelo, and accordingly he referred the matter to this Court with the recommendation that the proceedings pending against Capt. Angelo should be quashed.

The allegation made by the petitioner against Capt. Angelo was that he had demanded from the tenants certain gifts which he was not entitled to demand and that he had committed an offence under S. 63, Chota Nagpur Tenancy Act, as amended by the Chota Nagpur Tenancy (Amendment) Act, 1938 (Act 2 of 1938). The amended S. 63, Chota Nagpur Tenancy Act, reads as follows:

(1). (a) If a landlord or his agent levies, except under any special enactment for the time being in force, from a tenant of such landlord, any sum of money or anything in excess of the rent lawfully payable by such tenant for his tenancy and the interest payable on an arrear of such rent, or enforces compliance by any tenant with any prædial condition to which he is not lawfully entitled, such landlord or agent, as the case may be, shall be punishable with simple imprisonment for a term, which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(b) An offence under cl. (a) shall be bailable and shall be compoundable with the leave of the Court . . . . . (3) If in any suit, application or proceeding under this Act or any other law, the Court r presiding officer (not being the Deputy Commissioner) has grounds for believing that any landlord or his agent is guilty of an offence under cl. (a) of sub-s. (1), such Court or officer shall inform the Deputy Commissioner.

This Section makes it an offence for a landlord or his agent to levy, except under any special enactment for the time being in force, from a tenant of such landlord, any sum of money or anything in excess of the rent lawfully payable by such tenant for his tenancy. The allegation against Capt. Angelo is that he, as Manager of the Court of Wards which was in charge of the Ganwan Estate, had demanded from the tenants something over and above the rent which was lawfully payable by them. He had demanded certain commodities and animals which it was usual in the past for landlords and their agents to demand from tenants when they were in their vicinity. There appears little doubt that demands for such commodities or birds or animals might well be an offence within this Section. However it must be remembered that an offence is only committed if the landlord or his agent levies or makes such demands. There is no offence if anybody other than the landlord or an agent of the landlord demands commodities of this kind from persons who are not his tenants. The learned Deputy Commissioner was of opinion that Capt. Angelo was a public servant and therefore that no Court could take cognizance of this offence except with the previous sanction of the Provincial Government. It is common ground that the sanction of the Provincial Government was not obtained for instituting these proceedings against Capt. Angelo. S. 197, Criminal P. C., deals with the prosecution of public servants and is in these terms:

(1) When any person who is a Judge within the meaning of S. 19, I. P. C., or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the local Government.

Before the learned Deputy Commissioner it was conceded that Capt. Angelo was a public servant; but before us it has been strenuously argued that he is not a public servant. Capt. Angelo is the Manager of the Court of Wards which has assumed superintendence of the Ganwan Estate. His monthly salary is Rs. 350, and there can be no doubt that Capt. Angelo must be deemed to be a public servant for the purposes of the Penal Code. S. 59-A, Court of

Wards Act (Act 9 of 1879) expressly provides that every person employed by the Court of Wards under the Act shall, for the purposes of the Penal Code, be deemed to be a public servant. If the prosecution here was a prosecution for an offence under the Penal Code, it could not be argued that Capt. Angelo was not a public servant. However it is said that the prosecution here is for an offence created by the Chota Nagpur Tenancy Act and not by the Penal Code and therefore S. 59-A, Court of Wards Act, has no application. S. 4, sub-s. (2), Criminal P. C., provides that all words and expressions used in the Criminal Procedure Code, and defined in the Penal Code, but not defined in the Criminal Procedure Code, shall be deemed to have the meanings respectively attributed to them by the Penal Code. The term "public servant" is not defined in the Criminal Procedure Code, and therefore must be deemed to have the same meaning as given in the definition of that term in the Penal Code. If, for the purposes of the Penal Code, S. 59-A, Court of Wards Act, makes a servant of the Court of Wards a public servant, it would appear to follow that he must also be a public servant within the meaning of the term as used in the Criminal Procedure Code. However, it is not necessary to decide this question because in my view it is clear on the facts of the present case that Capt. Angelo is a public servant. As I have stated, his monthly salary is Rs. 350. S. 70, Court of Wards Act, authorizes the Court of Wards to make rules consistent with the Act, and R. 115 which was made under S. 70 deals with appointments to posts on duly sanctioned establishments, and this rule makes it clear that all appointments to posts carrying a monthly remuneration of over Rs. 200 including commission are to be made by the Court with the previous sanction of Government.

It has been said that Capt. Angelo was appointed before this rule came into force; but there is nothing to show that such was the case. Under this rule a manager whose salary is Rs. 350, could only be appointed by the Court with the previous sanction of Government. If he could only be appointed with the previous sanction of Government, it necessarily follows that he cannot be dismissed without the sanction or approval of Government. It would be an absurd position if sanction of the Government was necessary for an appointment by the Court which the latter could terminate at once without any reference to Government. An officer in the position of Capt. Angelo can only, in my view, be appointed with the previous sanction of the Government and can only be dismissed with the sanction or approval of the Government. A manager of a Court of Wards undoubtedly performs public duties. He is responsible for the management and supervision of the estate, and one of the main purposes of taking over estate is to ensure that all Government dues are paid. He occupies a public position, and as he cannot be appointed or dismissed without the sanction of the Government he is, in my view, a public servant. As I have stated earlier, this has always been conceded by the petitioner in the Courts below. It is strenuously argued that R. 115 is ultra vires as S. 20, Court of Wards Act, expressly gives the Court power to appoint and remove managers. The rule does not take away such power and only requires the previous sanction of Government. In my judgment Ss. 69 and 70 of the Act empower the making of such a rule and it is not ultra vires.

If he is a public servant, can a prosecution under the amended S. 63, Chota Nagpur Tenancy Act, be instituted against him without the previous sanction of the Provincial Government? It has been urged before us that no sanction of the Provincial Government is necessary by reason of the fact that the Criminal Procedure Code can have no application whatsoever to proceedings under the Chota Nagpur Tenancy Act. It is said that the Chota Nagpur Tenancy Act is a self-contained Act and that the procedure in all proceedings under that Act is governed by the Act itself.

Section 63 (1) (a), Chota Nagpur Tenancy Act, creates an offence and that offence is described in cl. (b) of that sub-section as a bailable offence which can be compounded with the leave of the Court. The Section is silent as to how the offence is to be tried. It has been contended that sub-s. (3) of S 63, Chota Nagpur Tenancy Act, makes it clear that the offence must be disposed of by the Deputy Commissioner. I have already set out this sub-section which directs that if it is discovered that there are grounds that a landlord or his agent is guilty under sub-s. 1 (a) to S. 63 of the Act, the Court hearing the suit, application or proceeding must inform the Deputy Commissioner. It is said that this sub-section means that the Deputy Commissioner is the only person who can try these offences.

If that be so, then it is difficult to understand how the learned Magistrate who heard this case, had jurisdiction to proceed in the matter. Sub-s. (3) of S. 63 does not give the Deputy Commissioner exclusive jurisdiction; it merely enjoins all Courts who have reason to believe that an offence has been committed to report the matter to the Deputy Commissioner. I am satisfied that there is nothing in S. 63, Chota Nagpur Tenancy Act, which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that Section. Reliance in the Court below was placed upon S. 258, Chota Nagpur Tenancy Act, and it was suggested that that Section deprived the Criminal Courts of jurisdiction. All that S. 258, Chota Nagpur Tenancy Act, does is to bar suits in certain cases. In other words, it makes the decision of the Tribunal contemplated in the Act final in certain types of proceedings. The wording of S. 258 makes it clear that only proceedings of a civil nature were in the contemplation of the Legislature and such only are made final. The concluding words of the Section are,

> and every such decision, order or decree shall have the force of a decree of a Civil Court in a suit between the parties and subject to the provisions of this Act relating to appeal shall be final.

This Section cannot deprive a Criminal Court of its jurisdiction to try a criminal offence. In my judgment Section 63 (1) (a), Chota Nagpur Tenancy Act, creates an offence, and if it does, prima facie the Criminal Procedure Code will apply to the trial of such an offence. S. 5, Criminal P. C., is in these terms :

> (1) All offences under the Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained; (2) all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

The offence under S. 63, Chota Nagpur Tenancy Act, is an offence not under the Penal Code but under a different Act. By reason of S. 5 (2), Criminal P. C., it must be investigated into and tried according to the provisions of the Code because, as I have already pointed out, there is nothing in the statute creating the crime dealing with the method in which investigation is to be made and the trial to be held. It was contended that the provisions of the Criminal Procedure Code would not apply to this case by reason of S. 1 (2), Criminal P. C. That sub-section directs that the Criminal Procedure Code shall extend to the whole of British India; but, in the absence of any specific provision to the contrary, nothing contained in the Code shall affect any special or local laws then in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. It was argued that the Chota Nagpur Tenancy Act is a local law and therefore the Criminal Procedure Code would not apply. As I have already pointed, the Chota Nagpur Tenancy Act is silent as to how the case is to be investigated and prosecuted, and that being so, the provisions of the Criminal Procedure Code must apply.

Holding as I do that in the prosecution of an offence under S. 63, Chota Nagpur Tenancy Act, the provisions of the Criminal Procedure Code apply, then the provisions of S. 197, Criminal P. C., must be complied with. That Section expressly states that where a public servant who is not removable from his office save by or with the sanction of the Local Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government. I have already stated that Capt. Angelo is undoubtedly a public servant, and, in my view, is a servant who is not removable from his office save with the sanction of the Local Government. In my view, as his appointment could only be made with the sanction of the Provincial Government his dismissal also would require such sanction. He is therefore in my judgment a public servant within the meaning of S. 197, Criminal P. C.

The previous sanction of the Provincial Government is only required when the public servant is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty and does not apply to all kinds of offences. It has been strenuously argued that the offence with which Capt. Angelo is charged is not an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty and therefore it is said, previous sanction of the Government is not necessary. I have already stated that the amended S. 63 (1) (a), Chota Nagpur Tenancy Act, makes it an offence for the

landlord or his agent to levy certain dues, and it is no offence if the person levying is neither a landlord nor a landlord's agent. The charge in the present case against Capt. Angelo is that as Manager of the Court of Wards, he made these demands. If he made them as landlord or agent of the landlord, then he may have committed a crime. If he did not make them in his capacity as landlord or as agent of the landlord, then no crime is committed. The allegation in the present case is that whilst acting as agent of the landlord he made illegal demands, and in my view, it is abundantly clear that Capt. Angelo was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. The meaning of the words,

> is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty,

was considered at length by the learned Judges of the Federal Court in 20 P L T 539.[1] In that case the learned Judges were dealing with S. 270 (1), Government of India Act. Whilst dealing with the construction to be given to the words of that Section, the learned Judges also discussed the authorities under S. 197, Criminal P. C. At p. 553, Sulaiman J. observed:

> Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a dereliction of it. What is necessary is that the offence must be in respect of an act done or purported to be done in execution of duty, that is, in the discharge of an official duty. It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say under the cloak of an ostensibly official act, though, of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another the impression that he is so acting.

At p. 560 Varadachariar J. observed:

> In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it.

He cited a number of Indian authorities in support of that proposition. He then mentions another group of cases where much stress had been laid upon the circumstance that the official character or status of the accused gave him the opportunity to commit the offence and then remarked that it seemed to him that the first group of cases laid down the correct principle and those cases insisted that there must be something in the nature of the act complained of that attached it to the official character of the person. In the present case, it is alleged, Capt. Angelo committed the act complained of in his official capacity, that is as agent of the landlord, and that being so, he committed an offence under S. 63, Chota Nagpur Tenancy Act. In my view the accusation in the present case is precisely the one contemplated in S. 197 (1), Criminal P. C. That being so, previous sanction of the Government was necessary before the learned Magistrate could take cognizance of this offence.

For these reasons I am satisfied that the learned trying Magistrate had no jurisdiction to order these proceedings to continue and that the learned Deputy Commissioner was right in referring the matter to this Court with the recommendation that the proceedings be quashed. I would therefore accept this reference and quash the proceedings which have been instituted against Capt. Angelo without the previous sanction of the Provincial Government.

It will however be open to the Provincial Government after considering the facts of the case to give their sanction to proceedings and in such an event a fresh complaint can be made and proceedings can be carried on to conclusion.

Manohar Lall J.—I agree. Capt. Angelo is the manager of an estate under the Court of Wards in Chota Nagpur. Therefore by the operation of S. 59-A, Court of Wards Act, 1879, he must be deemed to be a public servant within the meaning of the Penal Code. By R. 115 framed by the Court of Wards under S. 70 of the Act as Capt. Angelo is drawing a salary of over Rs. 200 per month he cannot be removed by the Court of Wards without the sanction of the Provincial Government. These facts being established, it follows as a necessary consequence that the provisions of S. 197, Criminal P. C., come into operation: that is to say no Court can take cognizance of any offence said to have been committed by Capt. Angelo while acting or purporting to act in the discharge of his duties as a public servant without the sanction of the Provincial Government. The learned advocate for the respondent strenuously argued that the offence created by the amended S. 63 (1) (a), Chota Nagpur Tenancy Act,

1. Hori Ram Singh v Emperor, (1939) 26 A I R F C 43=181 I C 317=40 Cr L J 468=I L R 1939 Kar (F C) 132=20 P L T 539.

was a special offence outside the jurisdiction of the Criminal Courts and that it cannot be tried by the ordinary Criminal Courts. He placed reliance upon the insertion and retention of S. 63 within S. 258, Chota Nagpur Tenancy Act, even after the amendment in 1938. It may be that the Legislature has omitted to remove S. 63 from S. 258, after the amendment of S. 63 or it may be that the Section had to be retained in the category of Sections enumerated in S. 258, because some proceedings which may under the old S. 63 have started before the Act was amended, had not yet terminated. In any case, the concluding words of S. 258 make it clear that an order passed under S. 63, shall have the force and effect of a decree of a Civil Court in a suit between the parties. It cannot be understood how an order passed convicting or acquitting an accused under the amended S. 63 can have the force and effect of a decree of a Civil Court in a suit between the parties. The obvious intention of S. 258, is, as was pointed out by my Lord the Chief Justice in the course of his elaborate judgment delivered just now, that the Act specifically bars the jurisdiction of any Civil Court to try a suit which would vary, set aside, alter directly or indirectly any order which may be passed under S. 63.

I am not at all impressed by the argument that although Capt. Angelo is a public servant within the meaning of the Penal Code he is not a public servant within the meaning of the Criminal Procedure Code. The Criminal Procedure Code does not create any offence; it is a procedural Act. It defines the procedure to be followed by the Courts before taking cognizance of an offence or after a Court has taken cognizance of an offence against an accused. The offence is created either by the Penal Code or by some other law for the time being in force. In the present case the offence is created by the provisions of the amended S. 63 (1) (a), Chota Nagpur Tenancy Act. In that Act I do not find any procedure provided for the investigation of that offence; nor does the Code define the Court which would try that offence or could give sanction to compound the offence as provided by sub-s. (3). It follows therefore as pointed out by my Lord the Chief Justice, that the ordinary procedure provided in the Criminal Procedure Code will come into operation and will guide the Courts in taking cognizance of the offence and investigating it if they possess jurisdiction to take cognizance thereof. In the present case as no sanction was obtained from the Provincial Government the trial Court had no jurisdiction to take cognizance of the offence.

I should have dealt with the argument of the respondents that R. 115 was ultra vires. The argument took the shape that the Court of Wards has authority under S. 70, to make only such rules as are consistent with the Court of Wards Act. Reliance was placed upon S. 20 of the Act to show that whereas by this Section the Court has the power to appoint a manager and also to remove the manager so appointed irrespective of the salary which he draws, R. 115 expressly limits the power of the Court to the appointment of those managers only whose salary does not exceed Rs. 200 a month. The argument is fallacious and omits to consider the effect of S. 69. S. 69 expressly authorizes that

> in the exercise of the powers and in the discharge of the duties conferred and imposed respectively on the Court by this Act, the Court shall be guided by such orders and instructions as it may from time to time receive from the Provincial Government.

The Court of Wards itself has framed R. 115, by which they have agreed to be guided by the orders of the Provincial Governments with respect to the appointment of a manager where his salary is above Rs. 200 per mensem. I do not see any inconsistency between R. 115 and any other provision of the Act. Indeed, the provisions of the Act are being carried out with greater efficiency under the control and direction of the Provincial Government itself. It was also argued that the Provincial Government have only a power to sanction the appointment of the manager but have no power to remove the manager appointed with their consent or approval. The principle is well established that where an authority has a power to sanction the appointment, the persons so appointed cannot be removed without the sanction of that authority. For these reasons I agree that the proceedings should be quashed, leaving it open to the parties to obtain the sanction of the Provincial Government if they so desire.

G.N./R.K. *Proceedings quashed.*

A. I. R. 1940 Patna 322

HARRIES C. J. AND FAZL ALI J.

Sri Thakur Kapildeo Bhagwan and another — Appellants.

v.

Ali Raza and another — Respondents.

Letters Patent Appeals Nos. 7 and 8 of 1939, Decided on 8th September 1939.

(a) Bengal Tenancy Act (8 of 1885), Ss. 103-B and 102 (ii) (gg) — Presumption of correctness attaches to entry in fard-ab-pashi — Entry that liability of tenant for rent will depend on maintenance of gilandazi (irrigation system) by landlord — Settlement officer is authorized to record such entry by S. 102 (ii) (gg)—Even if aforesaid entry is regarded as proof of custom that custom is not uncertain or indefinite.

A presumption of correctness attaches under S. 103-B to the entry in the fard-ab-pashi to the effect that the liability of the tenant to pay rent will depend on the maintenance of the gilandazi (irrigation system) by the landlord. The settlement officer is authorized to make such an entry by S. 102(ii)(gg). The entry in effect amounts to this, that there is an obligation on the landlord to maintain the irrigation system in good order, and the tenant has a corresponding right to claim remission of rent in case that obligation is not carried out by the landlord. [P 323 C 2; P 324 C 1]

The entry is an entry as to one of the incidents of the tenancy, but even if it is taken to be an entry as to a custom prevailing in the village the custom cannot be held to be uncertain or indefinite, for the Courts can have no difficulty in deciding it upon the entry at it stands. [P 324 C 1]

(b) Practice— New plea — Appeal — Letters Patent—Point which could not be raised in second appeal cannot be entertained in Letters Patent.

It is obvious that the High Court cannot entertain in Letters Patent appeal any point which the appellants were not competent to raise in second appeal. [P 324 C 2]

(c) Practice — Second appeal — Patna High Court can disallow point in second appeal in absence of certificate required by rules.

The second Appellate Court in Patna is justified in refusing to allow the appellants to raise a point before it in the absence of a certificate required by the rules framed by the High Court. [P 324 C 1, 2]

Barhandeva Narayan — *for Appellants.*

Ghulam Muhammad — *for Respondents.*

Fazl Ali J. — These are appeals under the Letters Patent from the decision of Dhavle J., in two second appeals arising out of two suits brought by the plaintiff-appellants to recover rent for the years 1339 to 1341 and first kist of 1342 F. The main point raised by the defendants in the suit was that the landlords had neglected the gilandazi and in consequence of their neglect there was a total failure of crops and so they were not liable to pay any rent. The defendants in support of their defence relied upon an entry in the fard-ab-pashi which is to the effect that the raiyat will be under an obligation to pay the existing rent if the arrangements for irrigation are fully maintained. The Munsif found on a consideration of the evidence that the landlords had neglected gilandazi till March 1934, but he granted a full decree to the plaintiffs on the ground that the defendants had failad to show that their crops had suffered in any way owing to the neglect of gilandazi. The lower Appellate Court agreed with the view of the Munsif that the landlords had neglected gilandazi, but he held in disagreement with him that

by reason of the bad condition of the irrigation system in the village there was failure of crops of the rent claimed lands during the period 1339 to Chait 1341 F.

He accordingly negatived the plaintiffs' claim for rent relating to the period 1339 to eight annas kist of 1341 F. and dismissed the plaintiffs' suit for that period. The plaintiffs thereupon preferred a second appeal which was dismissed by Dhavle J. They have now preferred an appeal under the Letters Patent. The points urged on behalf of the appellants before us are three in number: (1) that no presumption of correctness attaches under S. 103-B, Ben. Ten. Act, to the entry in the fard-ab-pashi, which is relied on by the defendants, inasmuch as the settlement officer was not authorized to make such an entry; (2) that this entry can be relied upon only as proof of a custom and the custom being uncertain and indefinite should not be given effect to by this Court; and (3) that there is no evidence whatsoever on the record to prove that the failure in crops alleged by the tenants was due to neglect of gilandazi by the landlords. The first point is fully answered by S. 102, cl. (gg), sub-s. (ii). There can be no doubt that under this provision the settlement officer was authorized to record

the rights and obligations of each tenant and landlord in respect of the repairs and maintenance of appliances for securing a supply of water for the cultivation of land held by each tenant, whether or not such appliances be situated within the boundaries of such land.

Thus, if there was an obligation upon the landlords to maintain the irrigation system in good order by gilandazi, the settlement officer was clearly authorized to make an entry to that effect in the fard-ab-pashi which is a part of the Record of Rights. The learned advocate for the appellants contends that in any event the settlement officer was not authorized to record the fact that the liability of the tenant to pay rent will depend on the maintenance of the irrigation system by the landlord. I am, however, not prepared to accept this contention. The Section refers to the rights and obligations of the tenant as well as those of the landlord. The entry in effect amounts to this, that there was an obligation on the landlord to maintain the irrigation system in good order, and the tenant

had a corresponding right to claim remission of rent in case that obligation was not carried out by the landlord. In my judgment, the entry in question must be presumed to be correct under S. 103-B, Ben. Ten. Act, and the Courts below were right in basing their decision upon it as the plaintiffs had failed to adduce any evidence to rebut it.

The second point also appears to me to be without substance. The entry in question is an entry as to one of the incidents of the tenancy, but even if it is taken to be an entry as to a custom prevailing in the village I do not think that the custom can be held to be uncertain or indefinite. The learned advocate for the appellants contends that the custom is uncertain, because if the neglect of the landlords as to gilandazi does not lead to a total failure of crops there is nothing in the fard-ab-pashi to show to what extent and on what basis the remission of the rent is to be allowed. In the present case no such question arises, because it had been found as a fact by the lower Appellate Court that there was a total failure of crops, but even if such a question arose, the Courts would, in my opinion, have found no difficulty in deciding it upon the entry as it stands.

The last point raised on behalf of the appellants is clearly one which might have been raised on their behalf before Dhavle J., but cannot be raised in the present appeal. We are informed by the learned advocate for the appellants that he attempted to raise it before Dhavle J., but he was not allowed to do so, because no certificate had been given in the memorandum of appeal as required by the rules of this Court to the effect that in fact there was no evidence on the record to support the contention of the defendants that there was a total failure of crops in consequence of the neglect of the landlords to maintain the irrigation system in good order. The learned advocate for the appellants contends that, though he had given no such certificate in the memorandum of second appeal, he is entitled to raise this point now, because such a certificate has been given by him in the memorandum of appeal filed under the Letters Patent. This argument is however clearly fallacious. The appellants can succeed in these appeals only if they can show that the judgment of Dhavle J. in second appeal is not correct, but on the case stated before us it is clear that Dhavle J. was right in refusing to allow the appellants to raise the point before him in the absence of a certificate required by the rules. It is obvious that we cannot entertain in these appeals any point which the appellants were not competent to raise in second appeal. As all the grounds raised on behalf of the appellants have failed, I would dismiss these appeals with costs. There will be only one set of hearing fee in both the appeals.

Harries C. J. — I agree.

G.N./R.K. *Appeals dismissed.*

✻ A. I. R. 1940 Patna 324
FULL BENCH

HARRIES C. J., WORT AND MANOHAR LALL JJ.

Bankey Behari Prasad and another — *Plaintiffs* — Appellants.

v.

Mahendra Prasad and others — *Defendants* — Respondents.

Appeal No. 1033 of 1936, Decided on 2nd April 1940, from appellate decree of Dist. Judge, Gaya, D/- 20th July 1936.

✻ (a) Contract Act (1872), S. 70—Construction—S. 70 does not apply to minors—It contemplates implied promise to pay.

Section 70 sets out the circumstances in which a person receiving a benefit must be deemed to have impliedly agreed to pay compensation or to return the thing done or delivered to him. In the circumstances set out in that Section the law implies a promise to pay. S 70 is an instance of an implied contract and therefore a minor cannot be made liable on such a contract The basis of a suit under that Section is a contractual one, and consequently a minor cannot be sued under that Section. This is made clearer still by the provisions of Ss. 11 and 68, Contract Act, which would become redundant if S. 70 were held as applicable to minors: *30 Cal 539 (P C), Rel. on; AIR 1931 Lah 344, Foll.; A I R 1928 Mad 317, Expl. and Not foll.* [P 326 C 1, 2]

(b) Civil P. C. (1908), S. 100—Finding as to share of party's liability cannot be interfered provided Court had before it material upon which finding could be based.

Finding as to the actual share of a party's liability is a pure question of fact, and the second Appellate Court cannot interfere with the finding of fact of the lower Appellate Court if there was material before that Court upon which such finding could be based. [P 327 C 1]

Raj Kishore Prasad — *for Appellants.*

Sarjoo Prasad, Kedar Nath Varma, G. P. Singh and Lal Narayan Sinha — *for Respondents.*

Harries C. J.—This is a plaintiffs' second appeal from a decree of the learned District Judge of Gaya. The case came in the first instance before Dhavle J., who referred it

to a Divisional Bench. That Bench by an order dated 12th February 1940, directed that the case should be laid before the Chief Justice with a view to its being referred to a Full Bench. The matter has in consequence been heard by this Bench.

The suit giving rise to the appeal was brought by the plaintiffs to recover from defendants a proportion of sums spent by the former in repairing a pyne which served both the plaintiffs and the defendants in the suit. The plaintiffs based their claim on S. 70, Contract Act. Defendant 4 in the suit was a minor, whereas defendant 7 was an adult. The defendants pleaded that they could not be made liable to pay anything towards the cost of the repairs because they had not been consulted before such repairs were executed and had never had an opportunity of rejecting the benefit proposed to be conferred upon them by the plaintiffs. Defendant 4 also pleaded minority. The learned Subordinate Judge, who heard the case at first instance, decreed the plaintiffs' claim against all the defendants whereupon defendants 4 and 7 appealed to the Court of the District Judge. The learned District Judge held that there was nothing in S. 70, Contract Act, which required the plaintiffs to give the defendants an opportunity of rejecting the proposed benefit before they could succeed in the suit. He further held that S. 70 did not apply to the case of a minor and consequently allowed the appeal of defendant 4 and dismissed the suit against him in its entirety. Though he held that defendant 7 was liable he found that the claim was excessive and reduced the amount decreed. Defendant 7 has not appealed, but the plaintiffs have appealed, contending that they were entitled to the amount originally claimed against both defendants 4 and 7.

The plaintiffs were cosharers in a village called Rampur Uber. Respondent 1, who was the minor defendant 4 in the suit, is a co-sharer with the plaintiffs in that village. Respondent 2, who was defendant 7 in the suit, is the proprietor of a village called Khaskhori. The pyne in question runs through both these villages and serves not only the plaintiff-appellants, but also both the respondents. The plaintiffs in their plaint alleged that in agreement with all the co-sharers they undertook and carried out the repairs to this pyne in the years 1334 to 1339 F. They alleged that the defendants had received the benefit of this work and consequently that they were bound to pay a proportionate share of the costs of repairs by reason of the provisions of S. 70, Contract Act. The defendants denied that they entered into any such agreement with the plaintiffs for repairing the pyne, and both the Courts below came to the conclusion that no such agreement had been entered into. The finding is that the plaintiffs themselves without consulting the defendants repaired the pyne, but that they did not intend to confer a benefit gratuitously upon the defendants. Further, it is clear that the defendants obtained considerable benefit from these repairs, and the question arises whether the respondents can be made liable.

The Bench which heard this case was of opinion that two points were involved : (1) whether a cosharer who undertakes repairs which the cosharers are under no legal obligation to do and have not agreed to his doing for them, is entitled to claim contribution from them ; and, in the event of that question being answered in the affirmative, (2) whether a cosharer is entitled to contribution against a minor cosharer. It will be convenient to deal, in the first place, with the question of minority. S. 70, Contract Act, is in these terms :

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

It will be seen that the Section is in general terms and no exception is made on the face of it in favour of a minor. It has consequently been argued on behalf of the appellants that on the plain terms of the Section it applies to a minor. It is clear, however, that a minor is incompetent to contract. S. 11, Contract Act, provides that :

> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

There appears at first to have been some doubt as to the meaning of this Section with regard to minors, but all such doubt has been removed by a decision of their Lordships of the Privy Council in 30 I A 114=30 Cal 539.[1] That case laid down that the Contract Act makes it essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract

1. Mohori Bibee v. Dhurmodas Ghose, (1903) 30 Cal 539=30 I A 114 = 7 C W N 441 = 8 Sar 374 (P C).

within the meaning of the Act. It follows that if a minor enters into a contract, such a contract is void ab initio and cannot be sued upon. S. 70, Contract Act, is in Chap. 5 of the Act, and that chapter is entitled "Of certain relations resembling those created by contract." In my view S. 70 sets out the circumstances in which a person receiving a benefit must be deemed to have impliedly agreed to pay compensation or to return the thing done or delivered to him. In the circumstances set out in that Section the law implies a promise to pay. If S. 70 is an instance of an implied contract, then clearly a minor cannot be made liable on such a contract. If a minor cannot be sued on an express promise, it appears to me clear that he cannot be sued under an implied promise. An implied promise is nothing more than a promise which is inferred from certain circumstances. The basis of a suit under S. 70 is, in my view, a contractual one, and consequently a minor cannot be sued under this Section.

If a minor is liable in a suit under S. 70, Contract Act, an extremely curious result would follow. It is clear that if a minor agreed to buy a motor car and the same was delivered to him by a motor car dealer, the latter could not maintain an action for the price. If, however, the motor car was delivered by mistake or without any previous agreement to the minor without any intention of making a gift of the motor car and the minor used it for his own benefit, then he would be liable to make compensation to the extent of the value of the car or to return the car if S. 70 applied to minors. In short, the minor would be under no liability to pay the price if he had promised to do so, whereas he would be under such liability if he had never made any promise. Such, in my view, could never have been the intention of the Legislature.

Again if S. 70, Contract Act, applies to minors, then S. 11 could be wholly defeated in many cases. For example, a minor cannot be sued on a contract to pay for luxurious goods supplied, but it could always be alleged that goods had been delivered to a minor without any intention of making a gift and that the minor had enjoyed the benefit of such goods. Such a case would fall within S. 70, and the minor, though he could not be sued on the contract, could always be sued under S. 70 for compensation in respect of the goods or for restoration of the goods. It appears to me clear that if S. 70 is held to apply to minors, then the latter can be made liable in cases of contract though S. 11 in terms says that they are incompetent to contract. Lastly, if S. 70, Contract Act, applied to minors, then S. 68 of the Act appears to be wholly redundant. S. 68 deals with claim for necessaries and is in these terms :

> If a person incapable of entering into a contract or anyone whom he is legally bound to support, is supplied, by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

There can be no doubt that a minor is a person incapable of entering into a contract and is, therefore, a person to whom S. 68 applies though, of course, S. 68 applies to persons other than minors such as lunatics. This Section makes it clear that if necessaries are supplied to a minor, the person who supplies them is entitled to recover the cost from the property of the minor. If S. 70 applied to minors, then S. 68 is wholly unnecessary as far as minors are concerned because the person who supplied the necessaries could recover under S. 70 on the ground that the plaintiffs had delivered the goods to the minor not intending to do so gratuitously and that the minor had enjoyed the benefit thereof. The fact that the Legislature has expressly dealt with "necessaries" in S. 68 of the Act shows that S. 70 was never intended to cover a case of the supply of such to minors. If S. 70 does not entitle a person who supplies necessaries to recover from the minor, then obviously it cannot possibly be intended to cover a case of a supply of luxuries or things which cannot possibly fall within the category of "necessaries." In 30 Cal 539[1] Sir Ford North who delivered the opinion of the Board observed at p. 548 with regard to S. 68, Contract Act :

> It is beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract; and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property.

It will be observed that the liability created in respect of the supply of necessaries is a liability which is limited to the property of the minor or other incapable person. The liability under S. 70 of the Act is not so limited. That latter Section simply states that the person who has received the benefit is bound to make compensation or to restore the thing done or delivered. It does not state that only the benefited person's property is liable for compensation.

It follows, therefore, that if S. 70 is applicable to goods supplied to a minor, then the liability of the minor would depend upon whether he was sued under S. 68 or S. 70 of the Act. If he was sued under S. 68, the liability would be limited to the property of the minor, whereas if he was sued under S. 70 there would be no such limitation. There is little direct authority upon this question. In A I R 1928 Mad 317[2] Reilly J. expressed the view that S. 70 was applicable to minors. Phillip Ag. C. J., who was the other member of the Bench, expressed no opinion on the subject, and it is clear from the facts of the case that the point did not arise. Reilly J.'s opinion is therefore purely obiter. A contrary view was taken by a Bench of the Lahore High Court in A I R 1931 Lah 344[3] in which it was expressly held that S. 70 did not apply to minors. In my judgment the view of the Bench of the Lahore High Court is the true one and should be followed. I therefore agree with the finding of the learned District Judge upon this point. As I hold that the minor could not in any event be sued for his proportion of the cost of the repairs to the pyne in question, the first question propounded by the Bench who heard this case does not arise. If by reason of minority respondent 1 is not liable, it matters not whether he had or had not an opportunity of refusing the proposed benefit. It is therefore unnecessary to express any opinion upon this point.

With regard to the appeal from the decree in so far as it affects the second respondent, little need be said. The learned District Judge reduced the amount which had been originally decreed by the learned Subordinate Judge. What the actual share of defendant 7 was is a pure question of fact and this Court cannot interfere with the findings of fact of the lower Appellate Court if there was material before that Court upon which such findings could be based. There was such material in the present case and accordingly the finding of the learned District Judge on the question of amount is final and cannot be challenged. For the reasons which I have given I hold that the learned District Judge was right and I would accordingly dismiss this appeal with costs.

Wort J.—I agree and have very little to add. I propose to express briefly and in my own words the considerations which in my judgment apply to the determination of this case. The most formidable argument advanced to us is that by reason of S. 70, Contract Act, and quite apart from juridical and legal principles, a liability apart from contract, express or implied, is created. In my judgment that argument although attractive is one which cannot be accepted. As their Lordships of the Judicial Committee of the Privy Council have pointed out in the case which has already been referred to by my Lord reported in 30 I A 114[1] the Sections which we have to construe are a part of the Contract Act; and there appears to be no valid reason why it should be held that those Sections are to be construed on the footing of the principles underlying the Act. If there were any doubt at any time with regard to the matter, it is now quite clear that a minor cannot make a contract, indeed the Act itself so provides. S. 70 states the circumstances under which liability accrues to a person taking goods or accepting benefits which benefits have not been conferred gratuitously. As the Section states, in those circumstances there is an obligation to compensate the person conferring those benefits. It is impossible to contend in my judgment that the circumstances as set out in the Section do not impose what lawyers describe as a contract implied by law. Now as my Lord has pointed out, if S. 70 is to be construed in the manner suggested by the learned advocate appearing on behalf of the appellants, then not only was S. 68, Contract Act, unnecessary and redundant, but further in one sense S. 70 would be contradictory. It is impossible to impute to the Legislature an intention to enact redundant or contradictory provisions. Ss. 68, 69 and 70 as I have already stated must be governed by the general principles underlying the Act. S. 68 circumscribes the liability of a minor both as regards liability itself and the method of imposing that liability. If it is correct (and in my judgment it is correct) to say that S. 68 circumscribes the liability of the minor, S. 70, on the construction which is sought to be placed upon it, immediately extends it and extends it in a most remarkable and in my judgment contradictory manner. S. 68 limits liability to necessities, S. 70 imposes an unlimited liability. The construction sought to be placed upon S. 70 is an impossible one being opposed to the other provisions of the Contract Act. I am

2. Muthayya Chetti v. Narayan Chetti, (1928) 15 A I R Mad 317=109 I C 101.
3. Shahbaz Khan v. Bhangi Khan, (1931) 18 A I R Lah 344=135 I C 177=33 P L R 1090.

clear that S. 70 indicates those circumstances in which there is an implied contract or obligation, implied by law, and it must be manifestly clear that a liability which cannot be imposed by an express contract cannot be imposed under an implied contract. In those circumstances I agree with my Lord that the appeal fails and that it must be dismissed with costs.

Manohar Lall J.—I am also of the same opinion for the reasons given by my Lord the Chief Justice.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 328

FULL BENCH

HARRIES C. J., DHAVLE AND MANOHAR LALL JJ.

Hari Prasad Singh and another — Appellants.

v.

Lal Behari Saran Singh and others — Respondents.

Appeals Nos. 210, 257 and 258 of 1937, Decided on 29th March 1940, from appellate decrees of Dist. Judge, Gaya, D/- 8th February 1937.

(a) Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 26—Title and interest of father do not include his right to sell son's share.

The right, title and interest of the father do not include his right to sell son's share. Hence, in a certificate sale held only against father, son's share does not pass: *Case law reviewed.* [P 330 C 2]

(b) Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 26—Sale of tenure —All parties interested in tenure not joined as debtors nor represented by parties joined as such — What passes at certificate sale is not whole tenure itself but only right and title of certificate debtors.

The question of representation is no longer foreign to certificate proceedings. In order to justify the sale of a tenure or holding under the Bihar and Orissa Public Demands Recovery Act, all parties interested in the tenure or holding must be joined as debtors in the certificate proceedings or be sufficiently represented by the parties joined as such, and unless this is done, the purchaser at the certificate sale will acquire neither the shares of other parties nor the power to annul incumbrances, but only the right, title and interest of the certificate debtors themselves: *17 C W N 833 and A I R 1933 P C 122, Rel. on.* [P 332 C 2]

(c) Landlord and Tenant — Rent suit—Some of cotenants left out — Landlord can still have money decree.

Even if some of the cotenants are left out, the landlord is not disentitled to a money decree: *A I R 1927 Pat 426 and A I R 1925 Cal 1056 (F B), Foll.* [P 333 C 1]

(d) Bihar and Orissa Public Demands Recovery Act (4 of 1914), Ss. 7 and 52—Death of certificate debtor after attachment but before actual sale — Notice not issued on legal representatives — Sale does not become void (Per *Dhavle J.*)

The certificate officer's jurisdiction to sell is founded in a "duly filed" certificate and not on the actual existence of the certificate debt nor on the service of the notice under S. 7 on the certificate debtor himself. The notice to the legal representatives of a deceased certificate debtor cannot be placed on a higher footing than the notice to the certificate debtor. Hence, the failure of the landlord to bring on the record of the certificate proceedings the legal representatives of the certificate debtor who died after attachment but before the sale is no more than an irregularity and does not affect the validity of the sale : *Case law discussed.* [P 339 C 2; P 340 C 1]

Sir M. N. Mukherji, B. N. Rai and Kaushal Kishore Sinha — *for Appellants.*

Dr. D. N. Mitter, N. K. Prasad II and Sat Narayan Sinha (in No. 210) and Sat Narayan Sinha (in Nos. 257 and 258) — *for Respondents.*

Dhavle J. — These appeals arise out of three suits brought by the junior descendants of one Dharam Narain Singh for declarations that three certificate sales were void, or failing this, that their own shares in the properties sold were unaffected by the sales in question. The trial Court dismissed the suits, but on appeal the District Judge decreed them in part and declared that the certificate sales affected only the shares of the certificate debtors named in the certificate proceedings and in one of the suits, further that the sale was void as regards the share of Bibhuti, one of the certificate debtors. Dharam Narain Singh had three sons, and in the Record of Rights of 1916 the properties, three mukarraris, were shown in the names of five descendants of his, (1) Sukhnandan, grandson of his eldest son, (2 to 4) Bishunandan, Bibhuti and Pashupati, the first a grandson, and the other two, sons of the second son, and (5) Sheonandan who had been adopted from the second son by the third son of Dharam Narain Singh. For the recovery of arrears of rent for 1336 Fasli in respect of a mukarrari interest of 1 anna 7 dams 10 cowries in mauza Dharaut Bhekh the landlord took certificate proceedings against all the five holders shown in the Record of Rights except Pashupati (No. 4 above), instead of whom three sons of his named Mahesh, Suresh and Naresh were joined as minors

under the guardianship of Sheonandan. A sale held in execution of the certificate in May 1930, proved abortive and then there was another sale in January 1931, the auction-purchaser taking out dakhaldehani on 3rd January 1932. The suit challenging this sale was instituted on 4th April 1934, and has been referred to by the District Judge as Title Suit No. 66, being the suit in which he declared that the sale was void as regards the share of Bibhuti.

The landlord similarly took certificate proceedings for the recovery of arrears of rent for the year 1337 in respect of two other properties of the family—the 16 annas mukarrari of mouza Jamanganj and a 1 anna 6 dams 5 cowries mukarrari in mauza Dharaut Khas. The certificate debtors named in these proceedings were the seven persons proceeded against on the earlier occasion (leading to Title Suit No. 66) besides, Dinesh another son of Pashupati. The certificate sales were held in March 1931, and petitions of "objection under S. 29, Public Demands Recovery Act (Bihar and Orissa Act 4 of 1914) were filed in May by twelve members of the family, of whom six (including our plaintiffs Naresh and Dinesh) were certificate debtors and the other six were descendants of Bibhuti who, it has been found as a fact, had died on 4th January 1931, the date of service of the notice under R. 25 of Sch. 2 of the Act. Mahesh, the only other certificate debtor, does not figure in these objections; he was apparently dead (though the time of his death has not been ascertained) and his three brothers who were among the objectors were his heirs. These objections were compromised in July 1931, it being agreed that the sales were to be set aside if the objectors paid a certain sum by 22nd December of that year and that otherwise the objections were to be dismissed without adjudication and the sales confirmed. The objectors failed to make the necessary deposits, and the sales were confirmed on 22nd December 1931.

We are now concerned with eleven of the plaintiffs in the suits out of which these appeals arise. Out of these eleven persons, Naresh and Dinesh (as already stated) were named as debtors in the certificate for the rents of 1337 fasli, while Naresh alone was among the debtors named in the earliest certificate. Six others out of these plaintiffs were among the objectors under S. 29 in the two later certificate cases and were parties to the compromise of July 1931. The remaining three are Gopal Saran Singh, minor, son of a certificate debtor Sukhnandan (No. 1 above), and Ganesh and Tarkeshwar (a minor), sons of another certificate debtor Sheonandan (No. 5). Plaintiffs impugned the sales on the ground that processes were fraudulently suppressed, and the compromise petitions in two of the three cases fraudulently put in. The trial Court found that there was no fraud, and in the lower Appellate Court the question of fraud was not pressed. Both the Courts held that the compromise of July 1931, estopped the eight objectors who are among these eleven plaintiffs from challenging the sales. The trial Court held that the mukarraris themselves had passed under the certificate sales but the learned District Judge came to the conclusion that what had passed at the sales was no more than the right, title and interest of the certificate debtors. The trial Court also held that the failure of the landlord to bring on the record of the certificate proceedings the legal representatives of Bibhuti, the certificate debtor who died before the sales, was no more than an irregularity and did not affect the validity of the sales. Differing on this point also from the trial Court, the learned District Judge held that the omission rendered the sale void in respect of the share of Bibhuti, but that this consideration could be given effect to only in title Suit No. 66, the other two suits being concluded in this respect by the compromise of July 1931.

Against the decision of the District Judge, the transferees from the purchasers at the certificate sales have appealed. The only points urged on their behalf are that the lower Appellate Court was wrong in differing from the trial Court on the two points already indicated and that the ordering portion of the judgment of the lower Appellate Court is not altogether in accordance with its findings. The first question in these appeals, thus, is whether it was the mukarrari tenures themselves or only the right, title and interest of the certificate debtors in them that passed under the certificate sales. S. 26 (1), Public Demands Recovery Act (Bihar and Orissa Act 4 of 1914), expressly provides that where property is sold in execution of a certificate, there shall vest in the purchaser merely the right, title and interest of the certificate debtor at the time of the sale, even though the property itself be specified. Sir Manmatha Nath Mukerji for the appellants has argued that this provision does not

prevent the Mitakshara son's share from passing at a certificate sale held against his father, and in support of this contention he has relied on A I R 1937 Pat 517,[1] decided by Courtney-Terrell C. J. and James J. The correctness of this ruling is one of the points that led to these appeals being referred to this Bench of three Judges because my Lord the Chief Justice and myself before whom they had come at first were inclined to doubt it. The late Chief Justice took the view that the right, title and interest of a Hindu Mitakshara father which had passed under a certificate sale included "the rights which he had by virtue of his position as the father, that is to say, the right to sell the family property for a debt which was not of an immoral nature, and which the son, the plaintiff in the suit, was under a pious obligation to pay. Beginning with the proposition that "a father, by incurring a debt, binds the property of the son so long as the debt is not for immoral purposes and lays the estate open to execution proceedings based upon a decree for the payment of that debt," the learned Chief Justice observed :

> In his individual capacity and apart from his fathership, it is true he has a right to partition and to take such share as might be allotted to him on partition, but in respect of his fathership he has the further right to sell the family property to discharge debts incurred by him and the sons are not in a position to object, being bound by the pious obligation to pay the father's debt in any case ....

This right to dispose of the family property for his own debt was, according to him, included in the father's right, title and interest because "if the judgment-debtor can sell the property to satisfy the debt, so can the purchaser who steps into his shoes." Now it is beyond question that a Mitakshara son cannot, by reason of his pious obligation, successfully impugn a sale of the family property by the father to discharge his own debts (provided they are not avyavaharika), and that the father may sell the joint family property including the son's interest therein to discharge such debts, or lay it open to be taken in execution proceedings for them. A few months before the decision in A I R 1937 Pat 517[1] it was also held by a Full Bench of this Court in 16 Pat 60[2] that this power of the father to dispose of the joint property is property which on insolvency passes to the Receiver. But this was based on the fact that the Receiver

> by his peculiar position under the (Provincial Insolvency) Act may be taken to represent the insolvent as well as his creditors. If he represents the insolvent, it would be illogical to hold that he cannot exercise the power which the insolvent could exercise to pay off his debts, and similarly it would be contrary to principle to hold that though the holder of a simple decree against the father can attach and sell the joint family property including the interest of his son, the receiver is unable to do so.

But this is very different from holding that the father's power, if he so chooses to sell the family property inclusive of the share of his son passes to the certificate purchaser of his own "right, title and interest." The holder of a decree against the father can effectively bring the family property to sale in execution not because he steps into the shoes of the father (as the receiver does) but because the son's pious obligation to pay his father's debts results in the father, by incurring a debt not tainted with immorality, laying the family property open to execution for such a debt without the possibility of a successful challenge by the son. The certificate holder is in a different position altogether, under S. 26 (1), Public Demands Recovery Act; a sale held at his instance can only pass the right, title and interest of the certificate debtor. The view that this includes the father's qualified power to dispose of the joint property is entirely opposed to a number of decisions of the Judicial Committee in which it was held that a sale of the right, title and interest of the father in execution of a decree for his debts entitled the execution purchaser to no more than the share that the father would get on a partition of the family.

In 3 Cal 198[3] for instance, their Lordships gave the father's execution purchaser, the appellant a declaration, as against the son who had been restored to possession that the purchaser had acquired the share of the father and was entitled to have it ascertained by partition, and they added that they could not make any more precise declaration as to the father's share "since if a partition takes place, his wife may be entitled to a share." This was followed in 10 Cal 626,[4] in which the Judicial Committee overruled Mr. Doyne's contention for the execution purchaser that the right,

1. Mahadeo Ram v. Ganesh Prasad, (1937) 24 A I R Pat 517 = 171 I C 232.
2. Bishwanath Sao v. Official Receiver, (1937) 24 A I R Pat 185=167 I C 765=16 Pat 60 = 18 P L T 1 (F B).
3. Deen Dayal v. Jugdeep Narain, (1877) 3 Cal 198 = 4 I A 247 =1 C L R 49=3 Sar 730=3 Suther 468 (P C).
4. Hardi Narain Sahu v. Ruder Perkash Misser, (1884) 10 Cal 626=11 I A 26=4 Sar 510 (P C).

title and interest of the father was " his interest as a manager who had incurred debts binding on the other members of the family " (*see* p. 633 of the report). Their Lordships held that the interest purchased was not the father's share at that time in the property but the right which he would have to a partition and what would come to him upon the partition being made, and they dismissed the execution purchaser's appeal on the ground that the decree of the High Court, which gave him a one third share in the property of the joint family consisting of the judgment-debtor, his wife, and their son, was more favourable to himself than he was entitled to. These and other decisions of the Privy Council regarding what is meant by the right, title and interest of a Mitakshara father were not referred to in A I R 1937 Pat 517[1] and make it impossible, in my opinion to hold that in that case the father's right, title and interest" was correctly held to include his power to sell the family property to discharge his own personal debts.

The learned advocate also cited a Special Bench decision of this Court, 19 P L T 328[5] in which a suit was brought by seven out of eight members of a Hindu joint family to prevent a sale of their interest in the family properties in execution of a certificate against the eighth member. This was after the certificate authorities had overruled the objections of the plaintiffs to the proceedings taking the view that the certificate debtor represented the family and had borrowed money in that capacity for family purposes from the Co-operative Society on whose behalf the certificate proceedings had been taken. Fazl Ali J. with whom Courtney-Terrell C. J. and James J. agreed, held that in the circumstances of the case the plaintiffs were not entitled to the relief they had claimed. The learned Judge pointed out that in the certificate proceeding itself it had been made clear upon the plaintiffs' own application that the certificate debtor had incurred liabilities as representing the entire joint family, and he referred among other provisions to S. 11, Public Demands Recovery Act, under which the Certificate Officer may amend the certificate by the addition of the name of any certificate debtor. The decision, therefore, cannot be taken to mean more than that as it was the joint family that was substantially in the position of the certificate debtor, it was not open to the plaintiffs to resist the sale of the family property. The case did not decide that on an ordinary certificate against one member of a joint Hindu family the certificate holder is competent to proceed against more than his right, title and interest in the family property, and, in my opinion, it is of no assistance to the appellants. By providing explicitly that there shall vest in the purchaser merely the right, title and interest of the certificate debtor at the time of the sale even though the property itself be specified, the Legislature has clearly adopted the view taken by the Courts under former Public Demands Recovery Acts—Bengal Act 7 of 1880 and Bengal Act 1 of 1895. These Acts had provided for the execution of certificates in the same manner as decrees for money under the Code of Civil Procedure, and it was held in a series of cases that certificate proceedings operate against the interest of the certificate debtor alone and that "the doctrine of representation and the principle of estoppel" upon which the decision of the majority of the Judges in 26 Cal 677,[6] was based are not to be extended to sales under the Public Demands Recovery Act: *see* 6 C W N 302[7] and 13 C W N 750.[8] It seems to me even less possible than under the former law to read the doctrine of representation and the principle of estoppel into sub-s. (1) of S. 26 of our Public Demands Recovery Act. There was, however, an important change in the law made in 1907, when Chap. 13A was added to the Bengal Tenancy Act, introducing a summary procedure for the recovery of rents under the Public Demands Recovery Act of 1895. Sub-s. (5) of S. 158A, the Section which constituted the new chapter provided that the certificate for the recovery of rent

> shall, as regards the remedies for enforcing the same and so far only, have the force and effect of a decree of a Civil Court passed in a suit for the recovery of rent, and the provisions of Chap. 14 shall, so far as may be practicable, be applicable to all proceedings for the execution of such certificate.

The Section was amended in 1914 when the Bengal Public Demands Recovery Act of 1895 was replaced by our Act 4 of 1914. Sub-s. 7 of S. 158A now provides that the Bihar and Orissa Public Demands Recovery Act, 1914, with such restrictions and

5. Bindeswari Prasad v. Shiva Dutt Singh, (1938) 25 A I R Pat 315 =19 P L T 328 (S B).

6. Nitayi Behari v. Hari Govinda, (1899) 26 Cal 677.

7. Rupram Namasudra v. Iswar Namasudra, (1902) 6 C W N 302.

8. Mt. Raja Koer v. Ganga Singh, (1909) 13 C W N 750=1 I C 197=10 C L J 201.

modifications (if any) as may be prescribed, shall apply to the execution and to all proceedings arising out of the execution of certificates filed under sub-s. (5), and S. 158B which is found at the beginning of Ch. 14, places certificates for arrears of rent, as regards the effect of a sale of a tenure or holding, on the same footing as decrees for the same, provided they are signed on the requisition, or in favour of a sole landlord, or the entire body of landlords. Certificates or decrees so obtained operate differently from money decrees in that when a tenure or holding is sold in execution of them, it is the tenure or holding, and not merely the right, title and interest of the debtor that passes. Sub-s. (3) of S. 26 of our Act of 1914 provides that notwithstanding anything contained in sub-s. (1) in areas in which Ch. 14, Ben. Ten. Act, 1885, is in force, where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof, the tenure or holding shall . . . pass to the purchaser . . . with power to annul the interests defined in the said chapter as "incumbrances." This provision does not indicate how a tenure or holding may be sold in execution of a certificate for arrears of rent due in respect thereof, but merely lays down what passes at such sales. But S. 158B, Tenancy Act, as I have already said places certificates on the same footing as rent decrees in respect of the sale of a tenure or holding. This Section, which requires the presence as plaintiffs or certificate holders of the whole body of landlords, makes no similar provision as to the tenants, but it is well established by the decisions that

> whatever may be required for the purposes of a mere money decree, ordinarily all the tenants of a holding are necessary parties to the suit in order that the decree and the sale in execution of it may have the important consequences described in Ch. 14, Ben. Ten. Act.

Jenkins C. J. from whose decision in 17 C W N 833[9] I have just been quoting, continued:

> I say ordinarily because there may be conditions in which the presence of even one or some of the tenants as defendant may be as effective as that of all . . . . The authorities sanction the view that where one of a number of tenants is put forward by the rest as their representative, he can be regarded as the sole tenant for the purpose of a suit for arrears of rent within Ch. 14. Whether one of several can be regarded as a representative of the rest must depend on the circumstances of each case, and is, if not essentially at any rate largely, a question of fact.

It was on this ground that in 37 Cal 75,[10] where the lower Courts had held on the authority in 9 C W N 843[11] that the holding had not passed at a sale held in execution of a decree for rent obtained against the recorded tenant only, Richardson and Chatterjee JJ. remanded the case for the lower Appellate Court to consider whether the recorded tenant did not represent the holding. The question of representation is thus no longer foreign to certificate proceedings. With S. 158B, as it now stands, we must take it, following the reasoning of Jenkins C. J. in 17 C W N 833[9] which was referred to with approval by Lord Thankerton in a case under the Chota Nagpur Tenancy Act, 12 Pat 626,[12] that in order to justify the sale of a tenure or holding under our Public Demands Recovery Act, all parties interested in the tenure or holding must be joined as debtors in the certificate proceedings or be sufficiently represented by the parties joined as such, and that unless this is done, the purchaser at the certificate sale will acquire neither the shares of other parties nor the power to annul incumbrances, but only the right, title and interest of the certificate debtors themselves. The learned District Judge was in error in so far as he took it that there could be no "representation" in proceedings under our Public Demands Recovery Act, 1914.

It has been further urged on behalf of the appellants that the lower Appellate Court should, as a matter of law, have held that all the parties interested in the mukarraries were sufficiently represented by those who were joined as certificate debtors, and this for three reasons: (1) the landlord took the proceedings against all those descendants of Dharam Narain Singh, whose names were shown in the record of rights, except Pashupati who was dead and whose sons were joined as certificate debtors; (2) the other members of the family who were interested in the properties had not given notice of their succession, though required by S. 15, of our Tenancy Act to do so, and had paid no rents; and (3) there was evidence that some of the certificate debtors were kartas of the family or its branches. But the landlord named only three sons of Pashupati's as certificate debtors in the proceeding for

9. Chamatkarini Dasi v. Triguna Nath, (1913) 17 C W N 833=19 I C 989.

10. Jagattara Dassi v. Daulati Bewa, (1910) 37 Cal 75=2 I C 695=13 C W N 1110.

11. Ashok Bhuiyan v. Karim Bepari, (1905) 9 C W N 843.

12. Jagdishwar Dayal Singh v. Dwarka Singh, (1933) 20 A I R P C 122=142 I C 781=60 I A 176=12 Pat 626 (P C).

the arrears of 1336 Fasli, while in the later proceedings he mentioned a fourth son Dinesh ; and Naresh and Dinesh were minors. This affects the matter in two ways: It suggests in the first place that the landlord did not even intend to proceed against the kartas as such but proceeded against them in their individual capacity — all the more so because it is now settled law that even if some of the tenants are left out, the landlord is not disentitled to a money decree : *see* 7 Pat 353[13] and the Full Bench decision in 53 Cal 197.[14] And Dinesh was left out in the first proceeding. The question whether a sale held in execution of a rent decree passes only the father's interest in the property sold or the whole holding or tenure depends upon the form of the execution proceedings, including the sale proclamation and the sale certificate, as well as the proceedings in the suit in which the decree was made. The certificate procedure is a summary mode for the recovery of arrears, and this makes it all the more necessary for the certificate holder to make it clear that he is bringing the whole holding or tenure to sale. He can, of course, do so by joining as certificate debtors all the persons interested in the tenure or holding; but where he has not done so, it becomes necessary for the purchaser at the execution sale (or his transferee) in a contest with those members of the family who were not joined in the certificate proceedings, to establish clearly that the latter were represented by those against whom the landlord had taken the proceedings.

It has not been urged on behalf of the appellants that there is any evidence indicating that the landlord did anything to show that he was proceeding against those certificate debtors who are said to have been kartas as such. The learned District Judge finds that though the onus was on the defendants to establish their plea of estoppel by representation, "they have done nothing to prove even the names of the tenants recorded in the landlord's registers" Even that if proved, would only have been the first step in establishing the plea. In 26 C W N 138,[15] a suit was brought by certain heirs for a declaration that their interest in a tenure had not been affected by a sale held in execution of a decree for rent obtained against another heir. The lower Courts had dismissed the suit, the District Judge holding that the very fact that rent decrees were obtained against the defendant tenant showed that he was recognized by the landlord as the tenant. This heir alone was shown in the Record of Rights. Mookerjee C. J. with the concurrence of Fletcher J. reversed the decision. He pointed out that in order to entitle the execution purchaser to invoke the aid of the principle of representation

> it is not sufficient to show that the landlord has chosen to obtain a decree for rent against one out of several heirs. It is to be established that all the tenants have held out one of them as their representative in their transactions with the landlord. If they have so held out one of them to represent them in the matter of the tenancy, they cannot complain if a decree for rent is obtained by the landlord against that representative and the entire tenancy brought to sale in execution thereof.

It was argued for the appellants in that case, as Sir Manmatha Nath Mukherji has done before us, that as the plaintiffs did not appear to have given the notice of succession required by S. 15, Tenancy Act, they were not entitled to relief ; but the learned Judges held that failure on the part of heirs to comply with the requirements of the Section does not necessarily entitle the landlord to treat one of the several heirs of the original tenure-holders as representative of the tenancy. A distinction has been made in several reported decisions between tenure-holders who are governed by S. 15, Tenancy Act, and raiyats who are under no such obligation : *see*, for example, 1923 P H C C 57[16] but in 12 Pat 626,[12] to which I have already referred, their Lordships of the Judicial Committee agreed with this Court in overruling the appellant's contention that the failure of defendant 5 to have her name entered on his sherista, along with the fact that she had never paid rent or been recognized by him as a tenure-holder, entitled him to proceed to the sale of the tenure without joining her as a defendant, observing that

> no such sanction as forfeiture of rights in the tenure in respect of failure to comply with the provisions of S. 11 is provided by the Act ; such failure only affects the transferee's power to recover rents from his under-tenants as provided in sub s. (4).

(The references are to the Chota Nagpur Tenancy Act. Similar provisions are to be found in Ss. 15 and 16, Bihar Tenancy Act).

13. Raghunath Das v. Baleswar Prasad (1927) 14 A I R Pat 426=105 I C 484=9 P L T 137=7 Pat 353
14. Jagan Mohan v. Brojendra Kumar, (1925) 12 A I R Cal 1056=90 I C 211=53 Cal 197=42 C L J 232=29 C W N 1000 (F B).
15. Faijunnessa v. Ramtaran Chowdhury, (1921) 8 A I R Cal 434=63 I C 706=26 C W N 138.
16. Jaideb Thakur v. Jamahir Missir, (1923) 10 A I R Pat 206=69 I C 565=1923 P H C C 57.

It cannot therefore be said that the distinction made by Das J. in 1923 P H C C 57,[16] following earlier cases, between tenure-holders and raiyats goes far to ground a presumption that the tenure-holder who omits to have his name registered must be taken to have acquiesced in the registered tenant representing him in their dealings with the landlord; and as to representation in the case of raiyats, it was held in that case that it did not follow as a matter of law that a co-tenant represented the holding qua the landlord when all that was shown was that the tenant proceeded against in the rent suit was the only recorded tenant and was the head of the family. There was a similar decision in 7 Pat 129,[17] in which it was held that evidence that the tenant proceeded against was the karbari of the family and paid the rent was not sufficient for the purpose of showing that the rent decree would bind all the co-tenants. The question of representation was, in the circumstances of this case, more a question of fact than an inference of law, and on the question of fact we are bound by the finding of the lower Appellate Court that the whole tenure was not represented in the certificate proceedings, which was arrived at independently of the erroneous view of the learned District Judge that a tenure cannot pass on a certificate sale unless all the tenants are named as certificate debtors. In my opinion, the contention of the appellants must be overruled. What passed at the certificate sales was not the mukarrari tenures but only the right, title and interest of the certificate debtors in them.

The next question is whether the sales were void, as held by the learned District Judge, in respect of the share of Bibhuti, by reason of the fact that, though alive at the time of "attachment," he was dead at the time of the sale. On this point the learned District Judge referred to 6 P L T 67[18] and 11 Pat 241.[19] According to the former ruling, so far as it applies, the sale would be good notwithstanding Bibhuti's death, unless set aside in appropriate proceedings. But the learned District Judge followed the later ruling in view of the present wording of S. 50, Civil P. C., which has been copied in S. 52, Public Demands Recovery Act, and held that the sale was void. The apparent conflict between the two rulings was another reason why these appeals were referred to a Bench of three Judges. Now, in 6 P L T 67[18] the suit was brought by an heir of the deceased tenant for recovery of possession from the purchaser at a sale in execution of a rent decree.

The tenant had died after the attachment but before the sale in execution; and the learned Judges held, following the Full Bench decision of the Allahabad High Court in 12 All 440,[20] 18 C W N 766[21] and other cases, that the failure of the decree-holder before the sale to bring on record the judgment-debtor's heirs did not render the sale a nullity, Kulwant Sahay J. after referring to the observation of Lord Hobhouse in 25 Bom 337[22] that there can be no question that omission to serve notice on the legal representative is a serious irregularity sufficient by itself to entitle the plaintiff to vacate the sale, concluded that the omission in that case had been taken to amount to an irregularity only, which did not render the sale invalid and null and void, but that such sale had to be vacated in one or other of the modes prescribed by law. As it has been suggested in some later cases that the ruling in 12 All 440[20] has been weakened by the substitution of the words "fully satisfied" for the words "fully executed" in what is now S. 50, Civil P. C., I would here point out that the sale in 6 P L T 67[18] took place before the present Civil Procedure Code came into force, and that as Varadachariar J. was inclined to think in 59 Mad 461[23] (at page 487), the altered phraseology need hardly have any such effect necessarily. Coming now to 11 Pat 241,[19] it must be observed at the outset that the question in that case arose on an application under O. 21, R. 90 and not in a suit brought after the confirmation of an execution sale. Nor was it a case in which the property sold had been attached before the death of the judgment-debtor.

The sale was attacked on the ground that the legal representative had had no notice

17. Shyam Sundar Naik v. Gobardhan Kamti, (1928) 15 A I R Pat 218=109 I C 519=7 Pat 129=9 P L T 735.
18. Barhamdeo Narayan Pande v. Saligram Sahay Pande, (1925) 12 A I R Pat 384=86 I C 141=6 P L T 67.
19. Smith v. Kailash Chandra, (1932) 19 A I R Pat 199=138 I C 99=11 Pat 241=13 P L T 323.
20. Sheo Prasad v. Hiralal, (1890) 12 All 440=1890 A W N 103 (F B).
21. Bepin Behary Bera v. Shashi Bhushan, (1914) 1 A I R Cal 554=22 I C 95=18 C W N 766=18 C L J 628.
22. Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=2 Bom L R 927=7 Sar 739 (P C).
23. Kanchamalai Pathar v. Shahaji Rajah Sahib, (1936) 23 A I R Mad 205=162 I C 156=59 Mad 461=70 M L J 162 (FB).

served upon him under O. 21, R. 22, and what was decided was that a proper notice under that provision was not rendered unnecessary by the circumstance that execution had been previously taken out against the judgment-debtor himself. The sale was accordingly set aside in the execution proceedings and before confirmation—which is quite different from holding in other proceedings, as we are asked to do in the present appeals, that the sale was void. The learned Judges considered that the matter was concluded by the decision of the Judicial Committee in 42 Cal 72.[24] And indeed, the notice in 11 Pat 241[19] was, like the notice in 42 Cal 72,[24] not a notice to show cause why the decree should not be executed, but a notice only to show cause why the person addressed should not be substituted for the deceased judgment-debtors: 42 Cal 72[24] was however not a case under O. 21, R. 22. It was a case where the property of the judgment-debtors had been attached in execution of a money decree and an order for sale made. The judgment-debtors then became insolvent, and their property vested in the Official Assignee. The judgment-creditors merely took out a notice to the Official Assignee to show cause why he should not be substituted for the judgment-debtors as a party, and this notice was served; but without any further notice to the Official Assignee, the property attached was sold in execution. It was admitted on behalf of the decree-holders-auction-purchasers that attachment in execution of a money decree, followed by an order for sale, does not confer on the judgment-creditor any charge on the land; and this led Lord Thankerton to observe in 56 Mad 405[25] that

> the decision of this Board in 42 Cal 72[24] was also referred to, but that decision proceeded on an admission by counsel. The point was not argued and the case in 5 Cal 148[26] was not referred to.

Their Lordships held in 42 Cal 72[24] that the sale was altogether irregular and inoperative for more than one reason unconnected with the operation of S. 248, Civil P. C. of 1882, which corresponds to O. 21, R. 22, sub-r. (1) of the present Code. They also observed however that the execution could not proceed until the Official Assignee had been brought before the Court and an order binding on him had been obtained; in their opinion this could only be done by obtaining an order for the issue of, and by serving him with, a notice under S. 248, and they referred with approval to 20 Cal 370,[27] in which it was held that a notice under S. 248 is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. The case has therefore been taken as an authority for the view that the absence of a notice under O 21, R. 22 is fatal to an execution sale.

The effect of non-compliance with this provision of the law was considered by a Full Bench of the Madras High Court in 47 Mad 288,[28] in which Schwabe C. J. began by observing that if the matter had been free from authority, he would incline to the view that such non-compliance was a material irregularity, but not an illegality which would make the subsequent sale a nullity. Ramesam J. discussed three possible views of the effect of want of notice under O. 21, R. 22, having regard to the two cases dealt with in sub-r. (1), and felt no strong inclination in favour of any one of them. He therefore concurred in the unanimous decision of the Court, which was rested on the authority in 42 Cal 72[24] that want of notice made the execution sale void. The notice required in 47 Mad 288[28] however was a notice not to the legal representative of a party to the decree on the latter's death, under cl. (b) of the Rule, but a notice to one of the parties under cl. (a) on the ground that more than one year had passed since the date of the decree. O. 21, R. 22, sub-r. (1) puts both these grounds together, so that it is not possible to treat the notice under the rule as vital in the case of the legal representative without regarding it in the same light in the other case, namely where execution is sought more than one year after the date of the decree. This is what led Schwabe C. J., with whom Waller J. agreed, to hold that even in those cases in which a notice is required on ground (a), the absence of the notice goes to jurisdiction and makes the execution sale void, the ruling in 42 Cal

24. Raghunath Das v. Sundar Das, (1914) 1 A I R P C 129=24 I C 304=41 I A 251=42 Cal 72 (P C).
25. Anantapadmanabhaswami v. Official Receiver of Secunderabad, (1933) 20 A I R P C 134=142 I C 552=60 I A 167=56 Mad 405 (P C).
26. Suraj Bunsi Koer v. Sheo Pershad Singh, (1881) 5 Cal 148=6 I A 88=4 C L R 226=4 Sar 1 (P C).
27. Gopal Chandar v. Gunamoni Dasi, (1893) 20 Cal 370.
28. Rajagopala Ayyar v. Ramanujachariar, (1924) 11 A I R Mad 431=80 I C 92=47 Mad 288=46 M L J 104 (F B).

72[24] being taken as decisive in cases relating to ground (b).

But there are decisions by our own and other High Courts upholding execution sales notwithstanding the absence of a notice under O. 21, R. 22. Thus, in 7 Pat 790,[29] the judgment-debtors had succeeded in getting one execution sale set aside on the ground of suppression of the notice under O. 21, R. 22. Fresh sale proclamations were issued and the property was sold again, and the judgment-debtors again urged that the sale should be set aside for want of notice under O. 21, R. 22. Kulwant Sahay J., with whom Macpherson J., agreed, observed that under the circumstances there was no sense in insisting on the issue of fresh notice under O. 21, R. 22, and no necessity to do so as the object of the provision had been attained when the judgment-debtors appeared in Court and raised objections to the execution. The sale was therefore upheld notwithstanding the fact that no notice under O. 21, R. 22 had been served on the judgment-debtors. This decision was followed by Rankin C. J. and Ghosh J. in 35 C W N 9[30] in which the judgment-debtors had actually appeared in response to a notice under O. 21, R. 66 and contested the proceedings relating to the valuation of the property. They afterwards attacked the sale on the ground that no notice under O. 21, R. 22 had been served upon them. It was contended that as it had been held in 42 Cal 72[24] that notice under R. 22 is a condition precedent and without it the Court has no jurisdiction the objection could be taken at any time. Rankin C. J., observed that it was quite unnecessary to push the abstract logic of the case in 42 Cal 72[24] to this ridiculous extreme, and that it appeared to him to be merely piling unreason upon technicality to hold in the circumstances of the case that it was open to the judgment-debtors to object to the jurisdiction of the Court because they had not got a formal notice to do something, namely to dispute the execution of the decree, when in point of fact they were busy disputing about it in all the Courts for the best part of the last two years. Cases of this kind are distinguishable from 11 Rang 79,[31] in which Page C. J., said that though the notice under O. 21, R. 22 goes to jurisdiction it would be mere pedantry to allow a party to dispute the validity of an execution sale on the ground that the notice was not served upon him if he was aware of the proceedings and had let the decree-holder obtain a consent order on an application to stay the sale. This was on the principle *renunciavit juri pro se introducto*; but it is not easy to reconcile the former decisions with the view that the notice under O. 21, R. 22 goes to jurisdiction strictly so called. It is also not unimportant that since the decision of the Privy Council in 42 Cal 72[24] S. 248, to which their Lordships referred, has had an addition made which we find in sub-r. (2) of O. 21, R. 22. Under this sub-rule, nothing in sub-rule (1) is to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. This sub-rule has sometimes been regarded in the light of a provision giving jurisdiction in certain cases in which without it the Court would have none (*see*, for instance, Schwabe C. J.'s observations at p. 302 of the report in 47 Mad 288.[28] But as Varadachariar J., points out in 59 Mad 461[23] it seems clear that if the Court had no jurisdiction aliunde, the new sub-rule will not operate to confer it on the Court.

In my opinion, the importance of this sub-rule in determining the real character of the notice arises from the consideration formulated by Mookerjee J., in 11 C L J 489[32]: the language of the provision for a notice may be mandatory, but this is by no means conclusive, and one test of its real character is whether the notice can in any circumstances be dispensed with. This difficulty in regarding the notice as vital was pointedly referred to by Mukerjee J. in 58 Cal 825,[33] where one of the judgment-debtors had applied to set aside a sale under O. 21, R. 90 and S. 47, Civil P. C. So far as O. 21, R. 90 was concerned, the application was found to have no substance. As regards S. 47, the application showed that no notice under O. 21, R. 22 had been served on her. Mukerjee J. with whom Mitter J.

29. Fakhrul Islam v. Rani Bhubaneshwari Kuer, (1929) 16 AIR Pat 79=117 IC 648=7 Pat 790.
30. Chandra Nath v. Nabadwip Chandra, (1931) 18 A I R Cal 476=131 I C 702=53 C L J 329 = 35 C W N 9.
31. Bimalanandhan Prasad v. United Refineries (Burma) Ltd., (1933) 20 A I R Rang 52 = 143 I C 299=11 Rang 79.
32. Levinia Ashton v. Madhabmoni Dasi, (1910) 11 C L J 489=5 I C 390=14 C W N 560.
33. Srischandra Nandi v. Rahatannessa Bibi, (1931) 18 A I R Cal 555=133 I C 670=58 Cal 825=53 C L J 46=35 C W N 220.

agreed, referred to the approval by the Judicial Committee in 42 Cal 72[24] of the dictum in 20 Cal 370[27] regarding the notice under S. 248 of the old Civil Procedure Code, and observed :

> This interpretation of the law has been applied to O. 21, R. 22, sub-r. (1), Civil P. C., since the Code of 1908 came into being, and it is perhaps too late to contend that in view of the insertion of sub-r. (2), nothing corresponding to which there was in S. 248 in the Code of 1882 what was under the Code of 1882 regarded as want of jurisdiction should now only be regarded as an irregularity, the effect of which would depend upon the circumstances of each particular case. In any event, no Court will perhaps have the courage to say until the Judicial Committee have another opportunity of considering the matter in the light of this sub-rule and of pronouncing an opinion in favour of this view ..... I have ventured to refer to this view merely because I find it very difficult to reconcile the view as to absolute want of jurisdiction with what the sub-rule says .....

I have already referred more than once to the Full Bench decision in 59 Mad 461.[23] The judgment-debtor in that case died a week before the date fixed for the sale and after his property had been attached in execution, the sale proclamation settled, and the order for sale passed. The decree-holder and his vakil were aware of the death, but no application was made under S. 50, Civil P. C., for leave to execute the decree against the legal representatives, and no notice was served on them in accordance with O. 21, R. 22. At the sale the property was purchased by a stranger. On an application by the legal representatives under S. 47 and O. 21, R. 90 it was held that the sale was void, and not merely voidable, for want of the notice. The judgments of the learned Judges contain an exhaustive discussion of the contrary view taken in Allahabad and Calcutta ever since the decision of Edge C. J. (in concurrence with the majority of his colleagues) in 12 All 440.[20] The decision was rested principally (1) on the authority in 42 Cal 72[24] approving 20 Cal 370[27] and (2) on general principles as to the effect of the death of a party or the jurisdiction of the Court, as there can be no execution against the mere "estate" of a deceased judgment-debtor. Cornish J. pointed out (at p. 473 of the report) that 42 Cal 72[24]

> was not a case of execution of a decree against the legal representative of a deceased judgment-debtor, and at the time the definition of legal representative 'as a person who in law represents the estate of a deceased person' had not been introduced into the Code.

The learned Judge however held that the matter was concluded by the approval in 20 Cal 370[27] a case in which (it is to be observed) the decree itself had been found to be fraudulent, and that the new sub-section operates to give a special power of dispensation, a view which I have already shown to be open to doubt. Varadachariar J. referred inter alia to the unsatisfactory way in which the placing together of the two classes of cases referred to in sub-r. (1) "as if they stood on the same footing for all purposes" had been dealt with in several decisions. Speaking with the utmost respect, it does not seem to me that the decision makes sufficient allowance for the peculiarities in 42 Cal 72[24] or for the effect of sub-s. (2) of O. 21, R. 22, to say nothing to Lord Thankerton's observations in 56 Mad 405,[25] while the circumstance that under O. 21, R. 90 (read strictly) an execution sale can only be set aside in certain conditions which did not obtain in the Full Bench case may partly have led to the decision (see p. 489 of the report).

I have ventured to refer to these considerations in particular, because they do not apply, as will be presently seen, to sales under our Public Demands Recovery Act. Even under the Civil Procedure Code, the view taken in 12 All 440[20] has been consistently followed in Calcutta and was followed in this Court in 6 P L T 67,[18] which was doubtless not referred to in the later decision in 11 Pat 241[19] because there was no question of any attachment pending at the death of the judgment-debtor in it. In 12 All 440,[20] Edge C. J. was of opinion that property under attachment must be considered as in the custody of the law. S. 234, Civil P. C., (corresponding to S. 50 of the Code now in force) was in his opinion, applicable only to cases in which, after the death of the judgment-debtor the decree-holder seeks to bring to sale property which was of the judgment-debtor in his lifetime, and which was not, at the time of his death, under attachment at the suit of the judgment-creditor. Having regard to the provisions of S. 276 (now our S. 64) the representative could not as against the judgment-debtor "duly" dispose of the property under attachment, and there was no reason to provide in S. 234 a means by which to ascertain the liability of the representative in respect of property under attachment at the suit of the judgment-creditor. The learned Chief Justice also referred to the absence of any Section in the Code which provided that the legal representative, any more than a stranger whose property is sold, was to get notice of the sale of

property under attachment, except as one of the public by the proclamation of the sale which is required under the Code. If this last consideration has lost some of its force since the Code of 1908, as pointed out in one of the recent Allahabad decisions, on account of the new provision for notice to be given to the judgment-debtor before drawing up the sale proclamation (see sub-r. 2 of O. 21, R. 66), it seems obvious that the omission of this notice, whether or not it may furnish a good ground for setting the sale aside under O. 21, R. 90, does not go to jurisdiction so as to render the sale a nullity.

After the decision of this Court in 6 P L T 67,[18] 12 All 440[20] was followed in 32 C W N 418,[34] which unlike 6 P L T 67,[18] was governed by S. 50 of the present Civil P. C. This was a case in which the judgment-debtor had died after service of the sale proclamation and the notice of attachment. The sale was held without bringing the representatives of the judgment-debtor on the record. Rankin C. J., considered the question whether the omission was more than an irregularity, and after referring to the decision of the Privy Council in 32 Cal 296,[35] followed the view taken in Calcutta decisions ending with 45 C L J 73[36] and also in a Madras case which has since been overruled by the Full Bench in 59 Mad 461,[23] and held that failure to bring the legal representatives on the record does not necessarily involve that the sale is not binding upon the heirs. The considerations set out by Edge C. J. in the case from 12 All 440[20] were referred to by Varadachariar J., in the Full Bench case from 59 Mad 461,[23] but taken to be insufficient to support the view that in such a case the absence of a notice to the legal representative does not make the execution sale null and void. We have however an unbroken course of decisions in these parts regarding cases where property under attachment is sold after the death of the judgment-debtor ; in 20 Cal 370[27] there was not attachment before the judgment-debtor's death.

It seems to me, moreover, that we are not called upon in these appeals, coming as they do under our present Public Demands Recovery Act, to decide whether the Madras view as regards O. 21, R. 22 should be adopted. For, in the first place, our Act, though passed in 1914, contains no provision much like that Rule. Unlike the Bihar Tenancy Act, which by S. 143 imports the Civil Procedure Code generally, it provides a complete procedure for the execution of certificates modelled on the Civil Procedure Code but not without several important departures from it. Under the former Public Demands Recovery Acts, a certificate duly filed had, in so far as regards the remedies for enforcing it, the force and effect of a decree of a Civil Court, but there is no such provision in the present Act. S. 46 of the Act gives exclusive jurisdiction for the purposes of execution of the certificate officer on much the same lines as S. 47, Civil P. C., but with the important difference that unlike sub-s. (3) of the later Section there is no provision empowering the certificate officer to determine the question whether any person is or is not the representative of a party for the purposes of the execution. The certificate officer is plainly not intended to deal with questions of title, but is to proceed (as a rule) against the right, title and interest of the certificate debtor ; and service of the notice prescribed by S. 7 operates, under S. 8, at once, and without any actual attachment, not only to render any private transfer of his interest in any immovable property void against any claim enforceable in execution of the certificate but also to charge upon it the amount recoverable under the certificate, and does all this even before the certificate debtor has had any opportunity of being heard—a good indication of the summary character of the special procedure provided by the Act.

The Act is confined to the recovery of public demands, as defined in S. 3 (b), and these are demands of a character which cannot be resisted on such grounds, as for instance, that the certificate debtor was not justified by family necessity in subjecting himself to them. Part IV of the Act carefully shuts out the jurisdiction of the Civil Courts to interfere except in certain specified contingencies. No certificate "duly filed" under the Act can be cancelled or modified by a Civil Court, even if the alleged debt was wholly or in part not due from the certificate debtor, unless (speaking generally) he has first urged that ground before the certificate officer, and in the case

34. Tarangini Debi v. Raj Krishna Mondal, (1928) 32 C W N 418=115 I C 520.
35. Khiarajmal v. Daim, (1905) 32 Cal 296 = 32 I A 23=9 C W N 201 = 1 C L J 584 = 8 Sar 734 (P C).
36. Hara Prasad v. Gopal Chandra, (1927) 14 A I R Cal 315=100 I C 997=31 C W N 299= 45 C L J 73.

of the demands mentioned in the first two Articles of Schedule I also paid those demands within a limited time if he should have been served with the notice under S. 7. Nor can the sale be set aside in such a suit without a direction for the refund of the purchase money to the certificate purchaser.

It is also to be observed that the charge created by S. 8 (b), which goes much further than, say, the charge we find in S. 65, Bihar Tenancy Act, can only be enforced in the certificate proceedings. The interest of the certificate debtor is thus at the disposal of the certificate officer in a much higher sense than the interest of the judgment-debtors in 42 Cal 72[24] could be said to have been at the disposal of the executing Court. The powers of the certificate officer as regards the execution of certificates are also on a very different footing from those of an executing Court. He can, in particular, set aside sales on grounds not to be found in O. 21, R. 90, confined as the latter is to material irregularities in publishing or conducting sales. (I am here leaving out fraud because our Act expressly saves this for the Civil Court.) S. 29 (1) authorizes the certificate officer to set aside a sale on the ground of a material irregularity in the certificate proceedings as well, and also on the ground that notice was not served under S. 7. If any notice is to be regarded as vital to the proceedings of the certificate officer, one would have thought that it is the notice under S. 7 to the certificate debtor. And yet Ss. 29 and 45 make it quite clear that even this notice does not go to the jurisdiction of the certificate officer to sell the property of the certificate debtor. For, under S. 29, a certificate sale can be set aside on the ground that the notice was not served only if the certificate debtor pays the amount found due from him, while S. 45 expressly provides that no sale of immovable property in execution of a certificate shall be held to be void on such a ground, but that a suit may be brought in a Civil Court to recover possession of such property or to set aside such sale on that ground, subject, however, to two provisos which bring into relief the point that I am now elaborating. In the first place, the suit must be brought not more than one year after the delivery of possession to the purchaser—a condition that is not satisfied in our Suit No. 66; and secondly, no such suit can be entertained if the certificate debtor has appeared in the certificate proceedings or applied under S. 28.

It seems to me from all this that the certificate officer's jurisdiction to sell is founded in a "duly filed" certificate, and not on the actual existence of the certificate debt nor on the service of the notice under S. 7 on the certificate debtor himself. As to any notice to the legal representatives of a deceased certificate debtor, the omission of any provision like O. 21, R. 22, recalls Edge C. J.'s observations in 12 All 440[20] with additional force derived from the special scheme of our Act (as already pointed out); and it seems to me impossible, from any point of view, to place such a notice on a higher footing than the notice to the certificate debtor. Having regard to what may be called the irresistible character of the demands enforcible under the Act and to the fact that demands of revenue and rent are, even apart from the Act, charged upon the properties concerned, the Legislature appears to have provided by this Act a special procedure by way of execution against the properties themselves, taking care, as it has done in S. 29 (2), to empower the certificate officer (subject to appeal to and revision by the higher revenue authorities) to entertain applications for setting sales aside (on payment of the amounts found due) without limit of time if there should be reasonable grounds for so doing.

It is no doubt true, in general, that it is against all principles to proceed against a party until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually; but even under the Civil Procedure Code, it is possible in extreme cases for a party to find himself bound by orders passed behind his back. In 25 Bom 337,[22] the true heirs of the deceased judgment-debtor lost their right to redeem the mortgage by reason of an execution sale to which, on account of an erroneous order of the executing Court, they were no parties. 45 C L J 73[36] like some earlier rulings, was a case under the (Bengal) Public Demands Recovery Act. On the whole, I can see no good reason why we should depart from our unbroken course of decisions, on the strength of which many titles must have been acquired by bona fide purchasers under the summary procedure provided by the Public Demands Recovery Act, by allowing a challenge to the jurisdiction of the certificate officer on a ground which, assuming the Madras decisions to be right, will have to be imported into the Public Demands Recovery Act on general considerations. My conclusion on this part of the case therefore is that 11 Pat 241,[19]

so far as it might seem to express a view different from that taken in 6 P L T 67,[18] is inapplicable to the facts of the present cases and that it is sufficient to say that the trial Court was right in following the decisions in 6 P L T 67[18] and 45 C L J 73.[36] I would hold, differing from the lower Appellate Court, that the sales were not void in respect of the share of Bibhuti.

The last contention on behalf of the appellants is that if, as the lower Courts have held, all the eleven plaintiffs except three that we are now dealing with were estopped in two suits other than Title Suit No. 66, the declaration given by the Court should have been, not that the certificate sales affected only the shares of the certificate debtors named in the certificate proceedings, but that the right, title and interest of the three excepted plaintiffs are not affected by the certificate sales in those two suits. This contention must plainly be accepted. Those three plaintiffs will also be entitled to a similar declaration in Title Suit No. 66. The result is that I would allow these appeals in part and modify the decrees of the lower Appellate Court as indicated. I would also give the appellants their costs of this appeal in proportion to their success.

Manohar Lall J. — I have had the advantage of seeing in advance the judgment prepared by my learned brother Dhavle J. I agree to the terms of the orders which he proposes to make in these appeals; but I reserve to myself the right to examine, when an appropriate occasion arises, the correctness of the proposition that a certificate officer while proceeding to enforce a certificate under the Bihar and Orissa Public Demands Recovery Act (4 of 1914) has jurisdiction to sell the estate of, or the right, title and interest of, a certificate debtor who has died between the date of the service of notice on him under S. 7 of the Act and the date of the actual sale without the issue of a notice to his legal representative. This question, as I shall show just now, does not properly arise for decision in these appeals. Two appeals arose out of Suits Nos. 65 and 67 in which the facts are similar and concern a certificate which was issued for the realisation of rent for 1337 Fasli. Notices under S. 7 were served on 6th November 1930, and the sales were actually held on 23rd March 1931. It has been found as a fact that one of the certificate-debtors, Bibhuti, had died on 4th January 1931, and therefore before the sale was actually held. On 23rd March 1931 objections to the sale were filed under S. 29 of the Act by a number of certificate debtors or their representatives including the heirs of Bibhuti. On 6th July 1931, the parties entered into a compromise with the auction-purchaser and promised to pay the amount fixed by the compromise by 22nd December 1931, failing which they agreed that the sales should be confirmed. As no payment was made the sales were confirmed on 22nd December 1931. These sales were set aside subsequently by the Collector, whose order was affirmed by the Commissioner, but the Board of Revenue reversed the decision of the Collector and the Commissioner and confirmed the sales. It is clear from this narrative of events that the sales cannot be set aside so long as the compromise entered into by the parties dated 6th July 1931 is not successfully impeached. As no argument has been advanced that the compromise entered into was fraudulent, I am of opinion that the appellants cannot have the sales set aside. I therefore agree with the order which is proposed to be passed in the appeals arising out of these suits though on different grounds.

The appeal which arises out of Suit No. 66 concerns the realization of arrears of rent for 1336 Fasli by means of a certificate which was filed on 20th August 1931. The notice under S. 7 was served on 12th September of the same year. The sale which was held on 12th May 1930 was set aside and a new sale was ordered which took place on 26th January 1931, after the death of Bibhuti on 4th January 1931. The delivery of possession to the auction-purchaser was made on 3rd January 1932, and the present suit was instituted on 4th April 1934, for a declaration that the sale is void and did not affect the interest of the appellants including the heirs of Bibhuti, and in effect for recovery of possession of the properties sold, mainly on the ground that the sale was void because the notices required by S. 7 had not been served. S. 52 of the Act provides the procedure that should be observed when a certificate-debtor has died before the certificate has been fully satisfied, as in this case. That procedure is that the certificate-officer after serving upon the legal representative of the deceased a notice in the prescribed form can proceed to execute the certificate against such legal representative; and the provisions of this Act shall apply as if such legal representative were the certificate-debtor and as if

such notice were a notice under S. 7. In this case the procedure prescribed by S. 52 was admittedly not followed. The legal representative of the deceased Bibhuti, therefore had a right to institute a suit for recovery of possession or for a declaration that the sale should be held to be void on the ground that the notice provided by S. 52 had not been served upon him after the death of Bibhuti. That notice is declared by the statute to be a notice under S. 7. It will be noticed from the dates which I have given above that the present suit has been instituted beyond one year from the date on which the possession of the property was delivered to the auction-purchaser. That being so, the suit of the appellants as the legal representatives of Bibhuti cannot be entertained by reason of the proviso to S. 45 which enacts that

> no such suit shall be entertained if instituted more than one year from the date on which possession of the property was delivered to the purchaser.

For these reasons I agree with the order that is proposed to be passed in this appeal although I have arrived at the same conclusion on a different ground.

Harries C. J. — I have had the advantage of seeing the judgment to be delivered by Dhavle J. and agree to the order which he proposes to make. I however agree with Manohar Lall J. that the question whether a certificate officer has jurisdiction to sell the estate of, or the right, title and interest of, a certificate-debtor who has died between the date of the service of notice on him under S. 7, Bihar and Orissa Public Demands Recovery Act, and the date of the sale does not arise in this case. As at present advised, I am not satisfied that a certificate officer has such jurisdiction and I prefer to refrain from expressing a definite opinion until the facts of the case make it necessary for me to do so.

D.S./R.K. *Decrees modified.*

*** A. I. R. 1940 Patna 341**

ROWLAND AND CHATTERJI JJ.

Prahlad Chandra Singh —*Plaintiff* — Appellant.

v.

Bhim Mahto and others — *Defendants* — Respondents.

Appeal No. 67 of 1938, Decided on 15th September 1939, from appellate decree of District Judge, Manbhum, D/- 27th September 1937.

*** (a) Civil P. C. (1908), O. 22, R. 3; O. 41, R. 4 and O. 1, R. 13—Decree in partition suit—Appeal by all defendants on common grounds — Death of one appellant pending appeal — Appeal can be heard and allowed in absence of legal representatives of deceased — Appeal heard before expiry of prescribed time for substitution — Respondent cannot raise objection for first time in second appeal.**

Where all the defendants in a partition suit appeal from the decree on grounds common to them all and one of them dies during the pendency of the appeal, the surviving appellants can continue the appeal under O. 41, R. 4 without the legal representatives of the deceased being substituted: *27 Bom 284; 25 All 27; AIR 1918 Mad 794 and A I R 1934 Cal 703, Rel. on; A I R 1935 Pat 241; A I R 1926 Cal 741 and A I R 1928 Cal 184, Disting.* [P 342 C 2; P 343 C 2]

Where the appeal is heard and decided within the prescribed period for substitution, the heirs of the deceased can complain, if the result of the appeal has been to their detriment, that the Court should not have heard the appeal without waiting for the prescribed time for substitution. But the respondent to the appeal who has not objected to the defect of parties in the lower Appellate Court is precluded from raising it for the first time in second appeal by reason of O. 1, R. 13. [P 343 C 1; P 346 C 1]

(b) Practice — Judgment — Probative value of finding in previous suit.

The question as to the probative value of a finding in a previous suit which does not operate as res judicata in a subsequent suit depends on the nature of the finding and of the issues involved in the two different suits. [P 344 C 2]

S. M. Mullick and S. C. Mazumdar — *for Appellant.*

B. C. De, N. N. Ray and Sambhu Barmeshwar Prasad — *for Respondents.*

Chatterji J. — This is an appeal by the plaintiff who brought a suit for partition of a rent-free tenure consisting of village Mirdih in the District of Manbhum. The village has been recorded in the Record of Rights published in 1920 as comprised of 24 khewats, namely Khewats Nos. 2-1 to 2-24. The tenure formerly belonged to a family of three brothers Buchu, Dakshin and Gandhu. In course of time, the shares of all these brothers passed into the hands of outsiders. On 23rd September 1935, the plaintiff who is the landlord of the village purchased the two-thirds interest of the first two brothers in execution of three decrees for arrears of cess obtained against the recorded tenure-holders. The defendants on the other hand originally obtained a mokarrari lease of Gandhu's one-third share but subsequently purchased that share at an execution sale on 30th August 1890. The position therefore is that the plaintiff is now the holder of the two-thirds share of Buchu and Dakshin and the defendants of the one-third share of Gandhu. The suit

was defended mainly on the grounds : (1) that there was a previous partition between the three brothers Buchu, Dakshin and Gandhu long ago; (2) that the plaintiff's purchase of the two-thirds share of Buchu and Dakshin was not valid as the decrees for cess were "without jurisdiction" and null and void;" and (3) that the defendants acquired partly by settlement and partly by purchase some lands from the branches of Buchu and Dakshin and have been in possession of those lands adversely for a long time.

The learned Subordinate Judge tried the suit, overruling all these defences, passed a preliminary decree for partition. On appeal by the defendants the learned District Judge has reversed the decree except with regard to the lands recorded in ijmal Khewat No. 2-24 area 21.99 acres. Hence this second appeal by the plaintiff.

The first point raised by Mr. S. M. Mullick on behalf of the appellant is that the appeal before the District Judge was not competent. It appears that during the pendency of that appeal one of the appellants, Rakhal Mahto, who was defendant 5 died on 18th July 1937 and without his heirs being brought on the record, the appeal was decided on 27th September 1937, that is to say within the period allowed for substitution. Mr. Mullick's contention is that after the death of Rakhal the appeal could not proceed in the absence of his heirs because in a partition suit all the co-sharers are necessary parties. He relies on the cases in 16 P L T 308,[1] A I R 1926 Cal 741[2] and 32 C W N 299.[3]

In the Patna case a suit for partition having been dismissed the plaintiffs appealed and during the pendency of the appeal one of the respondents died and no substitution of his heirs having been made within the prescribed period the appeal stood abated against him. The question then arose whether the appeal could proceed against the remaining respondents. It was held that it could not, because no decree for partition could be passed in the absence of any co-sharer.

In A I R 1926 Cal 741[2] it was laid down that an appeal in a partition suit is incompetent unless all persons interested are made parties to the appeal either as appellants or respondents. There a suit for partition having been decreed, some of the defendants preferred an appeal without impleading the plaintiffs as parties as the contest was limited to the question of shares as between the defendants inter se. The appeal was held to be incompetent for want of necessary parties. Though the plaintiff's share might not have been disputed, the object of the appeal was to obtain a decree for partition after determining the shares of the defendants inter se. This case therefore is only an illustration of the principle that no effective decree for partition can be passed unless all the co-sharers are before the Court.

In 32 C W N 299[3] the suit was one under S. 106, Ben. Ten. Act, for correction of the Record of Rights on the allegation that the rent was really Rs. 7 and not Rs. 10 as entered in the record. The suit was dismissed by the trial Court and on appeal it was decreed. The landlord-defendants then appealed to the High Court. During the pendency of the appeal in the High Court one of the appellants died and his heirs not having been substituted, the appeal abated so far as he was concerned. The respondents then contended that the whole appeal must fail. This contention was accepted on the ground that if the appeal were allowed to proceed as regards the surviving appellants and ultimately it succeeded, the result would be that there would be two contradictory decrees, one which stood against the deceased appellant declaring that the rent was Rs. 7 and the other which would be passed in favour of the surviving appellants to the effect that the rent was Rs. 10. Malik J., one of the Judges who decided the case, observed that the true test for determining whether the appeal is competent after partial abatement is whether, having regard to the nature of the suit and the decree made, the appeal can be heard in the absence of the heirs of the deceased appellant. The position in the present case is different. The trial Court passed a decree for partition and that decree was challenged in appeal by all the defendants. The decree proceeded on grounds common to them all and so also were their grounds of appeal. They were therefore entitled to the benefit of O. 41, R. 4, Civil P. C., which runs as follows :

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1. Churaman Mahto v. Bhatu Mahto, (1935) 22 A I R Pat 241=154 I C 856=16 P L T 308.
2. Mahammad Abjal v. Hafizannessa Khatun, (1926) 13 A I R Cal 741=91 I C 567.
3. Naimuddin Biswas v. Maniruddin Laskar, (1928) 15 A I R Cal 184 = 107 I C 726 = 32 C W N 299=47 C L J 82.

> Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants, may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

It is no doubt true that in a suit for partition no decree can be made in the absence of any cosharer. But it does not follow that a suit for partition cannot be dismissed against an absent defendant. Here the purpose of the appeal was to obtain a reversal of the decree for partition and dismissal of the suit. This purpose could be gained by the surviving appellants continuing the appeal after Rakhal's death. Indeed the heirs of Rakhal could complain, had the result of the appeal been to their detriment, that the Court should not have heard the appeal without waiting for the prescribed time for substitution. The plaintiff however cannot make any grievance out of this. In this connexion reference may be made to the cases in 27 Bom 284,[4] 25 All 27,[5] 40 Mad 846[6] and 61 Cal 879.[7] The facts in the Bombay case were that a suit for partition having been decreed, two of the defendants filed a joint appeal and pending its hearing one of them died without her representative being brought on the record. The surviving appellant proceeded with the appeal which was ultimately allowed and the suit was dismissed. On second appeal by the plaintiffs, it was contended that the lower Appellate Court ought not to have heard the appeal as it had abated. This contention was overruled and it was held that as the two defendants had appealed on grounds common to them both, the Court had power to hear the appeal and deal with the whole suit.

The suit in 25 All 27[5] was also a suit for partition. The suit was decreed by the trial Court and on appeal by the defendants one of them died pending its hearing and her heir not being substituted within time, the appeal, so far as she was concerned, abated. The contention was raised that the whole appeal abated. This contention was given effect to; but on second appeal the High Court overruled it. The case in 40 Mad 846[6] related to a suit by Hindu reversioners for recovery of possession of properties said to have been improperly alienated during the lifetime of the limited owner. The suit having been decreed, some of the defendants appealed. Two of the appellants died and their representatives were not brought on the record. It was contended that the appeal, having abated so far as those two were concerned, could not proceed as regards the surviving appellants. This contention was overruled and their Lordships said:

> The grounds of appeal in which the appellants have succeeded are common to all the appellants and we think the terms of O. 41, R. 4, Civil P. C., are wide enough to cover this case and enable this Court to set aside the decree as regards the whole of the plaintiffs' claim and not merely in respect of the interest of these appellants whose appeals have not abated.

In 61 Cal 879[7] which related to a suit for ejectment, the question arose whether an appeal which was preferred by the defendants could proceed after partial abatement due to the death of some of them. Their Lordships, applying the provisions of O. 41, R. 4, Civil P. C., held that the appeal could proceed at the instance of the surviving appellants. They however accepted as correct the statement of law made by Mallik J. in 32 C W N 299[3] that the true test is whether the appeal can be heard in the absence of the appellant who is dead. The principles deducible from all these decisions including those cited by Mr. Mullick may be thus stated: (1) In a partition suit no effective decree can be made unless all the co-sharers are before the Court. (2) In an appeal from a decree, which proceeds on grounds common to all the appellants, if there is partial abatement owing to the death of some of them, the surviving appellants may continue the whole appeal. (3) Where the decree appealed from is of such a nature that the hearing of the appeal after partial abatement may result in the passing of two inconsistent decrees, the whole appeal must fail. In the present case there was no abatement of the appeal on the death of Rakhal, because before the time for abatement came, the appeal was heard and decided. The whole appeal was still pending and the question is whether the Court could hear it in the absence of Rakhal's heirs. The answer to this is to be found in the second of the above-stated principles which may very well be applied here, though it is not a case of any abate-

4. Chintaman Nilkant v. Gangabai, (1903) 27 Bom 284=5 Bom L R 90.
5. Ram Sewak v. Lambar Pande, (1902) 25 All 27 =1902 A W N 171.
6. Somasundaram Chettiar v. Vaithilinga Mudaliar, (1918) 5 A I R Mad 794=41 I C 546=40 Mad 846.
7. Satulal Bhattacharjee v. Asiruddi Shaikh, (1934) 21 A I R Cal 703=154 I C 147=61 Cal 879=38 C W N 743=59 C L J 362.

ment. The contention that the appeal was incompetent must therefore be overruled.

Coming to the merits of the appeal, it is necessary to mention certain facts. Out of the twenty-four Khewats Nos. 2-1, 2-13 and 2-22 appear to have been recorded separately in the names of the plaintiff's predecessors-in-interest and No. 2-24 is recorded ijmal. Almost all the remaining twenty, covering a total area of 284.10 acres, were recorded in the names of the representatives of the third branch. The plaintiff in execution of his decrees for arrears of cess purchased khewats Nos. 2-1, 2-13, 2-22 and 2-3rds share in the ijmal khewat No. 2-24. According to the defendants they acquired by settlement or purchase some of the lands from the branches of Buchu and Dakshin. These lands, it is said, form part of 284.10 acres included in the remaining twenty khewats. The plaintiff claims that he purchased the undivided 2-3rds share of Buchu and Dakshin in the entire village and is therefore entitled to partition of the lands comprised in all the twenty-four Jhewats. The learned District Judge has dismissed his claim for partition except with regard to the lands of Khewat No. 2-24 on the finding that there was a previous partition. Apparently, this is a finding of fact, but Mr. Mullick wants to assail it on the ground that in coming to this finding the learned District Judge has committed an error of law. He argues in the first place that the learned Judge has merely relied on the entries in the Record of Rights, but those are not conclusive proof of partition. The learned District Judge's judgment however shows that in dealing with the question of previous partition, he considered the various documents in detail and after having done so came to the following conclusion :

> Broadly speaking the documentary evidence shows that for the last 90 years or so there has been separate possession of lands, and each branch of the family dealt exclusively with the lands in their own possession.

He therefore held that at least as regards the lands recorded separately, there could be no re-partition. There is no error of law in this finding. It is next contended that the learned District Judge did not take a correct view of the effect of a judgment in previous suit inter partes. That suit was brought in 1895 by the predecessors-in-interest of some of the present defendants for a declaration of their exclusive title to a tank on the ground that it was included in their share which was allotted to them by partition which took place long ago, this partition being the same as that alleged in the present suit. On a reference to the appellate judgment Ex. 7, it appears that the Appellate Court dismissed the suit mainly on the ground that the plaintiffs failed to discharge the burden of proving that they had title to the disputed tank. In the present suit the trial Court took the view that the decision in the said suit of 1895 operates as res judicata. The learned District Judge has dissented from that view but it is said that the reasons given by him are not supportable in law. This may be so, but it is clear that the previous decision cannot operate as res judicata for the simple reason that the previous suit was decided by a Munsif's Court which had no jurisdiction to try the present suit. Mr. Mullick then contends that although the previous decision may not operate as res judicata, it is a very strong piece of evidence. In support of this contention, he relies on the Privy Council decision in 48 Cal 460[8] and refers to the following passage:

> Their Lordships do not consider that this will found an actual plea of res judicata, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform.

This decision must be read with reference to the facts of that case. The question as to the probative value of a finding in a previous suit depends on the nature of the finding and of the issues involved in the two different suits. In the present case, the judgment of the trial Court in the suit of 1895 has not been produced and we do not know what were the issues framed there. Looking to the Appellate Court's judgment, Ex. 7, it appears that the real question for consideration in the present suit was not at all in issue in the earlier suit. As I have already pointed out, the Appellate Court dismissed the suit on the finding that the plaintiffs failed to discharge the burden of proving their title. The broad question as to whether there was a partition of the entire village does not appear to have been considered or decided. The previous decision therefore is hardly of any assistance in the present suit. This is the view which the learned District Judge has apparently taken and there is nothing wrong in it.

8. Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy, (1922) 9 A I R P C 241=64 I C 231=48 I A 49=48 Cal 460 (P C).

Mr. Mullick next attacks that part of the judgment of the District Judge where he says that even if it were held that there had been no partition, this suit cannot succeed in its present form. In dealing with this aspect of the case, it is said, the District Judge lost sight of the distinction between the landlord's interest and the tenancy right with respect to those lands of which the defendants took settlement from the two branches of Duchu and Dakshin. Mr. Mullick's argument is that in those lands the defendants have only tenancy right while the plaintiff has the superior interest, and the claim for partition being in respect of the superior interest, there is no reason for refusing partition of those lands. Indeed, the learned District Judge's observations in this connexion may be open to some criticism ; but the question does not arise in view of his finding that there was a previous partition. What he really means is that if the plaintiff has any superior right in respect of the lands which are in the possession of the defendants in tenancy right, the plaintiff may seek his remedy otherwise but not in a simple suit for partition. A further question was raised as to what was the effect of the sales in execution of the decrees for cess. On the one hand, it was contended that they had the effect of rent sales under the provisions of S. 208, Chota Nagpur Ten. Act; on the other hand, that they were sales in execution of money decrees. This question is of no consequence because the suit must fail on the ground that there was a previous partition. The appeal must therefore be dismissed with costs.

Rowland J.—I agree, and on the merits of the appeal have nothing to add. But, on the preliminary point that it was not competent to the District Judge to decide the appeal in the absence of the legal representatives of defendant 5, Rakhal, I may indicate my view, as the point is of some importance. Mr. Mullick for the appellants sought to bring the matter within the rule that a decree against a dead man is void ; and relied on O. 22, R. 3 and the decisions under that rule. He argued that in a partition suit as in a mortgage suit all the persons having an interest in the property are not only proper but necessary parties ; and that in the absence of any one of such parties, no new decree could be passed in appeal changing the title or status of the absentee, as declared by the Court below. Where the absentee is a respondent, there is abundant and uniform authority for saying that the decree cannot be changed to his disadvantage without his having an opportunity of being heard ; and in cases where an appeal has become defective through the death of a respondent, (he being a necessary party to the suit) it has always been held that such an appeal cannot proceed in the absence of his heirs. The appeal having abated against the deceased is no longer properly constituted and the whole appeal must fail. This was, for example, the position in 24 C W N 44,[9] a decision the correctness of which I have no wish to question. Following this decision in 32 C W N 299,[3] the same rule was applied to the case where the deceased had been an appellant. It was said that the appeal of the deceased having abated, the appeal in his absence was incompetent and could not proceed : it was said that the appeal of one appellant being dismissed that of the remainder could not be allowed for the result would be that there would be contradictory judgments on the same point.

But the position where the constitution of a suit or appeal has become defective through the death of a defendant or a respondent against whom relief being claimed, has in other decisions been distinguished from the case where the consequences of the death of an appellant are to be considered. In the latter case, it has been held the surviving appellants can invoke the aid of O. 41, R. 4, of the Code, if the decree appealed from proceeds on a ground common to all the plaintiffs or to all the defendants. The condition was fulfilled here. The decision in 32 C W N 299[3] was considered in a later case of the same High Court in 61 Cal 879,[7] where it was held that the appeal did not abate as a whole and that, the appeal succeeding, the appellate decree enured for the benefit of all the appellants including the deceased. The judgment approves the decision in the Madras High Court in 40 Mad 846,[6] which followed earlier decisions in 25 All 27[5] and 27 Bom 284.[4] The same principle has been applied to an appeal in a mortgage redemption suit in 2 Rang 486.[10]

I am of opinion that we ought to follow those decisions, that O. 41, R. 4 gives a discretionary power to an Appellate Court

9. Kalidyal Bhattacharjee v. Nagendra Nath Pakrasi, (1920) 7 A I R Cal 264=54 I C 822 = 24 C W N 44=30 C L J 217.
10. Maung Byaung v. Maung Shawe Baw, (1924) 11 A I R Rang 376=84 I C 170=2 Rang 486.

to save the rights of parties from being defeated by a purely technical objection, and that this was a case within both the letter and the intention of the Rule. In the case before us, it is to be noted that the appeal to the District Judge can in no sense be held to have abated because it was disposed of before the expiry of the time prescribed for making an application to substitute the heirs of the deceased. No objection as to defect of parties was taken at the hearing before the District Judge; if it had been taken, there was time to remedy it. In the memorandum of appeal to this Court, no mention is made of this alleged defect in the constitution of the appeal before the lower Appellate Court; and I think it relevant to refer to O. 1, R. 9 and O. 1, R. 13. O. 1, R. 9 lays down the principle that :

> No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

The principle is subject to necessary exceptions; but it seems to be the declared policy of the Legislature to limit rather than to enlarge these. And O. 1, R. 13, says that:

> All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity . . . . and any such objection not so taken shall be deemed to have been waived.

G.N./R.K. *Appeal dismissed.*

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* * A. I. R. 1940 Patna 346
FULL BENCH

HARRIES C. J., WORT AND MANOHAR LALL JJ.

Ramphal Sahu and others — *Defendants* — Appellants.

v.

Babu Satdeo Jha and another — *Plaintiffs* — Respondents.

Appeal No. 232 of 1936, Decided on 15th April 1940, from original decree of Sub-Judge, Muzaffarpur, D/- 30-9-1936.

*** * Civil P. C. (1908), O. 22, R. 3 and O. 41, R. 4—Appeal by all plaintiffs or defendants from decree proceeding on ground common to all—One of them dying—No substitution made within time — Appellate Court cannot reverse or vary decree in favour of all appellants :** *19 Pat 172=A I R 1940 Pat 341=185 I C 685, Overruled.*

By reason of the provisions of Rr. 3 and 11, of O. 22 the appeal in so far as it concerns the deceased appellant abates and as the abatement, if not set aside, has the force of a decree, the matter becomes final as against the deceased appellant. There is nothing in O. 41, R. 4 which permits the Court to disturb that finality of the decree as against the deceased appellant. The words "and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be" in O. 41, R. 4 suggest that all the plaintiffs or defendants are alive at the time when the decree of the Appellate Court is passed. The wording is not appropriate to a case where one of the plaintiffs or defendant-appellants has died during the pendency of the appeal. Hence, the Appellate Court has no power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under O. 41, R. 4, if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time and the application for setting aside the abatement, so far as the deceased appellant is concerned, has been refused assuming that the decree appealed from proceeded on a ground common to all the plaintiffs or defendants: *Case law reviewed*; *19 Pat 172=A I R 1940 Pat 341=185 I C 685, Overruled.* [P 346 C 2; P 347 C 2; P 348 C 1; P 351 C 1; P 352 C 1]

P. R. Das, Balaram Kumar Sinha and Prem Lall — *for Appellants.*

P. C. Manuk, Rati Kant Chaudhuri, Ramanugrah Narayan Sinha, Hareshwar Prasad Sinha and P. Jha — *for Respondents.*

OPINION

Harries C. J. — This is a reference to a Full Bench in which the following question has been submitted :

> Has the Appellate Court power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under O. 41, R. 4, Civil P. C., if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time and an application for setting aside the abatement, so far as the deceased appellant is concerned, has been refused, always assuming that the decree appealed from proceeded on a ground common to all the plaintiffs or defendants ?

On 7th July 1924, plaintiff 1 executed a mortgage bond for Rs. 1500 carrying interest at the rate of two per cent. per mensem with six monthly rests in favour of one Pandit Kapileshwar Missir, a pleader practising in the Courts at Laheria Sarai. On 16th October 1924, he executed another mortgage for Rs. 2000 with interest at two per cent. per mensem with quarterly rests in favour of the same mortgagee. On 14th May 1925, he executed a third mortgage for Rs. 2500, with interest at Re. 1-8-0 per cent. with annual rests in favour of the same mortgagee, and on 26th May 1926 he executed a fourth mortgage in favour of the same person for Rs. 7000 with interest at one per cent. per mensem with six-monthly rests. In all these four mortgages, the property mortgaged was an eight annas share in mauza Nebahi. In order to redeem these bonds, plaintiff 1 sold five annas out of the eight annas share in village Nebahi already mortgaged to the four defendants on 30th June 1929 for a sum of Rs. 27,737. He left with the purchaser a sum of Rupees

4658-12-6 to redeem the first bond, Rs. 3695 for the second bond, Rs. 3033-10-0 for the third and Rs. 12,592-2-0 for the fourth bond. The four defendants redeemed the first two bonds and not the third and fourth. It transpired that plaintiff 1 had not left sufficient money to redeem the third bond, as the parties were apparently under a mistaken belief that this bond was for Rs. 1500, whereas in fact it was for Rs. 2500. On 20th November 1933 plaintiff 1 sold a further one anna share of his eight-anna interest in mauza Nebahi to the four defendants for Rs. 2500, and it is conceded that the four defendants had after this sale sufficient funds to discharge the third and fourth mortgages. They however failed to do so, and eventually this suit was instituted praying that the liability of the four defendants be assessed at Rupees 33,070-4-2½ and further that it might be ordered by the Court that within a period to be fixed the defendants should pay to Pandit Kapileshwar Missir or should deposit in his name in Court the said sum of Rs. 33,070-4-2½ and cause the mortgage bonds to be filed in Court. In case of failure to pay the said debt in the manner indicated above, a money decree was prayed for the said sum.

The learned Subordinate Judge passed a decree in favour of the plaintiffs against all four defendants Ramphal Sahu, Ramkhelawan Sahu, Ramnarain Sahu and Bhola Sahu. Against this decree the four defendants appealed to this Court. During the pendency of the appeal, Ramnarain Sahu died, and no steps were taken within the prescribed period to bring the names of his heirs or personal representatives on to the record. Later an application was made to set aside the abatement ; but this application was rejected by a Bench of this Court. The remaining three defendants thereupon prosecuted the appeal. On the appeal coming on for hearing before a Bench of this Court, counsel for the respondents took a preliminary objection that the appeal was incompetent and that by reason of the failure to bring on to the record the names of the personal representatives of Ramnarain Sahu the whole appeal had abated. On behalf of the appellants, it was contended inter alia that the three appellants could continue the proceedings by reason of the provisions of O. 41, R. 4, Civil P. C. The Bench which heard the case was of opinion that the point involved was one of difficulty and importance and referred the matter to the Chief Justice for the constitution of a Full Bench. The question has therefore been heard by the present Bench. O. 41, R. 4, Civil P. C., is in these terms :

> Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

It is conceded by both parties that the decree in this case against the four defendants proceeded on the ground common to all. It was contended on behalf of the appellants that this rule applied not only to a case where one or more of a number of defendants had appealed but also to a case where all the defendants had appealed and one of them had died during the pendency of the appeal. It was argued that there was no difference whatsoever in principle between the case of some only of the defendants appealing and the case where all had originally appealed and one had died during the pendency of the appeal and no steps had been taken to bring the names of the heirs or personal representatives of the deceased appellant on to the record.

The wording of O. 41, R. 4, Civil P. C., suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The rule lays down that in such a case the Court may reverse or vary the decree in favour of all the plaintiffs or defendants in the suit as the case may be, provided that the decree appealed from proceeded on any ground common to all the plaintiffs or defendants. The words "and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be," suggest that all the plaintiffs or defendants are alive at the time when the decree of the Appellate Court is passed. The wording of the rule does not appear to me to be appropriate to a case where one of the plaintiffs or defendant-appellants has died during the pendency of the appeal. A plaintiff or defendant-appellant who has died during the pendency of the appeal can no longer be regarded as a plaintiff or defendant in the suit, and the rule does not state in terms that the decree may be reversed or varied in favour of all the plaintiffs or defendants or their personal representatives or representatives-in-interest. The reversal or variation can only be made in favour of

the plaintiffs or defendants and that suggests that it cannot be made in favour of the personal representatives of a deceased plaintiff or defendant. O. 22, Rr. 3 and 4, Civil P. C., deal with cases of plaintiffs and defendants dying during the pendency of a suit, and O. 22, R. 11 makes the provisions of O. 22, R. 3 applicable to cases of appellants dying during the pendency of an appeal. O. 22, R. 3 reads as follows :

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-r. (1), the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

As I have stated, this rule has been made applicable to appeals and therefore where one of the appellants dies and the right to prosecute the appeal does not survive to the surviving appellant or appellants alone, the Court on an application made in that behalf shall cause the legal representatives of the deceased appellant to be made a party and shall proceed with the appeal. But where within the time limited by law no application is made to bring the names of the representatives of the deceased appellant on to the record the appeal shall abate so far as the deceased appellant is concerned. In the present case, the right to appeal did not survive to the surviving appellants alone. The representatives of the deceased appellant could undoubtedly have joined in the prosecution of the appeal.

This rule is therefore applicable to the present case and the appeal abated in so far as the deceased appellant was concerned. The decree which had been passed against him became final as the Court on application made to it refused to set aside the abatement. It is to be observed that O. 22, R. 3 is silent as to the ultimate fate of the appeal. All it states is that the appeal abates in so far as the deceased appellant is concerned. It has however been laid down by all the Courts in India that the appeal will in these circumstances abate as a whole if the case is of such a nature that the appeal cannot proceed in the absence of the legal representatives of the deceased appellant. This Bench however is only concerned with the question whether the remaining appellants can successfully prosecute this appeal by reason of O. 41, R. 4, Civil P. C. If that rule applies, it seems clear that the appeal will not abate as a whole. However, even if O. 41, R. 4, Civil P. C., does not permit the appellants to continue to prosecute the appeal it does not follow that the appeal abates as a whole. The present reference is only concerned with the question whether O. 41, R. 4, Civil P. C., allows the remaining appellants to prosecute the appeal and not with the question whether on other grounds the appeal can or cannot proceed. O. 22, Civil P. C., provides a complete code to deal with the questions which arise by reason of the death of one of the parties to an appeal. That being so, it has been contended on behalf of the respondents that the rights of the parties in the present case must be governed solely by O. 22, R. 3, Civil P. C. That Rule makes it clear that the appeal in so far as the deceased appellant is concerned has abated. According to the respondents, if the remaining appellants are allowed to prosecute the appeal conflicting or contradictory decrees may result and therefore the whole appeal must be regarded as having abated. As I have stated, whether the whole appeal has or has not abated in such circumstances is not a matter for this Bench.

On behalf of the appellants, it is urged that even if the appeal in so far as it concerns the deceased appellant has abated, the surviving appellants can prosecute the appeal and the Court may, under O. 41, R. 4, Civil P. C., reverse or vary the whole decree, that is reverse or vary it in favour not only of the surviving appellants but also in favour of the legal representatives of the deceased appellant. In short, it is contended that in this case the Court has power to reverse the decree of the Court below and dismiss the whole suit not only against the surviving defendant-appellants but also against the legal representatives of the deceased defendant-appellant against whom the decree has already become final by reason of the refusal of the Bench to set aside the abatement.

The appellants' contention is supported by considerable authority. The earliest case is 22 Bom 718.[1] In that case one of several defendant-appellants died after appeal filed but before the hearing. An application to have the name of his heir entered on the

1. Chandarsang v. Khimabhai, (1898) 22 Bom 718.

record as an appellant was rejected as too late. The decree proceeded on a ground common to all the defendant-appellants. When the appeal came on for hearing, it was dismissed by the lower Appellate Court for want of parties. It was held in second appeal that any plaintiff or defendant has a right to appeal without the concurrence of any of the parties to the suit and the mere fact of the death of one of several appellants could not affect the right of the other appellants to proceed with the appeal if they chose to do so. The proper course for the Appellate Court to adopt was to order that the appeal had abated so far as the deceased defendant-appellant was concerned, and to proceed with the hearing so far as the remaining appellants were concerned. The Court expressly held that S. 544, (corresponding to present O. 41, R. 4) permitted the surviving appellants to prosecute the appeal against the whole decree in the absence of the personal representatives of the deceased appellant. The Court however did not expressly hold that the lower Appellate Court could reverse or vary the decree not only in favour of the surviving appellants but also in favour of the personal representatives of the deceased appellant who were not on the record.

This case was followed by another Bench of the Bombay High Court in 27 Bom 284.[2] That suit was for partition and the lower Court passed a decree in favour of the plaintiffs. Two of the defendants who denied the plaintiffs' right and claimed the property as their own, filed a joint appeal. Pending the appeal one of them died, and her representatives were not brought on the record. The surviving appellant however proceeded with the appeal and, at the hearing, the decree of the lower Court was reversed and the plaintiffs' suit was dismissed. The plaintiffs filed a second appeal to the High Court and contended that the lower Appellate Court ought not to have heard the appeal inasmuch as it had abated, or at all events that that Court had no power to reverse the lower Court's decree so far as it related to the deceased appellant. It was held that as the two defendants had appealed on grounds common to them both, the lower Appellate Court had power to hear the appeal and to deal with the whole suit under the provisions of S. 544, (corresponding to the present O. 41, R. 4), Civil P. C.) This case expressly lays down that in such a case the Court may not only reverse or vary the decree in favour of the surviving appellant, but also may do so in favour of the legal representatives of the deceased appellant. A similar view was taken by a Bench of the Allahabad High Court in 25 All 27[3] in which it was expressly held that where several plaintiffs or defendants jointly appeal against a decree to which S. 544 (corresponding to present O. 41, R. 4), Civil P. C., applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned ; it cannot have the effect of causing the appeal as a whole to abate. The Madras High Court took a similar view in 25 M L J 248[4] and in 40 Mad 846[5] and again in 146 I C 26.[6] The Rangoon High Court has also adopted this view in 2 Rang 486.[7] The view is supported by two early cases of the Punjab Chief Court, 26 I C 486[8] and 46 I C 50.[9] In A I R 1926 Cal 462[10] Walmsley J. adopted the same view and in the recent case in 61 Cal 879[11] a Bench of the Calcutta High Court took the same view and disapproved of an earlier case of that Court, 32 C W N 299.[12] There is also a very recent decision of this Court to the same effect, 19 Pat 172.[13]

On the other hand, there is considerable authority for the view that O. 41, R. 4, Civil P. C., does not apply to a case where one appellant has died. In 9 C W N 1061[14] it was held that when one of the several

2. Chintaman Nilkant v. Gangabai, (1903) 27 Bom 284=5 Bom L R 90.
3. Ram Sewak v. Lambar Pande, (1902) 25 All 27=1902 A W N 171.
4. Arthorama Pahu v. Arthapadhi, (1913) 25 M L J 248=20 I C 952=1913 M W N 687.
5. Somasundaram Chettiar v. Vaithilinga Mudaliar, (1918) 5 A I R Mad 794 = 41 I C 546 = 40 Mad 846.
6. Chenchuramayya v. Venkatasubbayya Chetty, (1933) 20 A I R Mad 655=146 I C 26.
7. Maung Byaung v. Maung Shwe Baw, (1924) 11 A I R Rang 376=84 I C 170=2 Rang 486.
8. Med Singh v. Mt. Kabir-un-Nissa, (1914) 1 A I R Lah 382=26 I C 486= 88 P R 1914 = 235 P L R 1915.
9. Piyare Lal v. Chura Mani, (1918) 5 A I R Lah 227=46 I C 50=84 P R 1918.
10. Upendra Nath v. Bishun Sahana, (1926) 13 A I R Cal 462=88 I C 970.
11. Satulal Bhattacharjya v. Asiruddin Shaikh, (1934) 21 A I R Cal 703=154 I C 147=61 Cal 879=59 C L J 362=38 C W N 743.
12. Naimuddin Biswas v. Maniruddin Lashkar, (1928) 15 A I R Cal 184 = 107 I C 726 = 47 C L J 82=32 C W N 299.
13. Prahlad Chandra Singh v. Bhim Mahto, (1940) 27 A I R Pat 341 = 185 I C 685=19 Pat 172.
14. Protap Chandra v. Durga Charan, (1905) 9 C W N 1061.

plaintiffs who had appealed against a decree which proceeded on grounds common to them all, died during the pendency of the appeal and substitution was not made within time, the surviving appellants were not entitled to the benefit of S. 544 (now O. 41, R. 4), Civil P. C. In this case the point, however, is not discussed in any detail in the judgment. The point was, however, considered at length in 32 C W N 299[12] in which it was held that O. 41, R. 4 gave no power to the Court to vary or reverse a decree in favour of a person who is dead but whose legal representatives have not been brought on the record and in respect of whom the appeal has abated. The order of abatement is virtually a decree and, so long as it stands, must be considered to have determined the rights between the parties. Consequently, when an appeal has abated in respect of one of several appellants and the right to appeal does not survive to the remaining appellants alone, the whole appeal becomes incompetent. At page 302 Cuming J. observed as follows:

> His counsel contends that the three appellants on the record have appealed from the whole decree on grounds which are common also to appellant 4 and that therefore the Court can reverse or vary the decree in his favour also.
>
> The first difficulty I have in accepting this contention is that I cannot imagine that the Court can vary or reverse a decree in favour of a person who is dead and no longer has any existence. So far as defendant 4 is concerned, he is no longer a defendant, for he is dead. Possibly he has some heirs but they are not on the record and so are obviously not parties. O. 41, R. 4, can have no application therefore. A dead person is no longer a party to a suit in any capacity. No doubt the death of an appellant does not cause the appeal to abate if the right to appeal survives, but this does not mean that any decree can be passed in favour of the dead person. It merely provides that his heir or representatives may carry on the litigation if they so desire and have themselves duly been made party. There is a further consideration which I think also makes it clear that O. 41, R. 4 can have no application. The appeal having abated so far as appellant 4 is concerned, the rights between him and the respondents have been determined.

This view was also taken by another Bench of the Calcutta High Court in 37 C W N 756[15] which expressly approved of the decision in 32 C W N 299.[12]

The Lahore High Court in recent decisions have also taken the view that O. 41, R. 4, Civil P. C., has no application to cases such as the present. In 15 Lah 667[16] a Bench of that Court held that the mandatory words of O. 22, R. 3 (2), Civil P. C., are not qualified by the words used in O. 41, R. 4, and therefore the provisions of the latter rule, which does not deal with abatement, cannot be applied to negative to a very large extent, the provisions of the very specific R. 3 (2) in O. 22, which deals expressly with abatement; consequently, that where one of several appellants, appealing on a ground common to all, died after the institution of the appeal, and his legal representatives were not brought on the record in time, the appeal abated. A very similar view was taken by another Bench of that Court in 155 I C 610.[17] In that case, a contract was entered into by defendant 1 in favour of two persons named *P* and *K* who were the plaintiffs in a suit for specific performance of the contract to sell certain land and both of them had preferred the appeal jointly. During the pendency of the appeal, P died and no application was made within the prescribed period to bring his legal representatives on the record. It was held that the right of appeal on the death of *P* vested in the legal representative of *P* along with *K* and not in *K* alone and the appeal abated according to the provisions of R. 3 and R. 11 of O. 22, Civil P. C., at least so far as *P* was concerned. It was further held that since the agreement between the parties did not specify any shares and it was impossible to say in what shares the consideration was to be paid by or the land to be divided between the two plaintiffs, the right to enforce the contract vested on the death of *P* in his legal representatives along with *K* and not in *K* alone and therefore no relief could be given to *K* when the legal representatives of *P* had not been brought on the record and his share could not be ascertained. Consequently, the whole appeal abated.

There is also a decision of this Court which supports this latter view, 5 Pat 755.[18] A joint decree was passed in favour of seven plaintiffs and the defendants preferred an appeal to the District Judge but impleaded some only of the plaintiffs as respondents. At the hearing of the appeal it was objected on behalf of the respondents that the appeal was incompetent: but the District Judge acting under the provisions of O. 41,

15. Rai Harendra Nath v. Dwijendra Nath, (1933) 20 A I R Cal 787 = 146 I C 831 = 37 C W N 756 = 58 C L J 29.
16. Amin Chand v. Baldeo Sahai Ganga Sahai, (1934) 21 A I R Lah 206 = 151 I C 784 = 15 Lah 667 = 35 P L R 92.
17. Pir Bakhsh v. Kidar Nath, (1935) 22 A I R Lah 478=155 I C 610 = 37 P L R 400.
18. Badri Narayan v. East Indian Railway, (1927) 14 A I R Pat 23=98 I C 1003=5 Pat 755=8 P L T 373.

R. 20, Civil P. C., added the omitted defendants as parties and dealt with the appeal. It was held that the order of the District Judge was without jurisdiction inasmuch as the appeal being against some only of the joint claimants, it was incompetent and the effect of the order was to give power to the appellants to present the appeal although it was time-barred at the time the particular order was passed. Das J. at p. 758 observed:

> As was pointed out in *Manindra Chandra Nandi* v. *Bhagwati Debi Chaudhurani*[19] 'it,' that is to say O. 41, R. 20, 'is not intended to override the provisions of O. 22, Civil P. C. The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated.' The right of those respondents who were not made parties to the appeals is a valuable right, because they were not made parties to the appeals and the appeals against them would be barred by limitation at the date when they were added.

The cases to which I have referred are the principal cases dealing with the respective contentions of the parties in this case. In my judgment, the latter cases to which I have referred express the correct view. O. 22, Rr. 3 and 11, Civil P. C., deal with cases in which one of a number of appellants has died. By reason of the provisions of those Rules, the appeal in so far as it concerns the deceased appellant abates and as the abatement, if not set aside, has the force of a decree, the matter becomes final as against the deceased appellant. In my judgment, there is nothing in O. 41, R. 4, Civil P. C., which permits the Court to disturb that finality of the decree as against the deceased appellant. To hold that O. 41, R. 4, Civil P. C., applies to a case such as the present one is to hold that a Court can reverse or vary a decree in favour not only of a person who is not before the Court but in favour of a person who is no longer in existence. It appears to me that before a Court can vary a decree in favour of the representatives of the deceased appellant such representatives must be brought on to the record. The Court could, of course, do so if a rule expressly empowered it; but in my judgment O. 41, R. 4, Civil P. C., does not give such a power. As I have stated earlier, that rule is framed on the assumption that all the plaintiffs or defendants in the suit are alive at the date of the passing of the appellate decree, O. 41, R. 4, Civil P. C., cannot override or create an exception to O. 22, Rr. 3 and 11, and in the case of one or more appellants dying even where a decree proceeds on a ground common to all, the matter must be governed solely by the provisions of those latter rules. To hold otherwise is to hold that O. 41, R. 4, Civil P. C., gives the Court power to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. Whether in such circumstances the appeal has or has not abated as a whole will depend upon considerations other than the provisions of Order 41, Rule 3.

It was also contended by Mr. P. R. Das who argued the case for the appellants with his usual ability that this Court could not now take a different view from that which had been taken by many High Courts in the past. Some of the earlier cases which are in favour of Mr. Das's contention were decided on S. 544, Civil P. C. of 1882. This Section was re-enacted in O. 41, R. 4 of the Code of 1908. Mr. Das contended that it must be assumed that the Legislature when re-enacting the Code of 1908 well knew the construction which had been placed on S. 544 of the old Code and that by re-enacting that Section in precisely similar terms the Legislature expressly recognized the meaning which had been placed on the old Section. Accordingly, he argues that O. 41, R. 4 must now be given the meaning which had been attributed to the words of S. 544 of the old Code. In support of this contention Mr. Das relied upon 4 Cal 172[20] and (1891) A C 531.[21] At p. 590 of the latter case Lord Macnaghten observed :

> I cannot help reminding your Lordships, in conclusion, that the Income-tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again ; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred.

It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point of course is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued

19. *Reported in* (1926) 13 A I R Cal 335=90 I C 986=30 C W N 45.

20. Empress v. Burah, (1879) 4 Cal 172=5 I A 178 =3 Sar 834=3 Suther 556=3 C L R 197 (P C).

21. Commissioners for Special Purposes of the Income-tax v. J. F. Pemsel, (1891) A C 531= 61 L J Q B 265=65 L T 621=55 J P 805.

that the inference grows stronger with each successive re-enactment.

In my judgment the principle enunciated by Lord Macnaghten can have no application to this case. During the period under consideration the Code of Civil Procedure was only re-enacted on one occasion and previous to 1908 there had been a very few decisions on S. 544 of the old Code. The Legislature may or may not have been aware of the interpretation given to the words of that Section by the Bombay and Allahabad High Courts; but, even if they were aware of that interpretation, it in no way follows that they adopted such interpretation when they re-enacted the Section in O. 41, R. 4. In my judgment the rule laid down in 4 Cal 172[20] and (1891) A C 531[21] has no application to the present case before the Court. For the reasons which I have given, I am satisfied that the appellants in the present case are not entitled by reason of O. 41, R. 4, Civil P. C., to prosecute the appeal and to obtain a reversal or variation of the decree in favour of all the plaintiffs and defendants. If they are entitled to prosecute the appeal and to obtain such reversal or variation, it is by reason of matters other than those contained in O. 41, R. 4, Civil P. C. I would therefore answer the question submitted to the Full Bench in the negative. I would direct that the costs of this reference abide the event.

Wort J. — I agree.

Manohar Lall J. — I agree entirely with the reasons given by my Lord the Chief Justice and would answer the question in the negative.

D.S./R.K. *Answered in negative.*

A. I. R. 1940 Patna 352

WORT AND MEREDITH JJ.

Rani Vishanath Kumari — Judgment-debtor — Appellant.

v.

Sonu Lal and others—Decree-holders — Respondents.

Appeal No. 383 and Civil Revn. No. 405 of 1938, Decided on 22nd December 1939, from original order of Sub-Judge, Gaya, D/- 23rd July 1938.

Bihar Money-lenders Act (3 of 1938), S. 11 — Application under S. 11 can be made any time between date of first levying of execution and date fixed for sale — Court cannot decline to consider merits of case.

An application under S. 11 for payment of decretal amount by instalments can be made at any time between the date of the first levying of execution and the date fixed for the sale. Therefore the fact that the application is made only when properties are going to be sold and not when decree was passed is no reason for the Court to decline to consider the merits of the case. [P 352 C 2]

K. N. Varma — *for Appellant.*

Raj Kishore Prasad and B. N. Rai — *for Respondents.*

Wort J. — This is an appeal from the order of the Subordinate Judge of Gaya made on 23rd July 1938 in an application by the judgment-debtor under S. 11, Bihar Money-lenders Act, to be allowed to pay a certain decree by instalments. There is also an application in revision against the order. I will say at once that the appellant withdraws the appeal. The only question therefore is the application to revise the order to which I have just referred. The learned Judge dismisses the application on the ground (I am using his own words) that the judgment-debtor comes with this application only when properties are going to be sold and did not choose to pray for instalments when the decree was passed.

It is quite obvious that that is no reason for declining to consider the merits of the case. The facts are quite contrary to those which are indicated by the learned Judge. The execution, as the learned Judge points out himself, was levied on 20th December 1937 and 5th August 1938 was the date fixed for the sale; and it was between the date of the first levying of the execution and the date fixed for the sale that the petitioner was given a new right by the Legislature, a right to make an application to be allowed to pay his decree by instalments. That order of course is to be made after considering all the circumstances of the case under S. 12 of the Act. The reason which the learned Judge gave for declining to consider the merits of the case is in my judgment no reason at all. The order therefore of the learned Judge in the Court below must be set aside and the matter is remanded to him to determine the question which came before him, namely whether the petitioner should be allowed to pay the decree by instalments. In determining that question the learned Judge will, as I have already indicated, consider all the circumstances of the case under S. 12, Bihar Money Lenders Act. The rule is made absolute with costs; hearing fee one gold mohur.

Meredith J. — I agree.

G.N./R.K. *Rule made absolute.*

A. I. R. 1940 Patna 353

HARRIES C. J. AND MANOHAR LALL J.

Firm Harchandrai Anandram — *Plaintiff* — Appellant.

v.

Firm Kedarnath Nirmal Chandra Guha — *Defendant* — Respondent.

Appeal No. 33 of 1937, Decided on 30th November 1939, from original decree of Sub-Judge, Bhagalpur, D/- 30th September 1936.

Hindu Law—Joint family business—Brothers governed by Dayabhag School starting business — Son of one of them taking active part in it from its commencement—He after his father's death is personally liable for debts of business.

Where a family of brothers governed by Dayabhag School has started business and a son of one of them takes an active part in the business from its commencement he must be treated as a partner in the business and after his father's death he is liable for the debts of the business not only to the extent of his interest in the family property but also personally. [P 355 C 1]

Sir M. N. Mukharji, G. N. Mukharji, S. N. Sahay, Prem Lall and K. P. Sukul — *for Appellant.*

S. M. Mullick, Nitai Chandra Ghosh, Sudhir Chandra Ghosh and Girindra Banarji — *for Respondent.*

Harries C. J.—This is a plaintiff's appeal from a decree of the learned Subordinate Judge of Bhagalpur passed in Money Suit No. 191 of 1934. The suit was decreed by the learned Subordinate Judge against all the defendants. As regards defendants 3 and 7, the decree was not only against their share in the family property but also a personal decree. The decree against the other defendants was a decree to the extent of their interest in the family property. In this appeal the plaintiff contends that he should have been granted a personal decree not only against defendants 3 and 7 but also against defendants 2, 4 and 6.

The facts of the case can be shortly stated as follows : In the year 1920, three brothers Ashu, Kedarnath and Gangadas commenced to carry on business, and in that business Charu and Nirmal, the sons of Kedarnath, played an important part. This family was governed by the Dayabhag School of Hindu law. In the year 1921, this business began to borrow money from the plaintiff. On 18th April 1931, Kedar, the father of defendants Charu, Nirmal and Bimal, died, and the business continued to be carried on under the old name of Kedarnath Nirmal Chandra Guha. On 3rd July 1931, Nirmal, as managing partner, settled the accounts of the firm up to 30th May 1931, and agreed to pay interest at the rate of 12 per cent. per annum on the balance due. The account ran on and in due course the plaintiff filed this suit claiming a balance of Rs. 5116-11-0 against the eight defendants. Charu, defendant 2, Nirmal, defendant 3 and Bimal, defendant 4, are the sons of Kedar deceased. Khitish, defendant 5, Jyotish, defendant 6 and Susil, defendant 7 are the sons of Gangadas, deceased, and Sudhir, defendant 8 is the son of Suresh deceased, who was the son of Gangadas deceased.

According to the plaintiff, the business, Kedarnath Nirmal Chandra, was a business, of this family which was actively conducted by Nirmal and Susil at Bhagalpur. The plaintiff also contended that Charu, Bimal and Jyotish were also actively interested in the firm, and they claimed that these defendants were not only liable to the extent of the family property but were also personally liable. The main defence was that this business was not a family business at all but was the business of Nirmal, who had been described as an idler and partially educated man. It is said that the business was created by Kedar to find employment for this somewhat useless son. The suit out of which this appeal arises, was tried with a large number of other suits, and the evidence led was treated as evidence in all the cases. The learned Subordinate Judge held that the firm Kedarnath Nirmal Chandra was the joint family firm of the defendants and not the personal business of Nirmal. His findings upon this question however are somewhat contradictory. At p. 80, Parts I and II of the paper-book, he sums up the position in these words :

> For these reasons I hold that the firm Kedarnath Nirmal Chandra Guha was the joint family firm of the defendants and was opened by the three brothers Gangadas, Kedar and Ashu, and after the deaths of the former two of their sons became partners of the firm in place of their fathers, and as such, all the defendants are liable for plaintiff's dues.

In this finding the learned Judge seems to suggest that the only persons interested in the business at the commencement were the three brothers, Gangadas, Kedar and Ashu, and that the sons of Kedar and Gangadas only became interested in the business on the death of their fathers. It is however clear from an earlier finding that Charu at least was actively interested in the business from its very commencement. At p. 79 the learned Subordinate Judge deals with the

evidence concerning Charu's participation in the affairs of this firm. Counsel for the respondents does not challenge the accuracy of the statement of the learned Subordinate Judge. It appears that as early as 7th April 1921, Charu was borrowing money from the Benares Bank to assist the firm. Charu and his father Kedar also raised money to discharge the debts of the firm in 1925. In 1930 Charu transferred Rs. 1900 from his private account to the firm's account. Again on 28th June 1932, Charu borrowed Rupees 5000 from the Bank and this amount was credited to the account of the firm. Summing up these transactions, the learned Subordinate Judge says: "These papers go to show that Charu had an important hand in the business of the defendant firm." In fact, these various transactions show that Charu took a very active part in the activities of the firm from its commencement, and there can be no doubt, in my view, that Charu was in the position of a partner in this business from its commencement. He was advancing money to the firm and providing for the payment of its debts. In fact, he appears to have been one of the most important members of the firm. There is also abundant evidence to show that later when this firm got into difficulties, Charu was taking an active interest in its affairs. The Benares Bank was a creditor of this firm for a very substantial amount, and at pp. 15, 16 and 17 (Part III of the paper-book) are printed letters passing between the Benares Bank and the defendant Charu. These letters make it clear that at a time, namely 1931, Charu was taking an active interest in the financial affairs of the firm and was endeavouring to make arrangements for payment to the Bank. At p. 30 (Part III of the paper book) there is printed a most important letter from Charu to Rai Bahadur Bansidhar Dhandhania, the proprietor of the plaintiff firm. This letter undoubtedly refers to the debt which is the subject-matter of this suit. In this letter he makes it clear that he was actively interested in the affairs of the firm, and he refers to the debtors of the firm as "our debtors" and to the creditors of the firm as "our creditors." In this letter Charu clearly admitted his interest in the firm.

There can be no doubt that Charu was interested in this firm; but it has been contended by Mr. Sushil Madhab Mullick on behalf of the respondents that he can only be made liable to the extent of his share of the family property. According to Mr. Mullick, the only persons who could be made liable personally were the two persons Nirmal and Sushil, who have been held to be the only two members of the family living at Bhagalpur and who were attending to the daily affairs of the business. Sir Manmatha Nath Mukharji on behalf of the appellant has however argued that Charu can be made personally liable for this debt, because he was throughout an active member of the firm. He has relied upon a number of cases; but it is unnecessary to refer to them in detail. Sir Manmatha Nath Mukharji agrees that the law is correctly stated at p. 259, Mulla's Principles of Hindu Law, Edn. 8. There the learned Author says:

> In the case of an ordinary partnership, it is not only the share of each partner in the partnership property which is liable for the payment of that partnership debts, but the separate property of each partner is also liable. In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction between the liability of a manager and the liability of his co-parceners. The manager is liable not only to the extent of his share in the joint family property, but being a party to the contract, he is liable personally, that is to say, his separate property is also liable. But as regards the other co-parceners, they are liable only to the extent of their interest in the family property, unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified ....

According to the appellant, the managing partner contracts not only on behalf of himself but on behalf of all the members of the firm who are taking an active part in the conduct of its affairs. The first loan in this case was taken by Kedar and Nirmal, and later payments made from time to time by Nirmal. Nirmal settled the accounts; but can it be said that Nirmal throughout was merely acting for himself or was he acting as agent for the other members of the firm who were actively interested in it? As I have stated, Charu was certainly very active in this firm from its very commencement, and in my view, it can well be said that he must be treated as one of the contracting parties to this loan.

Mr. Sushil Madhav Mullick, however, argued that Charu can never be liable in respect of this transaction, no matter how active an interest he took in the affairs of the firm after the death of his father. It is contended that during his lifetime Charu

had no interest in the property as the family was governed by the Dayabhag School, of Hindu law. Accordingly, it is urged that on his father's death Charu could not be personally liable for any debt contracted by the family firm before he acquired an interest in it. That argument in general may well be sound ; but the position is different in the present case. As I have already pointed out, Charu took a very active interest in the affairs of this firm from the very outset, and he was advancing money and helping to finance the firm certainly as early as 1921. It appears to me upon the Judge's findings that the only inference that can be drawn from the facts is that Charu was a partner in this business with his father Kedar and his brother Nirmal and his uncles Gangadas and Ashu. If he was a partner and an actual partner in the business when this loan was taken, then clearly he was personally liable in respect of it. That personal liability would not cease on the death of his father Kedar and on his acquiring an interest in the family property. In my view, upon the facts of this case, Charu was personally liable for this loan throughout. He had taken an active part in the business from its commencement, and though he was not resident in Bhagalpur, he still continued to take an active part after the death of Kedar. As I have stated, when creditors were finding difficulty in obtaining payment letters were written by them to Charu, and in reply to those letters he clearly admits his active interest in the firm. If the facts are regarded from this point of view, the difficult questions of Hindu law do not arise. This is not a case where Charu first became interested in the firm on his father's death. He was interested along with his father, and on the death of his father, he also acquired an interest in the family property. His personal liability remained, in my view, throughout, and that being so, the decree passed against Charu should have been not only a decree to the extent of his interest in the family property but should also have been a decree against him personally.

Sir Manmatha Mukherji also contended that a personal decree should also have been passed against Bimal, defendant 4, and Jyotish, defendant 6. He, however, admits that there is no evidence that these two persons ever took an active part in the affairs of this firm. Bimal was the son of Kedar, and there is nothing to show that he took an active interest either during Kedar's lifetime or after his death. Similarly, Jyotish who is the son of Gangadas, does not appear to have interested himself actively in the affairs of this firm either during his father's lifetime or after his death. The only possible evidence against these two persons are powers of attorney executed by them in favour of Nirmal giving the latter a right to execute a mortgage on their behalf. In my view, these two documents cannot possibly establish that either Bimal or Jyotish was ever actively interested in this firm, and in my judgment, the limited form of the decree passed against them must be sustained. For the reasons which I have given, I am satisfied that a personal decree should also have been passed against Charu, but in other respects the decree of the Court below cannot be successfully assailed. I would, therefore, allow this appeal in part and direct that a personal decree also should be passed against Charu. As this appeal has partially succeeded and partially failed, I would make no order as to costs in this Court. The order for costs in the Court below will remain unaffected.

Manohar Lall J.—I agree.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1940 Patna 355

ROWLAND AND CHATTERJI JJ.

Musahru and others — Appellants

v.

Emperor.

Criminal Appeal No. 224 of 1939, Decided on 7th December 1939, from decision of Additional Sessions Judge, Bhagalpur, D/- 19th August 1939.

(a) Criminal P. C. (1898), S. 252 — Magistrate is not required to summon all witnesses.

Section 252 does not make it obligatory on the Magistrate to summon all the witnesses whose names are given him by the complainant.

[P 358 C 1]

(b) Criminal P. C. (1898), S. 211 (2) — Accused presenting list of witnesses not to Magistrate but to Sessions Judge — Procedure is wrong—Correct procedure stated.

There is a departure from the procedure contemplated by the Code when the accused present their list of witnesses not to the Magistrate under S. 211 (2) but to the Sessions Judge and the most correct procedure for the Sessions Judge at that time is at once to forward the application to the committing Magistrate for disposal under S. 211 (2).

[P 358 C 2]

(c) Criminal P. C. (1898), S. 211 (2) — Power to accept supplementary list of witnesses should be exercised in accordance with Section 216.

The power to accept the supplementary list of witnesses in any case is a discretionary power and the discretion of the Magistrate is to be exercised in accordance with S. 216 and subject to the provisos in that Section. [P 358 C 2]

(d) Criminal P. C. (1898), S. 211 (2) — List presented to Sessions Judge being first list — Procedure stated.

Where the list presented to the Sessions Judge was not a list of witnesses in addition to the number already summoned but was the first list which had been presented to any officer, in such a case it is desirable to summon at least some of the witnesses regarding the effect of whose testimony some explanation could be given. [P 359 C 1]

(e) Criminal P. C. (1898), Ss. 210 and 211— Presentation of list of defence witnesses should be done at time when charge is framed.

It is not desirable that the presentation of the list of defence witnesses should be postponed till the last minute when the Code contemplates that it should be done at the time when the charge is framed. If the Magistrate simultaneously frames the charge and passes the order of commitment the procedure is wrong. [P 359 C 1]

(f) Criminal P. C. (1898), Ss. 210 and 211— Amendments and additions to charges after commencement of trial—Right of accused stated.

When amendments and additions are made to the charges after the commencement of the trial, the prosecutor and the accused have the right not only to recall and resummon any witness who may have been examined but also to call any further witnesses whom the Court may think to be material. A request to summon a fresh witness under this Section can only be refused on the ground that the evidence of the witness is not thought by the Court to be material. [P 359 C 2]

S. Naqui Imam, Gopal Prasad, K. P. Sukul and S. M. Siddique — *for Appellants.*

Asst. Govt. Advocate — *for the Crown.*

S. Jafar Imam and Binoy Bhusan Roy— *for Respondents.*

Rowland J. — This appeal arises out of a trial in which 26 persons were charged some with rioting with deadly weapons (S. 148); others with rioting (S. 147) and again some with murder (S. 302 read with S. 34) and others constructively charged with murder (S. 302 read with S. 149). Six of the accused were acquitted and 20 have been convicted and sentenced under S. 302 read with S. 34 and S. 302 read with S. 149 respectively all to transportation for life. The occurrence giving rise to the offences charged took place in a diara within the elaka of police station Nathnagore. There are two adjoining villages Bairiya and Dildarpur, the former being to the west of the latter. There is a boundary dispute between these villages which has led to the attachment of a large block of land which is alleged by one party to fall in village Bairiya and to be in possession of its proprietors through their tenants and by the other party to fall in village Dildarpur and to be in possession of the proprietors and tenants of that village. According to the prosecution, Sarobar Prasad Singh had grown rainchi crop in plot No. 169 of village Bairiya which was his occupancy land and was not part of the subject-matter of the S. 145 proceedings. He had reaped the crop and had stored it in plot No. 126/391 of the same village. This plot is said to belong to Mahabir Kumar. It has an area of 8 bighas 13 kathas 15 dhoors and a certain part of this area falls within the subject-matter of the S. 145 proceedings but part of it is outside that area and it is in this part that Sarobar Prasad by permission of Mahabir Kumar had stored his rainchi crop and kept a hut. On 2nd February 1939 a large mob consisting in the main of villagers of Sahebgunj who have land in Dildarpur came with deadly weapons and attacked the party of the prosecution. This party consisted of Sarobar Prasad and his brother Anandi, Jhumak Gossain, Mahabir Kumar, Biranchi and Bhothri Jha. These persons were sitting and talking at the khamar in plot No. 126/391. The mob coming near began to pelt them with brickbats and stones. The prosecution party scattered in different directions and were chased by members of the mob with the result that Anandi, Jhumak and Biranchi were each surrounded and killed. Another witness Pardip Singh who came to the place later than the former six persons received two lathi injuries. The mob also demolished the hut at the khamar and looted bundle of rainchi crop which had been kept there.

Substantially these allegations have been found by the Sessions Judge to be true and twenty appellants to have been sufficiently identified, some as actually taking part in the violent attacks on Anandi, Jhumak and Biranchi and others as present in the mob with knowledge that murder was likely to be committed in the prosecution of its common object. The defence appears to have consisted in questioning the correctness of the prosecution evidence and suggesting that the party of the accused and not that of the prosecution had the right to cut the crop. Reference has been made to the proceeding which was drawn under S. 145, Criminal P. C., on 29th June 1938 and was still pending. The origin of this proceeding was a report under S. 144 submitted by the Sub-Inspector of Police on 5th April 1938 at the instance of Musahru one of the appellants. Notices were issued to the par-

ties by the Sub-divisional Officer on 26th April 1938. The report it seems refers to a larger area, but the proceeding under S. 145 was drawn with reference to 500 bighas of land. Pending disposal of the proceedings, the lands covered by the proceeding under S. 145 were attached. On 12th January 1939, an application was presented to the Deputy Magistrate by members of the Bairiya party asking that the crop attached within the area covered by the S. 145 proceeding might be harvested by the police or sold and the proceeds kept in deposit in favour of the party that would eventually be successful in the proceedings. Along with this petition, the Magistrate considered also an application by Musahru and others of his party in which they stated that they had grown Kelai crops on 22 bighas of land which fell outside the lands, subject-matter of the S. 145 proceeding. Prayer was made for permission to cut the crop of the lands which were outside the S. 145 proceeding. This permission was granted. The Magistrate does not seem to have taken the precaution of wording his order so as to limit the permission expressly to the 22 bighas of kelai crop and this perhaps accounts for the attitude of Musahru and his party who appear to have acted as if this order entitled them to all the crops whether of kelai or any other kind of produce growing outside the attached area. It is however quite clear that no such permission of the Magistrate could give Musahru and his party any right to harvest the crops which had been grown by and were in the possession of other people, still less to take away from the possession of raiyats of Bairiya crops which the latter had not only harvested but had removed from the fields where they were grown and had stored in a khamar. The evidence of the prosecution was quite clear as to the possession of Sarobar Prasad over the plot No. 169 where the rainchi crop was said to have grown. It was not of course in that field that the occurrence took place. In fact the khamar is 1500 paces distant from it. As to the correctness of the prosecution evidence locating the occurrence at the khamar, the Sub-Inspector found near this plot the three dead bodies, brickbats, stones, pieces of a bana, portions of a pharsa, the head bearing the inscription of Musahru's name, blood stains on the ground and on the crops, trampled crops, the remains of the demolished hut and scattered crops. In fact it could not be seriously argued in the appeal that the place of occurrence had not been correctly located by the prosecution.

As to the nature of the occurrence the prosecution has alleged an unprovoked attack upon them by a very large number and heavily armed mob which it is said met with no resistance or provocation. There is no evidence of any injuries on any person of the party of the accused which could suggest that there was either provocation or resistance offered by members of the prosecution party. Therefore on the evidence as it stands the view taken by the Sessions Judge is clearly to be accepted in so far as it excludes any such defence as provocation or right of private defence.

But before affirming those findings, it is necessary first to consider a point raised by Mr. Gopal Prasad for the appellants, namely that the accused had evidence which they wished to produce and were wrongfully deprived of the assistance of the Court in obtaining the attendance of defence witnesses. The Magistrate who enquired into the offences had framed charges and passed orders of commitment on 31st May 1939. At the time of passing the order, he said that the accused must file a list of their defence witnesses at once. No such list however was filed in the Court of the Magistrate but a petition was presented before the Additional Sessions Judge on 18th July 1939 for summoning 44 defence witnesses. The trial had been fixed for 31st July and the learned Judge pointed out that no explanation was offered in the application for its being filed at such a late stage; nor was the pleader for the accused in a position to say that he wanted to take out a summons at his risk and cost. The learned Judge rejected the application. Another similar application was filed by the accused from jail on 20th July 1939 with a list of 41 witnesses said to be likely to prove the possession of the accused and stating that the accused were unable to deposit the cost of process. The learned Judge observed that the application had been filed too late as the hearing had been fixed for 31st July 1939. He observed that the long list of witnesses indicated that the application had been filed for the purpose of delaying the trial and was not bona fide; but he said he was disposed to summon the witnesses at the risk of the accused on their bearing the cost of the witnesses; but the pleader for the accused expressed inability to do so. Accordingly he rejected the application.

The argument is that the witnesses named by the accused ought to have been summoned if not as of right at any rate in the exercise of the Sessions Judge's discretion. In this connexion reference is made to the procedure in the Sessions Court on 31st July 1939 when the trial opened. The Sessions Judge amended four of the charges; he added a fresh charge and this it is said entitled the accused under S. 291 read with S. 231, Criminal P. C., to have any witnesses summoned whom the accused might desire to call. A further point taken is that if the Sessions Judge was of opinion that the witnesses should be summoned, he was wrong to make this conditional on any expenses being deposited. The Criminal Procedure Code contains provisions at several places with regard to the summoning of the witnesses and these vary according to the nature of the trial. In a summons case the Section applicable is S. 244 (2). In this class of cases the Magistrate may if he thinks fit, on the application of the complainant or accused, issue a summons to any witness. Here the issue of a summons is not obligatory and the Magistrate has an option to require the parties to produce their own witnesses.

In S. 244 (3) there is an express provision that the Magistrate may before summoning any witness on such application require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court. In warrant cases there are separate Sections dealing with the summoning of witnesses for the prosecution and witnesses for the defence. Under S. 252 the Magistrate is bound to hear the complainant and to take all such evidence as may be produced in support of the prosecution. The Magistrate is also to ascertain from the complainant or otherwise the names of persons likely to be able to give evidence and he is to summon such of them as he thinks necessary. The Section does not make it obligatory on the Magistrate to summon all the witnesses whose names are given him by the complainant. The accused's right in the matter of summoning witnesses is set forth in S. 257. On his applying to the Magistrate for process for compelling the attendance of any witness or the production of a document, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground is to be recorded in writing. Under sub-s. (2) the Magistrate is authorized before summoning any witness on such application to require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

For the procedure for summoning defence witnesses for a Sessions trial we must refer to S. 211. When a charge has been framed under S. 210, the Magistrate must require the accused at once to give in a list of the persons whom he wishes to be summoned to give evidence on his trial. The accused is entitled to have the assistance of the Court in obtaining the attendance of all the persons whose names he gives in at once on being required to do under S. 211. S. 211 (2) gives the Magistrate a discretion to allow the accused to give in any further list of witnesses at a subsequent time. So in the case before us there was a departure from the procedure contemplated by the Code when the accused presented their list of witnesses not to the Magistrate under S. 211 (2) but to the Additional Sessions Judge and probably the most correct procedure for the Sessions Judge at that time was at once to forward the application to the committing Magistrate for disposal under S. 211 (2). The power to accept the supplementary list of witnesses in any case is a discretionary power and the discretion of the Magistrate is to be exercised in accordance with S. 216 and subject to the provisos in that Section. The second proviso is that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material and if he is not so satisfied may refuse to summon the witness recording his reasons or may before summoning him require such sum to be deposited as may seem necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

Assuming that it was open to the learned Sessions Judge to deal with the application to summon defence witnesses as the case had already come on his file, then the principles which he ought to follow would be the same as those which the Magistrate should follow. The learned Judge in fact did give a reason for refusing to summon the witnesses except on their expenses being deposited; and we are not prepared to say

that the order passed by the learned Judge was in violation of the law. At the same time we do not wish to be understood as saying that the discretion was wisely exercised. The list presented to the Sessions Judge was not a list of witnesses in addition to the number already summoned but was the first list which had been presented to any officer. It would seem in such a case desirable to summon at least some of the witnesses regarding the effect of whose testimony some explanation could be given. Moreover, the trial was not expected to be finished in one day and the witnesses could have been summoned for perhaps the fifth or sixth day of the trial which in fact lasted until 12th August 1939 so that there would probably have been no real difficulty in obtaining the attendance of the witnesses or the majority of them before the closing of the prosecution case. On the other hand it is not desirable that the presentation of the list of defence witnesses should be postponed till the last minute when the Code contemplates that it should be done at the time when the charge is framed. I may point out here that the Magistrate by simultaneously framing the charge and passing the order of commitment on 31st May 1939 has departed from the order of procedure in S. 210 and following Sections of the Code. The charge is to be framed and explained to the accused under S. 210. He is then to be required to give his list of defence witnesses (S. 211), the Magistrate being given a discretion to accept a further list at a subsequent time. The Magistrate is given a discretion to summon and examine any of the defence witnesses and on doing so, he may cancel the charge and discharge the accused if he is satisfied that there are no sufficient grounds for commitment (S. 213), otherwise he makes an order committing the accused for trial (S. 213 (1)). It is not of course obligatory on the Magistrate to examine defence witnesses with a view to reconsidering the necessity for the charge and for a commitment; but it is undoubtedly the Magistrate's duty to see to the obtaining of the list of defence witnesses. If the accused are not ready with their list of witnesses at the date of commitment it is convenient for the Magistrate to fix a day perhaps a fortnight hence up to which the list of witnesses will be received so as to prevent the matter escaping the notice of the accused or their legal advisers.

Turning back to the facts of this case, I have pointed out above that at the outset of the trial amendments and additions were made to the charges. When such amendments are made after the commencement of the trial, the prosecutor and the accused have the right not only to recall and resummon any witness who may have been examined but also to call any further witnesses who the Court may think to be material. A request to summon a fresh witness under this Section can, it seems, only be refused on the ground that the evidence of the witness is not thought by the Court to be material. Had the accused after the amendment of the charges made a fresh application or renewed their application to the learned Judge to have defence witnesses summoned, such application could hardly be resisted, but in fact at the trial itself no such application was made and I think it must be taken that the wish on the part of the accused to have those witnesses summoned was abandoned. It is well known that in sessions trials defence witnesses though they may be in attendance are very seldom in fact examined. That being so, in the present case, I am not prepared to hold that there was prejudice caused to the accused by the procedure followed or by the exercise of his discretion by the Sessions Judge, although I may feel that I should perhaps myself have acted differently.

It remains to consider the case of the individual appellants which turned on the question whether each of them is sufficiently identified by the prosecution witnesses who have deposed to his presence and to the part played by him. The task of examining the cases of individual accused is facilitated by the care with which the learned Judge has set forth in detail the particulars of the evidence against each accused person. As against several of the accused the evidence on the face of the judgment is so voluminous and overwhelming that little if anything can be said against the conviction in the argument. I shall therefore think it sufficient to deal with the cases of those accused whose cases have been particularly pressed on our attention as cases in which the identification was insufficient or unreliable. In the case of accused 2 Manik Bind, this accused is a servant of Musahru and is identified by Sarobar, Mahabir, Bhothri Pardip and Naurangi. It is said that Pardip was not present throughout and is not a very reliable witness, that Bhothri had made some mistakes in identifying certain other accused and that when Bhothri states that this

accused was the assailant of both Jhumak and Biranchi there is probably a mistake because Jhumak and Biranchi were attacked at places at some distance from each other. The attacks on Jhumak and Biranchi however according to the evidence were not quite simultaneous and as the Sessions Judge says it was possible that this accused took part in killing both these men. On the whole, I would accept the finding of the Sessions Judge as correct in the case of this man. The next case stressed on our attention is that of Jethu Bind, accused 4. This man is aged 30 and is the son of Puran Bind. The witnesses who have identified him are Sarobar, Mahabir, Pradip and Bhothri and he is said to have attacked Anandi with a bhala. The Sessions Judge discarded the identification of this accused by Bhothri on the ground that the witness had identified Raghu as Jethu in the committing Court; but as regards the other three witnesses he considers their identification to be quite sufficient. I am in agreement with that finding and would affirm Jethu's conviction. Then there are two brothers, accused 6 Sadha Bind, aged 60, and accused 7 Madho, aged 65 or 70. In the case of both these there are a considerable number of identifying witnesses. Sadho is identified by Sarobar, Mahabir, Pardip, Naurangi, Kunjbihari, Bhothri, Musan, Ramgati and Thakur. There was some mistake in the committing Court where the two witnesses Kunjbihari and Musan picked out Sadho but called him Madho. One of the witnesses who identified the accused in the committing Magistrate's Court, a Thakur, failed to identify him at the trial. Nevertheless there remains the identification of these accused by five witnesses. His brother Madho was identified by Sarobar, Mahabir, Kunjbihari, Bhothri, Musan, Ramgati and Thakur, but the identification by three of these witnesses was open to comment. Kunjbihari and Musan had pointed out this accused but named him as Sadho in the committing Magistrate's Court. Thakur had failed to identify this accused in the Sessions Court; but there remain four identifying witnesses against whose identification little can be said. On this state of the evidence, I am disposed to agree with the Sessions Judge that both Sadho and Madho have been correctly identified and proved to have taken part in the riot.

Another accused whose case has been brought to our notice is Bhagirath, accused 12, aged 32. There are four identifying witnesses, namely, Sarobar, Mahabir, Bhothri and Ramgati. Comment was made in argument that Kunjbihari made a mistake in identifying this accused by calling him Sitaram; but as Kunjbihari is not one of the identifying witnesses on whose evidence the Sessions Judge has relied in the case of this accused, that does not shake the validity of the Sessions Judge's conclusion regarding him which I would accept as correct. Kutai, accused 13, whose age is given by the Magistrate as 40, and by the Sessions Judge as 32, is a brother of Raghu who was acquitted. In the case of this accused there is the evidence of Sarobar, Mahabir, Bhothri and Naurangi. As to his presence and participation Naurangi was regarded by the Sessions Judge as a witness of very doubtful value and Bhothri has in the course of his evidence made some mistakes in the committing Magistrate's Court and in the Sessions Court as to the identification of certain other accused. We do not however think that the identification of this accused is thereby rendered uncertain and unreliable and I would affirm his conviction. Jagdeo, aged about 25 or 30, has been identified by Sarobar, Mahabir and Bhothri and is named in the first information. I agree with the Sessions Judge in accepting this evidence as sufficient. Karu, accused 18, is an elderly man. Two of his sons, Doman and Jhaksu, have been acquitted in consequence of insufficient identification. Karu himself was identified by Sarobar, Pradip, Kunjbihari, Bhothri and Musan, and I agree with the Sessions Judge that this identification is sufficient.

The case of Damodar Misser was pressed on us principally on the ground of his age which is stated to be 94. Damodar had been a leading figure in the litigations and disputes in the past and all four assessors were of opinion that he was not guilty and should be acquitted. The direct evidence against him however appears to be overwhelming. He is identified by Sarobar, Mahabir, Pardip, Naurangi, Bhothri, Jatoo, Musan, Gobind and Ramgati and this identification remains overwhelming after discarding as the Sessions Judge has done the evidence of Naurangi. We cannot see our way to rejecting this great volume of testimony in his case. Bhagwat Ojha, aged 38, is the son-in-law of Damodar and looks after his affairs. Against him the identifying witnesses are Sarobar, Mahahir, Pardip, Bhothri, Jatoo and Ramgati. This accused is said to have been spoken to by Pardip whom he struck with a lathi. There seems little reason to

doubt his participation in the riot and I would accept as correct the finding of the Sessions Judge regarding him. Then there is the case of Maghu Dhanuk, accused 22. The witnesses identifying him are not so numerous as in the case of other accused and he is not named in the first information report. The identifying witnesses are Mahabir, Pradip and Bhothri and their evidence regarding him is that he was armed with a barchha and took part in the assault on Anandi. This accused is a servant of accused Musahru, the ringleader of the whole party. He was found at Musahru's house on the night of the occurrence and the statements of Musahru and Maghu in their examination at the trial appear to proceed on the assumption that this accused was present at the riot though of course the nature of the riot is represented differently as an attack by the prosecution party on the accused's party. The Sessions Judge in the circumstances was justified in accepting and acting on the evidence against this accused. As regards the others, the identification cannot be said to be insufficient in the case of any of them; and I would therefore accept the findings of the Sessions Judge as to the participation of the individual accused.

It is finally suggested that the convictions under S. 302 read with S. 149 should not be supported in the case of those accused who were armed not with deadly weapons but only with lathis as in their case it can hardly be said to be established that they took part in the riot knowing that murder was likely to be committed in the prosecution of the common object of the unlawful assembly. That is an argument which of course is to be considered with reference to the facts of each case and in the present instance I do not feel myself able to accede to it because the number of persons armed with deadly weapons was so considerable that those who carried lathis must have had good reason to believe that the deadly weapons were likely to be used with deadly effect. The fact that the attacks inflicted did not stop at one victim but that three persons were killed, that of those persons Anandi had 25 injuries, Jhumak had 13 and Biranchi 27 makes it impossible to hold that the intentions of the assembly as a whole were comparatively peaceful and were exceeded by merely one or two members. I would dismiss the appeal.

Chatterji J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 361

DHAVLE J.

Gulabi Mahto and others — Petitioners

v.

Emperor.

Criminal Revn. No. 654 of 1939, Decided on 4th January 1940, from order of Sess. Judge, Purnea, D/- 16th October 1939.

Criminal P. C. (1898), S. 56—Police officer not present on spot asking constables to bring certain person with papers to thana—Order does not amount to direction for arrest as contemplated by S. 56—Use of force by constables is illegal—Person resisting force cannot be convicted under S. 224, Penal Code, nor can persons assisting him be convicted under Ss. 225 and 353.

Where a police officer who is not present on the spot asks the constables to bring a certain person to thana with some papers, the order does not amount to a direction for arrest as contemplated by S. 56 unless the order is given in writing. The use of force by constables, therefore is illegal and if the person against whom force is used resents it and a scuffle ensues in the course of which brickbats are thrown, the person cannot be convicted under S. 224, Penal Code, nor can persons assisting him be convicted under Ss. 225 and 353, Penal Code. [P 362 C 1, 2]

Hareshwar Prasad Sinha and P. Jha — *for Petitioners.*

Order. — Of the five petitioners Gulabi Mahto has been convicted under S. 224, Penal Code, and the other four under Ss. 225 and 353, Penal Code. The learned Sessions Judge on appeal reduced the sentence on Gulabi (which was originally three months rigorous imprisonment) to a fine of Rs. 30. The sentence passed by the trial Court upon the other petitioners was upheld by the Court below. The prosecution story was that on the orders of the Sub-Inspector who was investigating a case of rioting and theft lodged by one Chetan Mandal, Gulabi was arrested by the constables; but he gave a push and freed himself. He was seized again, and then the other petitioners intervened and rescued him after a scuffle in the course of which two constables and the dafadar were slightly injured. The defence was that Gulabi was not arrested at all, but that the constables as the Sub-Inspector had directed them, asked him to accompany them to the thana with the papers required in the countercase that Gulabi's brother Kishun Prasad had lodged with the Sub-Inspector. Gulabi said that it was late at night and that he would produce the papers the following morning. The constables caught him by the hand and wanted to take him away forcibly and he resisted it. This was followed by a scuffle. The trial Court

seems to have believed the whole prosecution story; but the learned Sessions Judge was unable to do so for reasons given. In his opinion the evidence of Dukha, chaukidar, P. W. 3, was nearer the truth than the evidence given by the other prosecution witnesses; and Dukha's evidence was that the Sub-Inspector had left the place after asking them to bring Gulabi and other accused persons to the police station. It was admittedly very late at night, and Gulabi whom the constables wanted to take to the thana was disinclined to go out at that hour. "It is then," says the learned Sessions Judge,

> that the constables tried to take him to the thana by force, which he resented. After this there was some scuffle followed by throwing of the brickbats.

On these findings of fact, it seems to me that there is an end of the prosecution case of offences under Ss. 224, 225 and 353. The learned Sessions Judge finds that the Sub-Inspector had asked the constables to bring Gulabi to the thana apparently with papers and he considers that this was a direction for arrest. But surely the Sub-Inspector, if he wanted the contables to arrest a man, who according to the finding of the learned Sessions Judge was not present on the scene, would not have forgotten S. 56, Criminal P. C., nor failed to give them an order in writing. The learned Sessions Judge has disbelieved the constables' story that the Sub-Inspector's order was given in the presence of Gulabi, and he has gone on to hold in reply to the defence contention about S. 56, Criminal P. C., that that Section did not take away the constables' power under S. 54 to arrest persons accused of a cognizable offence. But this overlooks the fact that the constable never pretended on his own account to arrest Gulabi at all. I cannot agree with the learned Sessions Judge that the Sub-Inspector's asking the constables to bring Gulabi to the thana with the papers was in any sense "a direction for arrest," whether valid or otherwise. The learned Sessions Judge also observes that the trouble evidently arose because the time was late at night and the constables presumably first asked Gulabi to go to the thana with the papers which possibly misled him "in respect of the point whether he was under arrest or was simply being asked to go to the thana." This I am unable to follow. S. 46, Criminal P. C., prescribes how arrests are to be made, and it is not easy to find from the judgment of the learned Sessions Judge at what stage in the occurrence, as he conceives it, the constables gave up their demand for papers and proceeded to exercise what the learned Judge calls their statutory power to arrest persons under S. 54. If all that happened was that the constables tried to take Gulabi to the thana by force, that Gulabi resented this and that this was followed by a scuffle in the course of which brickbats were thrown and this is the view of the learned Sessions Judge himself, it seems to me quite clear that the conviction of the petitioners was entirely unwarranted. Gulabi was not guilty of any offence under S. 224; nor the other petitioners under Ss. 225 and 353, Penal Code. The application in revision is therefore allowed, and the convictions and sentences of the petitioners set aside. The fines, if paid by them, must be refunded on application.

G.N./R.K. *Application allowed.*

A. I. R. 1940 Patna 362

HARRIES C. J. AND MANOHAR LALL J.

Collector of Monghyr — Appellant.

v.

Bhekdhari Mander and others — Respondents.

Appeal No. 185 of 1937, Decided on 7th December 1939, from original decree of Dist. Judge, Monghyr, D/- 2nd September 1937.

(a) Land Acquisition Act (1894), S. 18— Acquisition of occupancy land—Case of tenants that valuation should be on basis that land could be sold without hindrance as building land not challenged in lower Court—Collector cannot plead it in appeal.

Where the occupancy land is acquired and the case of the tenants that valuation should be made on the basis that tenants could sell the land without let or hindrance as building land was not challenged in the lower Court, the Collector cannot in appeal allege that the land was not saleable as building land. [P 364 C 1]

(b) Land Acquisition — Agricultural land on high level, suitable for building purposes and adjacent to railway station held could be valued as building land.

The value of the land together with all its advantages must be considered. Where land used for agricultural purposes is on a high level and apparently suitable for building purposes, and is also adjacent to the railway station, it can be valued as building land. [P 364 C 1]

Advocate-General — *for Appellant.*

P. Misra — *for Respondents.*

Harries C. J.—This is a first appeal by the Collector of Monghyr from a judgment in a reference under S. 18, Land Acquisition Act. It appears that proceedings were commenced for the compulsory acquisition

of 9.195 acres of land in village Nayagaon, Pargana Monghyr, which was required for remodelling the railway station yard of Jamalpur. The area of land is equivalent to 27 bighas 16 kathas 6 dhurs. The Collector under S. 11 of the Act awarded to the tenants compensation for the lands amounting to Rs. 21,414-1-0 and Rs. 200 for a well together with additional compensation amounting to Rs. 3242-1-0 at the statutory rate of 15 per cent. The total compensation awarded, therefore, to the tenants amounted to Rs. 24,856-2-0. The landlord was also awarded compensation; but he has accepted the award, and we are not concerned with the amount granted to him.

The tenants objected to the award on the ground that the lands were in close proximity to Jamalpur railway station, and that being so, the tenants contended that the land was valuable building land and that the compensation awarded was wholly inadequate. They also objected to the amount of compensation awarded for the well, namely Rs. 200. The Collector in due course made a reference to the learned District Judge, and the matter was heard and determined by him. The learned District Judge was of opinion that the compensation awarded by the Collector to the tenants was not sufficient, and he increased the compensation for the land to a sum of Rs. 28,862-6-8 and for the well to a sum of Rupees 350, making a total of Rs. 29,212-6-8. This sum together with 15 per cent., which is allowed for compulsory acquisition, came to Rs. 33,594-4-0. The District Judge ordered that a sum of Rs. 8738-2-0, which is the difference between these two sums, should be paid to the tenants as additional compensation. The Collector of Monghyr preferred the present appeal which has been argued by the learned Advocate-General. He has contended that the amount awarded by the Collector was sufficient and that the learned District Judge was wrong in valuing this land as building land. He has pointed out that the land in question is occupancy land and that the tenants had no right to sell it as building land without the sanction of the landlord.

It appears that the Collector valued this land by taking the average sale price of a number of kobalas relating to occupancy lands. The Collector appears to have obtained this information from the registration office, but these kobalas were not produced in the Court of the District Judge and no evidence was given as to the situation of the lands which were the subject-matter of these kobalas. There is nothing on the record to show that the kobalas upon which the Collector relied, related to lands anywhere in the vicinity of the lands in question in this case. On the other hand, the petitioners produced a number of kobalas relating to land in close proximity to the land which was acquired in these proceedings. These kobalas went to show that the rate per katha granted by the Collector, which was Rs. 66-4-0, was too low and that the rate should have been well over Rs. 100 per katha. These kobalas produced by the petitioner, however, refer to homestead lands and not to occupancy lands. They refer to lands which the tenants could sell as building lands without obtaining the consent of the landlord or without paying any salami. They were lands which could be disposed of by the tenants as building lands without objection by anyone and without anyone having any right whatsoever to any part of the proceeds. The present lands, however, being occupancy lands, could not be so freely disposed of as building lands. The landlord's consent to such a sale would be essential, and salami would be payable to him. Accordingly the learned Advocate-General has argued that the rate per katha shown in the various kabuliyats produced and proved by the petitioners form no guide for valuing the present land.

It is clear from a perusal of the judgment of the learned District Judge that no suggestion was made in the Court below that the petitioners in this case could not freely dispose of the lands in question as building lands. Bhekhdhari Mandar, who is a son of one of the petitioners, gave evidence. He stated that the land acquired was near Jamalpur railway station and that he would not sell it under Rs. 125 per katha. He then mentioned that the land acquired was on a high level and was fit for residential purposes. If there was any doubt as to whether the petitioners could sell this land for residential purposes, then this witness should have been cross-examined about it. There was nothing in the cross-examination which went to show that the petitioners could not have sold this land as building land. It appears to have been assumed in the Court below that the landlord in this case would have raised no difficulty and that the tenants would have been allowed to retain the major part, if not the whole of the consideration of the sale of the land for building purposes. Had the argu-

ment now put forward by the learned Advocate-General been put forward in the Court below, reference would undoubtedly have been made to it by the learned District Judge. However, the latter deals with the question on the assumption that the tenants in this particular case sell the land without let or hindrance as building land. In my view as the case for the petitioners was never challenged upon this point, the Collector cannot now allege that the land was not saleable as building land as alleged and conceded in the Court below.

In my judgment the learned Judge was right in treating this land as building land and valuing it as such. The value of the land together with all its advantages must be considered, and it is no answer to the petitioners' claim to say that the land was used purely for agricultural purposes. The land was on a high level and apparently suitable for building purposes. It was near the village of Nayagaon and also adjacent to the Jamalpur railway station. That being so, it was clearly building land and was rightly valued as such. The kobalas produced by the tenants showed a higher rate than Rs. 100 per katha. The learned District Judge, however, was of opinion that for the particular land in question Rs. 100 per katha was a fair valuation. He rightly points out that the land in dispute was situate in a triangle formed by two railway lines. The close proximity of these two railway lines and the shape of the land in question undoubtedly reduced its value. The learned District Judge took that into account and valued the land, as I have stated, at Rs. 100 per katha. In my judgment having regard to the prices obtained for land in the vicinity of this land it cannot be said that Rs. 100 per katha is unreasonable. It appears to me to be a fair valuation of the land in this area.

The learned District Judge also increased the value of the well. The well, as I have stated, was valued by the Collector at Rs. 200. It was a pakka well 30 feet deep and 6 feet in diameter. The valuation of Rs. 350 placed upon this well by the learned District Judge is, in my view, a reasonable one and cannot be seriously challenged. I wish to make it clear that in cases of this kind the Collector must prove the kobalas upon which he relies. Evidence in the present case should have been given on behalf of the Collector as to where the lands, which were the subject-matter of the kobalas, were situate, and the kobalas themselves should have been produced and proved, if not admitted by the petitioners. The Collector cannot rely upon any statement in his award that the amount awarded per katha is based upon the average price per katha contained in a number of kobalas. In cases of this kind the Collector is a defendant and has to support his award, and he must do so by producing evidence and establishing the facts upon which he relies. In the present case there was no evidence whatsoever before the learned District Judge relating to the situation or nature of the lands the price of which the Collector relied upon.

For the reasons which I have given, I am satisfied that no ground has been made out for interfering with the decision of the learned District Judge and I would accordingly dismiss this appeal with costs.

Manohar Lall J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 364

VARMA J.

Sri Bhagwat Lal — Petitioner.

v.

Bachu Pandey — Opposite Party.

Criminal Revn. No. 661 of 1939, Decided on 3rd January 1940, from order of Dist. Magistrate, Shahabad, D/- 29th September 1939.

Criminal P. C. (1898), S. 144—Expression of opinion as to possession in favour of party in order under S. 144 cannot affect real rights of parties.

Any expression of opinion on the question of possession in favour of one party or the other under S. 144 is not of a permanent nature. Such an order is passed in summary proceedings and cannot affect the real rights of the parties on the question of possession. [P 365 C 1]

Kedar Nath Varma — *for Petitioner.*

Order. — This is an application against an order under S. 144, Criminal P. C., passed by the Sub-Divisional Officer of Bhabua on 3rd August 1939. The original notice under S. 144 was issued on 29th June 1939. Therefore the order under S. 144 spent itself after sixty days from the date of the original notice; so the order complained against is no longer in force and therefore it is not necessary for me to set it aside. But the real grievance of Mr. Kedar Nath Varma is that there are certain observations in the order which amount to a declaration of possession in favour of the opposite party who happens to be the first party, the petitioner being the second party. It is well known that any expression of

opinion on the question of possession in favour of one party or the other under S. 144, Criminal P. C., is not of a permanent nature. Such an order is passed in summary proceedings and cannot affect the real rights of the parties on the question of possession. With these remarks the rule is discharged.

G.N./R.K. *Rule discharged.*

A. I. R. 1940 Patna 365

HARRIES C. J. AND FAZL ALI J.

Rambrichh Singh & others—Appellants

v.

Emperor.

Criminal Appeals Nos. 171 and 173 of 1939, Decided on 13th September 1939, from decision of Sess. Judge, Bhagalpur, D/- 20th July 1939.

(a) Words and Phrases — Word 'mojrim' — Meaning of.

The word 'mojrim' does not mean injured. It has only one meaning and that is "accused persons or offenders." [P 368 C 1]

(b) Evidence — Interested witness —Value of evidence.

It would be dangerous to act upon the evidence of an interested witness without corroboration. [P 370 C 2]

(c) Criminal Trial — Defence version untrue — Duty of prosecution.

Even if the version put forward by the defence be wholly untrue, yet the prosecution must establish beyond all reasonable doubt that the case put forward by them is true. [P 370 C 2]

(d) Criminal Trial—Riot—Fight between two armed mobs—Mere suspicion that accused were present cannot be basis for conviction.

If a fight took place between two armed mobs, then there is no evidence as to what actually occurred. A mere suspicion that the accused or some of them were present can form no basis for a conviction. Once the Court has any doubt about the truth of the version even as first recorded, then the accused is entitled to the benefit of that doubt. [P 371 C 1]

Sir Sultan Ahmed and K. K. Banerji (in No. 171) and Jafar Imam, S. N. Sahay, B. N. Rai, S. Mehdi Imam and R. J. Bahadur (in No. 173) — *for Appellants.*

Government Pleader — *for the Crown.*

Binoy Bhusan Ray and G. C. Das — *for Complainant.*

Harries C. J.—These are two connected appeals arising out of a criminal case tried by the learned Sessions Judge of Bhagalpur. The appellants in the two appeals are Jadu Jha, Bhukhan Jha, Satyadeo alias Sahdeo Missir, Rama Dhanuk, Shaikh Gafoor, Mahabir alias Jung Bahadur Gope and Rambrichh Singh. The two appeals arise out of the same matter and can be disposed of in one judgment. The seven appellants together with three other persons who were acquitted, were tried on a number of charges arising out of a riot which took place on 16th January 1939, in village Singhar, P. S. Kishunganj, in the District of Bhagalpur. Jadu Jha was charged under Ss. 302 and 148, I. P. C.; the appellants Bukhan Jha, Satyadeo, Ramo Dhanuk and Mahabir were charged under S. 148 and S. 302 read with S. 149, I. P. C.; and the appellants Shaikh Gafoor and Rambrichh Singh were charged under S. 147 and S. 302 read with S. 149, I. P. C. Jadu Jha was found not guilty of the charge under S. 302, I. P. C., but was convicted under S. 302 read with S. 149 and S. 148, I. P. C., and sentenced to transportation for life under S. 302 read with S. 149, I. P. C., and to two years rigorous imprisonment under S. 148, I. P. C., the sentences to run concurrently. The remaining appellants were found guilty under S. 302 read with S. 149 and S. 147, I. P. C., and sentenced to transportation for life under S. 302 read with S. 149 and to one year's rigorous imprisonment under S 147, the sentences to run concurrently. It is against these convictions and sentences that the present appeals have been preferred. There can be no doubt that a riot took place in the village of Singhar on 16th January 1939, and that during the course of that riot one Jhapta Tiar was killed and another person Mukhlal Chaudhuri severely injured. It is in respect of the death of Jhapta Tiar that the seven appellants have been convicted under S. 302 read with S. 149, I. P. C.

The case for the prosecution can be shortly stated as follows : In the village of Singhar there was a plot No. 657 of an area of about 1½ bighas. This plot formed part of a larger area of 16 or 17 bighas, which was the bakasht land of Mahant Sundar Gir. This land has formerly formed part of a larger area which had been owned by one Sundar Mahto and his nephew Gorelal. These two persons partitioned the land, and Sundar Mahto got the bakasht land on the north-west of the patti and Gorelal the land in the south-east portion. The appellant Jadu Jha and his brother Janardan Jha purchased the land of Sundar about eight years ago in execution of a money decree and the entire interest of Gorelal was purchased by Mahant Sundar Gir in 1933. The plot in question, it is said, formed part of the land allotted to Gorelal in this partition and therefore became the

property of the mahant. In 1934 the mahant obtained dakhaldehani of the property and since then, it is said, he has been in khas possession of the same. In the year 1935 the appellant Jadu Jha undoubtedly laid claim to this bakasht land of Gorelal alleging that the latter had given it to him in raiyati settlement. There were proceedings under S. 144, Criminal P. C., between the appellant Jadu Jha and the mahant; but these proceedings were eventually compromised and the appellant Jadu Jha gave up all claims to the area of 16 bighas of bakasht land which included plot No. 657 which is the important plot in this case.

According to the prosecution, on the morning of 16th January 1939, Satto Kuar, the mahant's tahsildar, sent off ten ploughs and ploughmen together with two peons, Jhapta Tiar and Mukhlal, to plough the bakasht land. According to the prosecution, Jhapta Tiar was a man of another village who had been in the mahant's employ as a sipahi for about two months. The party arrived at Singhar and commenced to plough plot No. 657. The prosecution allege that shortly afterwards Jadu Jha at the head of a mob of about forty or fifty men came from Jadu Jha's basa, about a quarter of a mile to the north-west of the field, and approached Jhapta Tiar. Jadu Jha is said to have asked Jhapta Tiar why he was ploughing the land, and the latter replied that he was entitled to plough his master's land. Thereupon, it is said, Jadu, who was armed with a spear, came towards Jhapta, who ran towards the south. The mob pursued him, caught him up and Jadu speared him below the right arm pit, and the appellant Mahabir struck him on the head with a garasa. Jhapta fell down whereupon the mob joined in beating him. After disposing of Jhapta, it is said that the mob turned their attention to Mukhlal and that Jadu Jha speared him in the stomach, whereas others struck him with pharsa, bhala and lathi. After Mukhlal had fallen down, the mob attempted to lift him up, but this they failed to do. The learned Sessions Judge remarks that "Mukhlal is a man of altogether unusual physique and of colossal bulk," and for this reason it is suggested that the mob could not move him. The appellant Jadu and his followers then returned to Jhapta Tiar, who was by then dead and picked up the body and carried it to an orchard of Bhubneshwar Singh. There, it is said, they wrapped the body in a cloth, placed it in a bullock cart and took it to the basa of Jadu Jha. After that four or five members of the mob returned to the field which was covered with long paddy stubble, and they set fire to it. It is suggested by the prosecution that they did this in order to conceal the blood marks caused by the attacks on Jhapta and Mukhlal.

The two peons, Jhapta and Mukhlal were seated on the boundaries of the plot some distance from each other and some distance from the ploughmen who were actually ploughing. The latter, it is said, ran away some little distance and witnessed the whole occurrence. One of them, namely Shyamlal (P. W. 1), went to Sonbarsa, where Satto Kuar, the mahant's tahsildar, was and reported to him what had occurred. Satto Kuar, it is said, immediately proceeded on horseback to the Police Station at Kishunganj, which was about six miles away, and at 11-30 A. M. he made a first information report. In this report Satto Kuar mentions that he had sent the ploughmen together with Jhapta and Mukhlal to plough the land and that the appellants Jadu Jha, Pukhan Missir, Gafoor Mia, Sahdeo Missir, Mahabir Gop and another person Uma Missir who was acquitted together with 40 or 50 men came on to the plot armed with bhala, garasa and lathi and began to assault the two peons. He mentions that this mob caused injuries to Mukhlal with bhala and garasa and assaulted Jhapta with the same weapons. He further mentioned that he could not say where they had carried Jhapta from the spot and said that the latter was so severely injured that he might well be dead. He added that the accused persons were grievously hurt and that the ploughmen were witnesses of the occurrence.

According to the prosecution, just as the Assistant Sub-Inspector had completed the recording of this report, the appellant Mahabir arrived at the thana and made another report. According to Mahabir's report, Satto Kuar together with about a hundred men came to Singhar armed with bhalas, garasas and lathis and went to the house of the appellant Jadu Jha. It is said that they used force, whereupon the appellants Gafoor Mia, Jhapta Tiar, Bukhan Jha, Baso Missir and the informant defended themselves. In this assault Jhapta Tiar is said to have been struck down and killed. Mahabir alleged that he had been struck with a spear and that he had an injury on the left thumb. It will be seen that according to this report the deceased man Jhapta Tiar was said to

be a servant of Jadu Jha and not of Mahant Sundar Gir.

The police took up investigation and visited the scene of the riot and found that part of the stubble had been burnt as alleged by the prosecution. According to the police, blood-stained earth was found in places in spite of the fires, and this earth was later found to be stained with human blood by the chemical examiner and imperial serologist. The police came to the conclusion that the version given in Satto Kuar's report was the correct one, and accordingly proceedings were brought against the seven appellants and three others. According to the prosecution, the occurrence took place between a mob of 40 or 50 led by the appellant Jadu Jha on the one hand and two peons of Mahant Sundar Gir on the other hand. It is not alleged that the ten ploughmen took any part in the proceedings. The motive for the attack is said to be the appellants' desire to recover this bakasht land which he had claimed in 1935 to be his property.

It is difficult to believe that the riot was the result of any claim made by the appellant Jadu Jha to this property. As I have stated earlier, it was the case for the prosecution that this property had given rise to proceedings under S. 144, Criminal P. C., and that those proceedings had been compromised. By that compromise Jadu Jha acknowledged that the mahant was entitled to khas possession of this land, and that being so, there appears to be no reason why the appellant Jadu Jha should have suddenly laid claim to the land. There are indications in this case which suggest that the trouble between the villagers of Singhar and the mahant was far more acute than the prosecution suggest. It was admitted by the witnesses for the prosecution that the mahant's land had been previously cultivated by bataidars and that the mahant over a period of time had succeeded in ejecting these persons.

Further, it must be remembered that Jadu Jha and some of the other appellants were prominent members of the local Congress organization and were taking an active part in the Kisan movement. There was undoubtedly enmity between Jadu Jha and the mahant and litigation had taken place between them. In such circumstances it may well be that the occurrence which took place on the morning of 15th January 1939, was something different from that suggested by the prosecution. It is more likely that this was an occurrence between kisans demanding possession of bakasht lands and the malik who was denying such possession. From the evidence of Satto Kuar (P. W. 2) it would appear that he did not expect any trouble on the morning in question : hence he only sent two peons Jhapta Tiar deceased and Mukhlal. It is to be observed however that these two persons were of somewhat unusual character. Jhapta Tiar is admitted to have been an absconder in a murder case whereas according to the Sessions Judge, Mukhlal was a man of extraordinary physique who might well have been a retired wrestler, though Mukhlal denied this. However, if only two peons were sent, it does suggest that no trouble was anticipated on the morning in question.

I am however far from satisfied that this was an occurrence between a mob on the one hand and two peons on the other. At 11 A. M., that is half an hour before Satto Kuar made his report, Lalji (P. W. 20) chaukidar of the village reported at the thana that there was an apprehension of a breach of the peace between Jadu Jha and Mahant Sundar Gir and that both parties had collected lathials. He concluded by saying that he could not say what was the cause of the trouble. Lalji had gone to the thana on foot, and it is fairly clear that he must have left the village immediately before the riot started. In the report he clearly says that both sides had collected lathials. The learned Sessions Judge does not attach any great importance to this report and he regards it as an exaggeration on the part of the chaukidar. The learned Judge thought that Lalji having seen Jhapta Tiar and Mukhlal with the ploughmen might well have thought that the mahant had gathered together lathials. Lalji chaukidar gave evidence and he undoubtedly resiled from his earlier statement. In the witness box he said that he had seen a number of men at Jadu Jha's house and more men on the mahant's land. According to him, this was the sole reason why he went to the thana to make a report. When it was put to him that he had mentioned that both sides had collected lathials, he denied having ever made such a statement. The police, on the other hand, had to admit that such a statement had been made and recorded. If both sides had collected lathials on this particular morning, then it is clear that the prosecution have given a false version of what occurred.

That the occurrence was something different from that suggested by the prosecution is also indicated in the first information report made by Satto Kuar. The names of the accused are given as Jadu Jha, Gafoor Mian, Bhukhan, Satdeo Missir, Mahabir Gop, Uma Missir and 40 or 50 men more, residents of villages Karawan, Sonbarsa and Tilakpur. These are villages lying at a distance of two or three miles from Singhar, and if the mob consisted of persons from other villages, the probabilities are that this was part of the kisan agitation and not a private quarrel between Jadu Jha and the mahant.

Another important statement in the first information report is that the accused persons have been grievously hurt. It is not suggested now by the prosecution that any of the accused persons were hurt, and indeed they could not have been hurt if the prosecution version be true. As I have stated, the account now given by the prosecution of the affair is an unprovoked attack by a large mob upon two persons who attempted to run away. There is however the clearest statement in the first information report that "the accused persons have been grievously hurt." The Assistant Government Advocate who appeared for the Crown attempted to explain away this difficulty by saying that the word used was not "accused" but "injured." In short he says the sentence ought to read "the injured persons have been grievously hurt," and it is to be observed that the first information report was so translated in the Court below and that was the translation which was placed before the Sessions Judge. Accordingly the Sessions Judge does not deal with this aspect of the case. The word used in this sentence is *mojrim* and there can be no doubt whatsoever that that word means "accused" or "offenders." It cannot possibly mean "injured." The Assistant Government Advocate suggested that the word might be majrooh which means "injured"; but it is clear that the word written is not majrooh but mojrim.

Mr. Jafar Imam, who has argued this case with great ability on behalf of the main appellants, has contended that the word majrooh is not a word which any person in that locality would be likely to use and that in any event an Assistant Sub-Inspector would never use the word mojrim when he meant injured persons. According to Mr. Jafar Imam, mojrim is a word in common use, whereas majrooh is not. It would be impossible for me to arrive at any decision upon this question but for the fact that I had the advantage of sitting with my learned brother Fazl Ali J., who has a wide knowledge of the language and of all districts in this province. He is satisfied that a Sub-Inspector could never use the word mojrim to mean injured. It has only one meaning and that is "accused persons or offenders." If Satto Kuar stated that accused persons had been grievously hurt, then it is obvious that there were lathials on the side of the mahant and that a fight had taken place between two armed mobs. This is, of course, denied by the prosecution; but, in my view, the statement that accused persons had been grievously hurt can only be explained on the ground that there had been a fight between armed parties. If such was the occurrence, then it is clear that the case for the prosecution is wholly false. There are other indications in the first information report that the document is not a genuine one. Counsel who appeared with counsel for the Crown in the Court below also appeared with the Assistant Government Advocate in this case, and according to him, the original document was never inspected thoroughly by anybody in the Court below. As I have stated, a translation had been prepared which was before the learned Sessions Judge. A mere glance at the first information report will show that additions have been made to it. The report of the occurrence is written on both sides of the page, and the first page ends with these words

after one hour Shyamlal Missir came running to the muth and reported that Mukhlal Singh peon and Mohan Mandal alias Jhapta Tiar had gone to get the land ploughed.

On the reverse side of the sheet the report was continued, and it is clear that the first word on the reverse side is *usme*. The opening sentence on the reverse side of the sheet can be translated,

thereupon, or in that affair, the accused persons Jadu Jha and others caused injuries to Mukhlal Singh by assaulting him with bhala and garasa, &c.

However, above the first line on the reverse side of the page have been inserted three lines which have been written very close together. The lines in the remainder of the report are well and evenly spaced, but these three lines are squeezed in the narrow space between the line beginning with *usme* and the top of the page. What appears in the three lines written in that narrow space are the words

Jadu Jha, Bhukhan Missir, Gafoor Mian, Sahdeo Missir, Mahabir Gop, Uma Missir and forty or fifty men more came armed with bhala, garasa and lathi and began to assault him.

In short, the names of the accused other than Jadu Jha all appear in these three lines which have been squeezed in at the very top of the page. As I have stated, a cursory glance at this document is enough to show that these three lines could never have been written by a person taking down Satto Kuar's statement in the ordinary course of his duty. The spacing is entirely different and the handwriting is smaller, and it is clear that when these three lines were written it was obvious to the mind of the writer that he had very little space in which to write them.

It is inconceivable that if Satto Kuar knew the names of the accused, he would have omitted to mention them when the report was first recorded. If this report as originally recorded did not contain the names of Bhukhan Missir, Gafoor Mian, Sahdeo Missir, Mahabir Gop and Uma Missir, then it must have been deliberately altered in order to strengthen the case for the prosecution. It cannot be overlooked that after this report was recorded the appellant Mahabir arrived and made another report, and in that report he mentions not only that he was present but also that the appellants Gafoor Mian and Bhukhan Jha were also there. It was strongly urged by Mr. Jafar Imam that the names of these appellants were added in the thana after it became known from Mahabir that Bhukhan, Gafoor and Mahabir were present in the occurrence. It is quite impossible for me to come to any conclusion as to when and why these names were added; but I am perfectly satisfied in my own mind that the only name which appeared in this report when it was first recorded, was the name of Jadu Jha. The report has undoubtedly been altered and the names of other appellants interpolated therein.

Column 2 on the front page of the first information report also shows that alterations had been made. This is the column in which the names and residences of the accused are given : and it is clear that the name of Mahabir Gop was added in this column. Whoever filled this column first wrote five names, Jadu, Bhukhan, Gafoor, Sahdeo and Uma, and numbered them 1 to 5. Between the name of "Sahdeo" and "Uma" the name of "Mahabir Gop" has been added and numbered 5 and the original No. 5 which stood opposite Uma's name has clearly been altered to 6. This also shows that there were alterations made in this report of which the prosecution have offered no explanation whatsoever. The attention of the Court was also drawn to another addition on the first page. On the last line of the first page of the report it is stated that Mukhlal Singh peon and Mohan Mandal had gone to get the land ploughed. Underneath the name "Mohan Mandal" appears the words "uruf Jhapatu Tiar." According to the prosecution, the deceased Jhapta Tiar was also known as Mohan Mandal, and it may well be that this was an honest mistake. No attempt seems to have been made to alter the words first written in the report and the words "uruf Jhapatu Tiar" are written just under the words Mohan Mandal. I therefore do not attach any great importance to this alteration. However, the insertion of names in this first information report does throw the very gravest doubt upon the genuineness of the case for the prosecution.

That some of the names of the appellants mentioned in the report could not have been given by Satto Kuar, is, in my view, clear from the evidence. It must be remembered that Satto Kuar was not an eye-witness and that he merely stated what Shyamlal Missir (P. W. 1) had reported to him. Shyamlal in evidence had to admit that he had not named either Satdeo or Uma to the Police. He stated that he did not know their names at that time and then said that he forgot whether he gave their names to Satto Kuar or spoke of them as the sons of Khuddar. If he did not know their names at the time, he could not have named them to Satto Kuar, and if he made any reference to these two men he could only have mentioned them as the sons of Khuddar. Even if he had said that the sons of Khuddar were there, such could not account for Uma being named by Satto Kuar because he is not a son of Khuddar. Shyamlal, when he was called to identify Uma and Satyadeo, could not distinguish between them, and before the committing Magistrate he wrongly pointed out Bhubhan for Satyadeo, which suggests that he knew neither. It seems clear from Shyamlal's evidence that he could not have named either Satyadeo or Uma, yet both names appear in the interpolation in the first information report. The prosecution can offer no explanation as to how these names appear except that Shyamlal must have given them to Satto

Kuar. It is clear from Satto Kuar's own evidence that he had no information whatsoever except that given him by Shyamlal; but in spite of that names appear in the first information report, which Shyamlal could never have given and those names appear in the most suspicious circumstances. That being so, I cannot accept this first information report as a genuine document; and that being so, grave doubts arise in my mind about the truth of the case for the prosecution.

The Assistant Sub-Inspector came on to the scene later in the afternoon, and during night he recorded the statements of the various ploughmen. These ploughmen are all servants of the mahant, and therefore their evidence must be scrutinized with great care. If some one in authority had determined to make out a case against the appellants, these unfortunate ploughmen would have no alternative but to support it. I would therefore not attach any great weight to the evidence of the ploughmen unless it is corroborated by independent testimony. As I have stated, the ploughmen all support the prosecution version that this was an unprovoked attack upon two peons; and this version, as I have already pointed out, is most unlikely having regard to the report made at the thana at 10-30 A. M. that morning by Lalji chaukidar (P. W. 20). The fact that Lalji chaukidar in the witness-box denied having stated that both sides had collected lathials, also suggests that the prosecution, for reasons best known to themselves, were not putting forward a true version.

Three witnesses made it clear that in this mob were men from Karawan, though they undoubtedly tried to resile from that version later. Jahuri (P. W. 19), a raiyat of the village, in a statement on oath made under S. 164, Criminal P. C., mentions a mob from Karawan which was joined by Jadu's men. In evidence in the Sessions Court, he denied the truth of this and could not remember whether he had ever told the Magistrate when his statement was recorded under S. 164. Medni (P. W. 21), another raiyat of the village, also stated to the Magistrate that a mob from Karawan also surrounded the deceased man Jhapta Tiar. In the Sessions Court he says that what he meant was that a mob came from the Karawan side of the Basa which joined Jadu's mob. Shyamlal (P. W. 1) mentioned to the Magistrate in his examination under S. 164, Criminal P. C., that a mob of forty or fifty men came from Karawan and Singhar. Before the committing Magistrate he said that the mob came from Jadu's Basa, and in the Sessions Court he said that the mob came with Jadu from the north-west and denied that he had stated in his examination under S. 164 that the mob came from Karawan as well as Singhar. It is clear that these witnesses did at first say that the mob consisted of men from Karawan as well as of Singhar but that they have denied this presumably, with a view to supporting the case of the prosecution that this was a mob assisting Jadu in a personal quarrel.

All the indications show that this was a riot between kisans on the one hand and the zamindar's men on the other. Unfortunately at that time feelings were running high between the parties, and such an occurrence might well have taken place. If that be the true view of the occurrence, then there is the real danger that Jadu might be mentioned as the leader whether he was present or not. The learned Sessions Judge fully realized the danger of acting on the evidence of interested witnesses, but in his view the main case for the prosecution was supported by the evidence of witnesses upon whom reliance could properly be placed. (After discussing the evidence his Lordship proceeded.) The injured peon Mukhlal is obviously an interested witness, and the Sessions Judge very rightly points out that it would be dangerous to act upon his evidence without corroboration. It appears to me that there is no independent evidence corroborating any of these prosecution witnesses and therefore in the circumstances of this case it would be dangerous to act upon the evidence of the eye-witnesses. It is unnecessary to consider at any length the various versions put forward by the accused. As I have stated earlier in the judgment, Mahabir, in the report which he made, alleged that the deceased man, Jhapta Tiar, was a peon of the appellant Jadu Jha. The learned Sessions Judge was satisfied upon the evidence that this was untrue and that Jhapta Tiar was in fact a servant of the mahant. In my view, the learned Sessions Judge was right in holding that Jhapta Tiar was a servant of the mahant and that he was killed on the plot in question and not at the Basa of Jadu Jha. However even if the version put forward by the defence be wholly untrue, yet the prosecution must establish beyond all reasonable doubt that the case put forward by them is true.

In my judgment, the riot which took place on the mahant's land on the morning of 16th January 1939, was a riot between a body of kisans on the one hand and lathials of the mahant on the other. It may be that some of the appellants, if not all of them, were present in that affair; but on the evidence before me I cannot hold positively that their guilt has been established. Once the case, as presented by the prosecution, is found to be false, there is no evidence before this Court upon which any of the appellants can be convicted. If a fight took place between two armed mobs, then there is no evidence as to what actually occurred. A mere suspicion that the appellants or some of them were present can form no basis for a conviction. It is true that even before the interpolations in the first information report, the name of Jadu Jha is mentioned; but once the Court has any doubt about the truth of the version even as first recorded, then Jadu Jha is entitled to the benefit of that doubt. In my view the guilt of the appellants has not been established beyond reasonable doubt, and that being so, they must be acquitted. In the result therefore I would allow these appeals, set aside the convictions and sentences passed upon the appellants and acquit them on all the charges. They must be set at liberty forthwith unless required by the authorities upon any other charge.

Fazl Ali J.—I agree.

D.S./R.K. *Appeals allowed.*

A. I. R. 1940 Patna 371

HARRIES C. J. AND FAZL ALI J.

Mukhan Singh and others—Defendants — Appellants.

v.

Babu Chandrika Prasad Singh and others — Plaintiffs — Respondents.

Letters Patent Appeal No. 11 of 1939, Decided on 21st September 1939, from decision of Agarwala J., *Reported in A I R 1939 Pat 413.*

(a) Bihar Tenancy Act (8 of 1934), Ss. 179 and 155 — Parties to mukarrari lease can contract that right of ejectment which landlord shall have under agreement would not be subject to provisions of S. 155.

The words "any terms agreed on between him and his tenant" which occur in S. 179, are very wide and show that the parties to a mukarrari lease to which that Section applies can contract not only out of Ss. 10, 65 and 178 but also S. 155. There is nothing in S. 179 to prevent the landlord from entering into a contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by S. 155. [P 372 C 2; P 373 C 1]

(b) Bihar Tenancy Act (8 of 1934), S. 179— Parties to mukarrari lease agreeing that on default in payment of any instalment of rent landlord would have right to eject tenant — Suit for ejectment — Tenant is not entitled to relief under S. 114, T. P. Act.

Where parties to a mukarrari lease have agreed under S. 179, Bihar Tenancy Act, that on default of payment of any of the instalments of rent the landlord would have right to eject the tenant and on default of payment of instalment a suit for ejectment is brought, the tenant would not be entitled to relief under S. 114, T. P. Act, as neither S. 114 nor the principle underlying that Section can be applied to such a case. [P 373 C 1]

Phulan Prasad Varma — *for Appellants.*

Baldeva Sahay, Harinandan Singh and Harians Kumar — *for Respondents.*

Fazl Ali J. — This is a Letters Patent appeal from a judgment of Agarwala J. in a second appeal arising out of a suit in ejectment. It appears that on 17th November 1912, the plaintiffs' predecessor-in-interest granted a permanent mukarrari lease to defendant 4 at an annual rent of Rs. 19 in which there was a clause to the following effect:

> If any of the fixed instalments (of rent) remain unpaid, the said proprietors (i. e. the lessor) and their heirs and representatives shall be competent to cancel this patta on their own authority and bring the mukarrari property into their own direct possession or to settle it with others, to which no objection by me or my heirs and representatives shall be entertained.

On 29th August 1934, defendant 4 transferred the mukarrari land to defendants 1 to 3, and as neither these defendants nor defendant 4 paid the rent due for the year 1341 and 1342 Fasli to the plaintiffs, the latter brought in 1935 the present suit for the ejectment of defendants 1 to 3 on the ground that the lease had been forfeited. They also claimed compensation for use and occupation of the land by the defendants subsequent to the date of the alleged forfeiture. The trial Court passed a decree in the following terms:

> The suit be decreed on contest with costs against defendants 1 to 3 and ex parte against defendant 4. Defendants 1 to 3 are directed to pay to the plaintiffs the sum of Rs. 21-9-6 the amount claimed by them in this suit, as compensation and damages for 1342 F, along with full costs of this suit within 15 days from this date. In case the money is paid to the plaintiff or is deposited in Court within the aforesaid period, the lessee shall hold the property leased, as if the forfeiture had not occurred, but in case the order is not complied with, the plaintiffs will be entitled to eject the defendants from the holding and recover possession thereof. Defendant 4 will be liable for payment of Rs. 21-9-6 to the plaintiff on account of compensation and

damages for 1341 F. Pleader's fee at 8 per cent. Future interest at 6 per cent.

The plaintiffs appealed from the decree of the trial Court and the lower Appellate Court, while maintaining the decree for compensation, gave them an unconditional decree for ejectment. The judgment of the lower Appellate Court was upheld on second appeal and hence this appeal under the Letters Patent. S. 179, Bihar Tenancy Act, provides that:

> Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant.

This Section was construed by a Full Bench of this Court in 13 Pat 231[1] and the view expressed in that case was as follows:

> The true construction of S. 179 is that it is a permission to landlords and tenants, in the case of a creation of a permanent tenure in a permanently settled area, to contract out of the Act and that whereas the general law created by the Bengal Tenancy Act as applicable to the relationship of landlord and tenant will apply to a permanent mukarrari lease the parties are at liberty to make a specific provision for the elimination of such terms as may be imposed by the Act as they may select to eliminate.

The same view has been expressed by this Bench in S. A. No. 388 of 1938.[2] In that case it was contended that there can be no ejectment for non-payment of rent under the Bihar Tenancy Act by reason of Ss. 10, 65 and 178, sub-s. (1), cl. (c), but this contention was negatived and my Lord the Chief Justice pointed out in his judgment that S. 179 is by its terms, an exception to the law as laid down in the earlier Sections and therefore those Sections of the Act would not prevent the parties agreeing to whatever terms they thought proper. Now, the point raised in this appeal is not that the plaintiffs cannot claim ejectment by reason of any specific provisions of the Bihar Tenancy Act. On the other hand, it is conceded that they have a right to sue for ejectment in the present case. What is really contended is that before suing for ejectment it was incumbent on the plaintiffs to follow the procedure laid down in S. 155, Bihar Tenancy Act, and the decree passed in that suit must conform to that Section. It is argued that S. 155 merely provides the procedure which must be followed in all suits for ejectment, and so there is no conflict between this Section and the right to claim ejectment which may be provided for by any special covenant in a mukarrari lease between a tenant and a proprietor or holder of a permanent tenure in a permanently settled area. As this point was neither raised nor decided in S. A. N. 388 of 1938,[2] it is necessary to deal with it specifically in this appeal.

Section 155 provides among other things (1) that a suit for the ejectment of a tenant, on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and, where the misuse or breach is capable of remedy, requiring the tenant to remedy same, and, in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request; and (2) that a decree passed in favour of the landlord in any such suit shall declare the amount of compensation which would reasonably be payable to the plaintiff for the breach, and whether, in the opinion of the Court, the breach is capable of remedy, and shall fix a period during which it shall be open to the defendant to pay that amount to the plaintiff, and, where the breach is declared to be capable of remedy, to adopt the same.

The first question to be decided is, whether there is anything in the Tenancy Act to prevent the parties to a mukarrari lease from contracting out of this Section or in other words entering into an agreement that if the lessee is to be ejected he may be ejected unconditionally and independently of the provisions of this Section. In my opinion, the answer to this question must be in the negative. The words "any terms agreed on between him and his tenant" which occur in S. 179 are very wide and show that the parties to a mukarrari lease to which that Section applies can contract not only out of Ss. 10, 65 and 178 as was held in Second Appeal No. 388 of 1938,[2] but also S. 155, Ben. Ten. Act. As was pointed out by Agarwala J. if the provisions of S. 155 are examined, it will be found that the right of ejectment which the landlord may have, is qualified by them in two particulars: first, the landlord is required to give a notice in the prescribed

1. Moinuddin Mirza v. Sourendra Kumar Roy, (1934) 21 A I R Pat 153=147 I C 655=13 Pat 231=15 P L T 156 (F B).
2. Muhammad Hasan v. Baidyanath Sahay, *Reported in* (1940) 27 A I R Pat 140=184 I C 605=21 P L T 117.

form specifying the breach of contract; and, secondly, the landlord is compelled to accept compensation in lieu of forfeiture in the event of tenants choosing to pay such compensation. But, as has already been pointed out, there is nothing in S. 179 to prevent the landlord from entering into a contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by S. 155.

The next question to be considered is whether there is any such contract in the mukarrari lease upon which the title of the defendants is based. In my opinion, the relevant clause in this document which has already been referred to, gives the landlord an absolute and unqualified right of re-entry. This is clear from the use of the expression "on their own authority" and also by the provision that no objection to the right of re-entry shall be entertained if any objection is put forward by the lessee or his heirs. The vernacular expression which has been translated to mean "on their own authority" is ba-ikhtiare-khud. In my view, the use of this expression makes it clear that the right of re-entry which the landlord was entitled to exercise under the lease was subject to none of the qualifications laid down in the Bihar Tenancy Act. It was lastly contended by the learned advocate for the appellants that the appellants are in any event entitled to a relief under S. 114, T. P. Act. This Section runs as follows :

> Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within 15 days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

The lower Appellate Court has, in its judgment, clearly shown that S. 114 can be of no avail to the appellants, because the conditions laid down in this Section have not been fulfilled in the present case. But apart from that fact it is quite plain that neither S. 114, nor the principle underlying it can be applied to the present case. S. 114 is not applicable because this case is not governed by the Transfer of Property Act, but by the Bihar Tenancy Act. As to the principle underlying that Section, it is enough to point out, first, that this principle is also embodied in S. 155, Bihar Tenancy Act, which is virtually a counter-part of S. 114, T. P. Act, and secondly, that if the Act itself which contains this provision enables the tenant to contract himself out of the concession available to him under it, there can be no further room for the application of any equitable principle. In my opinion, the case was correctly decided by Agarwala J., and I would dismiss this appeal with costs.

Harries C. J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 373

AGARWALA J.

Kesrilal Kedia and another
Accused
v.
Emperor.

Criminal Ref. No. 8 of 1940, Decided on 26th February 1940, made by Sess. Judge, Darbhanga, D/- 20/ 24th January 1940.

Defence of India Ordinance (1939), S. 2—Defence of India Rules, R. 34 (6)—"Prejudicial act" in R. 34 (6) does not include profiteering.

Profiteering was not intended to be included in the definition of "prejudicial act" in R. 34 (6). Therefore the selling of a pair of dhoties by charging an increase over 10 per cent in the price does not fall under R. 34 (6). [P 374 C 1, 2]

C. P. Sinha — *In favour of Reference.*

Government Pleader —

Against Reference.

Order. — This is a reference under Section 438, Criminal P. C., by the Sessions Judge of Darbhanga. The facts were as follows : On 24th September 1939, the accused sold for Rs. 2-6-0 a pair of dhotis similar to a pair which they had sold on 5th September for Re. 1-13-6. The police submitted a Namokamal charge-sheet alleging the commission of an offence under Rr. 34 (h)/38, Ordinance Act of 1939. The accused persons were sent in custody to the Sub-Divisional Magistrate who remanded them to hajat until 27th September 1939. The learned Sessions Judge recommends the setting aside of this order taking cognizance of the offence on the ground that no offence has been made out by the facts alleged. The Sections referred to in the charge-sheet are presumably rules embodied in the Defence of India Rules framed by the Central Government, under S. 2, Defence of India Ordinance, 1939. There is no R. 34 (h) but there is a R. 34 (6), which

defines what is meant by "a prejudicial act" and sub-r. (h) includes within the definition of "prejudicial act" any act which is intended or is likely to impede, delay or restrict the distribution of any essential commodity. Essential commodity is defined in R. 34 (3) as food, water, fuel, light, power or any other thing essential for the existence of the community which is notified in this behalf by Government. There is no evidence before me that the Government has notified clothing to be an essential commodity within the meaning of this Rule. Under sub-r. (g) of R. 34 (6) it is also a prejudicial act to cause fear or alarm to the public or to any section of the public. An increase of roughly 10 per cent. in the price of a pair of dhotis can hardly be said to be an act likely to cause fear or alarm to the public or to any section of it, whatever other consequences it may have on the public mind. It has also been suggested that the act complained of falls within sub-rule (p) of R. 34 (6). This sub-rule refers to acts intended or likely to prejudice the efficient prosecution of the war and the defence of British India or the public safety or interest. The increase in the price of this pair of dhotis is not likely to have any bearing on the efficient prosecution of the war and the defence of India or the public safety; nor, in my opinion, can it be said to prejudice the public interest that a shopkeeper increased the price of a pair of dhotis by 10 per cent. I am confirmed in my view that this rule is not aimed at profiteering by a comparison of Rr. 38 (5) and 81 (4). R. 38 (1) (a) prohibits the doing of any "prejudicial act" as defined in R. 34 (6), and R. 38 (5) provides that any person who contravenes the provisions of R. 38 shall be punishable with imprisonment for a term which may extend to five years and shall also be liable to fine. It is apparently sought to punish the accused under S. 38 (5) and if that sub-rule applies the accused is liable to imprisonment for five years for what is popularly known as profiteering.

Now, R. 81 (2) authorises the Central Government for the purpose, inter alia, of maintaining supplies and services essential to the life of the community, to provide for the control of prices at which articles or things of any description whatsoever may be sold, and sub-r. (4) provides that any person who contravenes the provisions of this rule shall be punishable with imprisonment for a term that may extend to three years and shall also be liable to fine. It will be observed, therefore, that in the rule which specifically refers to the control of prices the punishment is limited to three years whereas the punishment for doing a 'prejudicial act" may extend to five years. This distinction, I think, supports the view that profiteering was not intended to be included in the definition of "prejudicial act" in R. 34 (6). The next question to be considered is whether the accused is liable by reason of R. 81 (4). For this purpose it is necessary to enquire whether in fact there has been any order controlling the price of cloth. S. 2 (4) (b), Defence of India Ordinance, 1939, empowers a Local Government to direct that any of the powers conferred upon it by sub-r. (1) shall be exercised by any Provincial Government or by any officer or authority subordinate to such Government. R. 2 (1) authorizes the Central Government to make rules for maintaining supplies and services essential to the life of the community. In exercise of the powers conferred by sub-r. (4) of R. 2, the Central Government has directed that the powers conferred on it by sub-r. (2) of R. 81, Defence of India Rules, to provide for controlling prices shall also be exercisable by any Provincial Government : *see* Notification of the Department of Commerce No. 20 dated 8th September 1939. The notification provides that the powers thus conferred on the Provincial Government shall only be exercised, inter alia, in respect of the cheaper qualities of cotton cloth and that the orders issued by the Local Government shall not subject the prices to a minimum lower than 10 per cent. above the ruling price on 1st September 1939.

Now in the first place, the learned Subordinate Judge pointed out that no scale of prices for cloth in the Darbhanga District had been promulgated before 21st September 1939; nor has any order fixing the price of cloth in that district been brought to my notice. Furthermore, even if the Local Government has fixed or does fix the price of cloth it is bound to allow 10 per cent. above the price ruling on 1st September last. Assuming that the price of the dhotis with which I am concerned was Re. 1-13-6 on 1st September 1939, the Local Government was bound by any order which it issued to permit the dealer to charge up to Rs. 2 and some odd pies. In the present instance it has exceeded that price by less than six pies; but it has not

been shown that the Local Government or the Central Government has in fact fixed the price of cloth in exercise of the powers conferred on them. In the absence of any order fixing the price of cloth in the Darbhanga District it cannot be held that the accused has committed any offence under the Defence of India Rules. The reference is therefore accepted and the order of the Sub-Divisional Magistrate taking cognizance of the case is set aside.

It may be observed that the Defence of India Ordinance, 1939, has been repealed and replaced by the Defence of India Act 1939, which received the assent of the Governor-General on 29th September 1939. R. 21 of the Act provides that rules made under the Ordinance shall be deemed to have been made in exercise of powers conferred by or under the Act as if the Act has come into operation on 3rd September 1939. It has not been shown that any fresh rules have been issued under this Act relevant to the present question.

G.N./R.K. *Reference accepted.*

A. I. R. 1940 Patna 375

DHAVLE J.

Ram Bilas Sharma and others
Petitioners

v.

Emperor.

Criminal Revn. No. 544 of 1939, Decided on 27th November 1939, against order of Sub-Divisional Magistrate, Monghyr, D/- 19th July 1939.

(a) Criminal Trial — Bail — Order-sheet of Magistrate containing undertaking on which he accepted bail-bonds — Bailors signing against such part—Order-sheet together with bailors' signatures becomes part of contract between parties.

If a contract is required to be in writing, it is not the law that it must be contained in one piece of writing alone and the full terms of contracts in writing have often to be gathered from a series of letters passing between the parties put together. Hence, where the bailors signed the order-sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bonds, the order-sheet with the bailors' signatures itself becomes a part of the contract between the parties. [P 376 C 1]

(b) Criminal P. C. (1898), S. 514 — Bailors should not be held to their bonds before hearing them.

It is wrong to pass an order of forfeiture and to hold bailors to their bonds without calling upon them to show cause why the penalty should not be paid. [P 376 C 1]

G. P. Shahi — *for Petitioners.*

Asst. Govt. Advocate — *for the Crown.*

Order.—The petitioners stood bail for certain persons accused of offences under Ss. 143 and 447, Penal Code. Before accepting the bail bonds into which they entered, the learned Magistrate who took the bonds made it clear that the release of the accused persons was to be conditional. The Court Sub-Inspector had prayed that the bailors' fitness might be enquired into, and the Magistrate did not consider this necessary, especially when the bailors were substantial people. As regards the conditional release of the accused persons he added:

> The bailors undertake before me orally that they would keep the accused in Monghyr so that they may neither rejoin the Satyagraha at Lagar nor do they instigate others to join or carry on the movement there. I accept their undertaking on the distinct understanding that if any report is received showing contravention of this undertaking, I will at once cancel the bail and forfeit the bail amount. On this condition I accept the bail bond and order the release of the three accused on bail at once.

This was a part of the order passed by the Magistrate on 7th July 1939, and was signed in the margin by the bailors, the petitioners before me. On the 19th of the same month the Magistrate appears to have received a report from the police saying that two of the accused persons had been to Gogri and had made arrangements for volunteers to be sent in batches to Lagar to offer Satyagraha. He thus found that the undertaking given by the bailors had been violated "as the accused themselves say that they had gone to Gogri," and he cancelled the bail bonds of those two accused persons and also forfeited the bail amount of Rs. 200 of the bailors. He further directed the issue of distress warrants at once for realization of the amounts. On 24th July the petitioners applied to the Magistrate and prayed for being exempted 'from the liability of paying penalty.' The application was apparently rested on the ground that the petitioners

executed the bail bond in which there was nothing regarding the accused persons not going anywhere, that is, in ordinary course of business the bail bond had been executed,

though in the next paragraph of the application it was said

of course in the ordersheet mention of the fact was made that the accused persons should not go to Lagar and take any part, etc.

In the next paragraph it was stated that it appeared that Suresh Chandra Misra (one of the accused persons) went to Bihpur and thence to Gogri and met the Inspector of Police who asked him to go back to Monghyr and he at once came to Monghyr and surrendered before the Court and admitted his

mistake in leaving Monghyr on some economical grounds. The learned Magistrate refused the application of the petitioners and noted that

the conditions were explained to the bailors in Court and the latter put in their signatures in the order-sheet.

Against the dismissal of the petitioners' application of 24th July to the Sub-Divisional Magistrate, an appeal was preferred to the District Magistrate. The argument in the appeal appears to have been that the bail bonds did not contain the conditions imposed by the Sub-Divisional Magistrate, and that therefore the bail could not be forfeited for breach of those conditions. The learned District Magistrate dismissed this as a "merely technical argument to wriggle out of the situation." He dismissed the appeal.

It has been contended by Mr. Shahi, who appears for the petitioners, that the procedure followed by the Sub-Divisional Magistrate, in holding the petitioners to their bond was wrong and that the petitioners should have been heard before the order of forfeiture was passed. This contention must clearly be accepted.

The learned advocate has further contended that the conditions which I have quoted from the order-sheet of the Magistrate form no part of the contract of bail and that the liability of the petitioners must be determined on the terms of the bail bonds themselves. But, if it be a fact that the petitioners signed the order-sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bonds, the order-sheet with the petitioners' signatures itself becomes a part of the contract between the parties. If a contract is required to be in writing, it is not the law that it must be contained in one piece of writing alone and the full terms of contracts in writing have often to be gathered from a series of letters passing between the parties put together. I am therefore unable to accept the petitioners' contention that their liability is confined to the bail bonds alone, and I hold that bail was accepted, as the Magistrate put it in his order of 7th July,

on the distinct understanding that if any report is received showing contravention of this undertaking I will at once cancel the bail and forfeit the bail amount.

This is a case where the Magistrate concerned undoubtedly failed to follow the appropriate procedure under S. 514 in that he held the petitioners to their bonds without calling upon them to show cause why the penalty should not be paid. But it is also a case where there is no real dispute about the facts. In fact, the only point mooted below was that the "distinct understanding" was no part of the contract of bail, and this, as I have already held, is quite untenable. It was suggested by Mr. Shahi that there is no proof that the signatures against the Magistrate's order of 7th July, which purport to be the signatures of the petitioners were in fact made by them. But the answer to this is furnished by what the Magistrate has said in his order of 31st July, on the petitioners' application of the 24th of that month and by the failure of the petitioners to challenge it in appeal. There is also no question that the Magistrate did receive a report on 19th July, regarding the doings of at least one of the accused persons for whom the petitioners had stood bail, nor indeed about the doings of that accused contrary to the conditions imposed by the Magistrate before agreeing to accept bail. S. 537, Criminal P. C., provides (to quote those portions which are now material) that

no order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account of any error, omission or irregularity in any inquiry or other proceedings under this Code unless such error, omission, irregularity . . . . has occasioned a failure of justice.

It seems to me quite clear that this is sufficient in the circumstances of this case to prevent interference in revision, though it must not be understood that this is in any sense an approval of the carelessness shown by the Magistrate in his proceeding under S. 514. The application is dismissed.

D.S./R.K. *Application dismissed.*

A. I. R. 1940 Patna 376

DHAVLE J.

Chandrawati Debi and others —

Petitioners.

v.

Nandkishoreprasad and others —

Opposite Party.

Civil Revn. Petn. No. 403 of 1939, Decided on 5th January 1940, from order of Munsif, Chapra, D/- 23rd May 1939.

Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 7—Construction — Applicability — Opening words of S. 7 are not concerned with law of procedure—Preliminary mortgage decree passed and confirmed in appeal before passing of Act—S. 7 does not apply.

The opening words of S. 7 "Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in

any agreement" have little to do with the law of procedure. [P 377 C 2]

The passing of the final decree does not involve the determination of any amount of interest for the period preceding the institution of the suit at all and therefore where the preliminary decree has been passed and confirmed on appeal before the passing of the Act and it is only the final decree (which is controlled by the preliminary decree in respect of the amount of the interest) that remains to be passed, S. 7 can have no application. [P 377 C 2]

Raj Kishore Prasad — *for Petitioners.*

Jaleshwar Prasad — *for Opposite Party.*

Order. — This is an application in revision by certain defendants in a mortgage suit. The preliminary decree was passed in August 1936, and was confirmed on appeal in November 1937. When in May 1938, the mortgagee applied for a final decree, the petitioners in January 1939, raised objections under the Money-lenders Act. On 23rd May 1939, these objections were overruled by the lower Court. The only point that has been urged before me is that the lower Court ought to have applied S. 7, Bihar Money-lenders (Regulation of Transactions) Act, 1939. This Section provides that:

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realized as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in or evidenced by such document.

The contention of the learned advocate is that a mortgage loan is a loan within the meaning of the Act (*see* S. 2 (f)), that a suit does not end with the decree passed by the trial Court, S. 2 (k); and that under the explanation to S. 2(2), Civil P.C., a suit cannot be said to be completely disposed of when all that has happened is that a preliminary decree has been passed. It must be conceded that the suit out of which this application in revision arises was a pending suit; but the prohibition against passing a decree for an amount of interest for the period preceding the institution of the suit which together with any amount already realized as interest is greater than the amount of loan advanced can only operate at the time appropriate for passing a decree for any interest at all. In mortgage suits the appropriate time is the preliminary decree. It is true that the suit will remain pending until a final decree is passed; but the final decree is entirely controlled by the preliminary decree and merely works out the arithemetical results of the preliminary decree minus any payments that may be made by the debtor subsequent to that decree. The passing of the final decree does not involve the determination of any amount of interest for the period preceding the institution of the suit at all, and the preliminary decree in the present case became binding on the parties when it was confirmed on appeal long before the passing of our first Money-lenders Act. The learned advocate has laid stress on the opening words of the Section

Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement.

These words however have little to do with the law of procedure; and it seems to me perfectly clear that S. 7 has no application in a case like the present where the preliminary decree was passed in 1936 and confirmed on appeal in 1937 and it is only the final decree (which is controlled by that preliminary decree in respect of amount of the interest) that has now to be passed. The result is that this application must be dismissed with costs: Hearing fee one gold mohur.

G.N./R.K. *Application dismissed.*

A. I. R. 1940 Patna 377

AGARWALA AND ROWLAND JJ.

Hridaysingh — Plaintiff — Appellant.

v.

Kailash Singh and others — *Defendants* — Respondents.

Appeal No. 987 of 1938, Decided on 16th January 1940, from appellate decree of Addl. Dist. Judge, Patna, D/- 23rd July 1938.

(a) Negotiable Instruments Act (1881), S. 20 —Holder of blank stamped and signed paper described by drawer as hand-note can convert it into negotiable instrument payable to any specified person and not necessarily to himself —Person signing cannot plead that holder is not person entitled to recover—Onus is on drawer to prove want of consideration.

The holder of a blank but stamped and duly signed paper described as a hand-note by the drawer in his own handwriting can convert it into a negotiable instrument payable to any specified person and not necessarily to himself: *(1813) 2 M & S 90; 17 I C 915 and A I R 1932 Pat 324, Rel. on.* [P 378 C 2]

In such a case it is not open to the drawer to plead that the person to whom the money is due

is not the specified payee: *30 Mad 88 and A I R 1934 Pat 382, Rel. on; A I R 1930 Pat 313, Held overruled.* [P 379 C 2]

The onus of proving that no consideration had in fact passed lies on the drawer and he is not entitled to deny that the document is a hand-note : *A I R 1931 Pat 266 and A I R 1930 Pat 598 Rel. on; A I R 1931 Pat 219, Disting.* [P 379 C 1]

(b) Negotiable Instruments Act (1881), S. 78 —Suit by payee on hand-note—Payments by drawer to third person cannot be considered.

In a suit by the payee of a hand-note against the drawer the defence that payments have been made to some one who is not the payee cannot be taken into consideration. [P 379 C 2]

Sambhu B. Prasad — *for Appellant.*

Sarjoo Prasad — *for Respondents.*

Agarwala J. — This appeal is by the plaintiff from a decision of the Additional District Judge of Patna reversing a decision of the Munsif. The appeal arises out of a suit on a hand-note dated 12th June 1930, and expressed to be for Rs. 1000. Across the stamps of the hand-note are these words in the handwriting of the defendant, 'Sahi Kailash Singh *ek hazar rupaiya qarza leli wo handnote likhdeli se sahi bakalam khas.*" The case of the defendant was that this endorsement was made by him on a blank piece of paper and was intended to operate as collateral security for a loan advanced by one Shamnandan Prasad Singh to Dhanukdhari Singh, a relation of the plaintiff. The name of the payee in the instrument is that of the plaintiff and not of Shamnandan Prasad Singh. The defence explained this by asserting that when the defendants assigned the instrument it was blank and that Shamnandan Prasad Singh subsequently caused the body of the instrument to be written out and inserted the name of the plaintiff as payee instead of his own. The Court of appeal below has dismissed the plaintiff's suit holding that the transaction was one between the defendant and Shamnandan Prasad Singh and not between the defendant and the plaintiff. The effect of assigning a paper stamped in accordance with the law relating to the negotiable instruments is dealt with in S. 20, Negotiable Instruments Act, 1881, which provides that where a person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments, then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. It is contended on behalf of the defendant-respondent that this Section does not authorize the person to whom the stamped and signed paper is delivered to insert in it as payee the name of anyone but himself. In this connexion reference was made to S. 4 of the Act which defines a promissory note as an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. The promissory note in question does, of course, promise to pay the sum mentioned unconditionally to a certain person, namely, the plaintiff, and I can see nothing in that Section which in any way curtails the general authority conferred by S. 20 on the person to whom a stamped and a signed paper is delivered to convert it into a negotiable instrument payable to any specified person. This appears also to be the law in England. In (1813) 2 M & S 90,[1] the facts were that a bill of exchange was drawn in Jamaica upon one Henry Man of London leaving a blank for the name of the payee. This bill was negotiated in England by one Vashon who endorsed it to the plaintiff in payment of an old debt. The plaintiff inserted his own name as the payee. In a suit on the bill the defence was that the plaintiff had no right to insert his own name in the bill. Lord Ellenborough C. J., disposed of this defence in the following words :

> As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant by leaving the blank undertook to be answerable for it when filled up in the shape of a bill.

Bayley J. said:

> The signing the bill in blank without the name of the payee was an authority to a bona fide holder to insert the name.

Twomey J., in 17 I C 915[2] also held that

> a payee can fill in a blank inchoate instrument and sue on it himself after filling it or endorsing it to some one.

This case was referred to by Dhavle J., in 13 P L T 506.[3] Mr. Sarjoo Prasad on behalf of the defendants-respondents contends that under S. 20, Negotiable Instru-

1. Cruchely v. Clarance, (1813) 2 M & S 90 = 14 R R 596.
2. M. N. P. L. Firm v. Kirwan Gyan, (1912) 5 Bur L T 162=17 I C 915.
3. Brijbhusan Pande v. Ramjanam Kuer, (1932) 19 A I R Pat 324 = 142 I C 163 = 13 P L T 506.

ments Act, Shamnandan Prasad Singh must be taken to have been authorized by the defendant only to execute an instrument of surety for the debt of Dhanukdhari. In my view, the defendant cannot be heard to challenge the authority of Shamnandan Prasad Singh on that particular ground in view of the endorsement which he himself wrote across the stamps on the instrument in which he described the document as a hand-note. He chose to send this instrument into the world in a form showing that the document was a hand-note and therefore he is answerable for it.

Mr. Sarjoo Prasad also referred to two decisions of this Court dealing with the question of the onus of proof in cases where it is admitted or proved that the thumb impression or signature on hand-note is that of the defendant. In 12 P L T 231,[4] it was held that when the execution of a hand-note is admitted, the onus of proof of showing that no consideration passed is thrown entirely on to the defendant. In 12 P L T 233,[5] it was held that an admission by a defendant regarding the putting of a signature or a thumb mark on a document, while he maintains that the paper when he signed it was blank, is not such an admission of the execution of the document as to throw the burden of proving his case upon him and it is for the plaintiff in such a case to prove primarily the due execution of the document relied upon by him. This case must be distinguished from the present where the defendant in his own handwriting described the document as a hand-note. There is also a decision of a single Judge of this Court in 11 P L T 606,[6] in which it was held that in a suit on a hand-note where the defendant admits that he put his thumb mark on a blank piece of paper but asserts that it was intended that a kabuliyat should be written out on the paper, the burden of proof lies on the defence to explain how the hand-note bearing the defendant's thumb impression came into existence. For the reasons which I have given above I would hold that on the facts of this case the defendant is not entitled to deny that the document is a hand-note and the onus of proof does not lie on the plaintiff in such a case.

As in my view the instrument with which we are concerned is a negotiable instrument it is not open to the defendant to plead that the holder of the note, namely the payee, is not the person entitled to recover on it, that is to say the defendant cannot plead that the person to whom the money is due is not the plaintiff, who is the specified payee Shamnandan Prasad Singh, (*see* 30 Mad 88[7]). Kulwant Sahay, J. sitting singly, disagreed with this decision in 11 P L T 255,[8] but the decision of Kulwant Sahay, J. was disapproved by a Division Bench in 13 Pat 655.[9] Although this last mentioned case has been overruled on another point by the Full Bench in 16 Pat 74,[10] it is still good authority for the view that the decision in 11 P L T 255,[8] is not good law. In the result I would allow the appeal of the plaintiff and restore the decision of the Munsif. The plaintiff will have his costs throughout. The defendant in the present suit also pleaded that he had made certain payments to Shamnandan Prasad Singh in respect of the amount for which he is now sued. In a suit by the payee of a hand-note against the drawer the defence that payments have been made to some one who is not the payee cannot be taken into consideration : *see* S. 78, Negotiable Instruments Act. We are therefore not concerned with the truth of the defendant's allegations regarding these payments.

Rowland J.—I agree.

G.N./R.K. *Appeal allowed.*

4. Chulhai Lal Das v. Kuldip Singh, (1931) 18 A I R Pat 266=134 I C 632=12 P L T 231.
5. Ramlakhan Singh v. Gog Singh, (1931) 18 A I R Pat 219=134 I C 635=12 P L T 233.
6. Sahdeo Mauar v. Fulesar Nonia, (1930) 17 A I R Pat 598=129 I C 144=11 P L T 606.
7. Subha Narayan Vathiyar v. Ramaswami Aiyar, (1907) 30 Mad 88=16 M L J 508 (F B).
8. Sarjug Singh v. Deo Saran Singh, (1930) 17 A I R Pat 313=123 I C 395=11 P L T 255.
9. Pearey Pasi v. Gauri Lal, (1934) 21 A I R Pat 382=151 I C 694=13 Pat 655=15 P L T 576.
10. Ghanshyam Das v. Ragho Sahu, (1937) 24 A I R Pat 100 = 167 I C 57 = 16 Pat 74= 17 P L T 919 (F B).

A. I. R. 1940 Patna 379

HARRIES C. J. AND MANOHAR LALL J.

Kisan Ram Marwari — *Plaintiff* — Appellant.

v.

Smt. Godawari Debi and others — *Defendants* — Respondents.

Appeal No. 153 of 1937, Decided on 18th December 1939, from original decree of Sub-Judge, Dhanbad, D/- 16th March 1937.

(a) Fraud—Benami—Person assigning his decree to another to defraud his creditor — He cannot subsequently ask Court to declare that assignment as benami.

Where a person has assigned his decree to another person with a view to avoid attachment

of that decree by his creditor, he cannot subsequently ask the Court for a declaration that the assignment was benami. Court cannot relieve him from the consequences of his own fraud.

[P 380 C 2]

(b) Evidence Act (1872), S. 92—Assignment stating that consideration was paid in cash — It can be shown that consideration was paid not in cash but in goods.

Evidence of the manner in which the consideration was paid is not evidence tending to vary the terms of a written contract. Hence, where an assignment states that consideration for the assignment was in cash it can be shown that consideration was paid not actually in cash but in goods.

[P 381 C 2]

R. S. Chatterji and K. P. Sukul — *for Appellant.*

S. C. Mazumdar — *for Respondents.*

Harries C. J.—This is a plaintiff's appeal from a decree of the learned Subordinate Judge of Dhanbad dismissing his claim for a declaration. The plaintiff in the year 1925 obtained a decree for about Rs. 10,000 against defendant 4 who was the manager of the Katras Encumbered Estate. On 3rd December 1926, this claim was admitted by the manager at Rs. 9924. In the year 1927 one Bansidhar brought a suit against the plaintiff for Rs. 3800, and on 9th June 1927 this suit was compromised by the plaintiff agreeing to pay the said Bansidhar Rs. 3000 within a month. It is now the plaintiff's case that he took steps to prevent the attachment of the decree which he held against the Katras Encumbered Estate. According to the plaintiff, he executed a registered deed of assignment on 16th August 1927 of the decree for Rs. 9924 in favour of Nagarmall, husband of defendant 1. In this deed, it is said, that the consideration for the sale was Rs. 4000 but according to the plaintiff no money passed, and this transaction was a purely benami one, the purpose being to put this decree of Rs. 9924 out of the reach of Bansidhar who held a decree for Rs. 3000 against the plaintiff. Later Nagarmall assigned the decree to his adopted son Saligram, defendant 3, and the present suit was brought for a declaration that these two deeds of assignment were inoperative and were benami transactions.

The defence was that the assignment to Nagarmall was a genuine and valid assignment for good consideration and that Nagarmall had become the owner of the decree in every sense of the word. Accordingly, it was contended that Nagarmall could do what he liked with the decree and assign it to Saligram if he so desired. The learned Subordinate Judge came to the conclusion that the assignment to Nagarmall was a genuine and valid transaction and accordingly dismissed the plaintiff's claim in its entirety.

It has been strenuously argued by Mr. R. S. Chatterji on behalf of the appellant that the decree of the lower Court cannot be sustained. The lower Court, in the first place, held that there was no real motive for this transaction. The Court has found that at the date of this assignment to Nagarmall the plaintiff had considerable house property and shop property which could have been attached by Bansidhar in execution of his decree for Rs. 3000. The plaintiff admits that he had this property, and that being so there appears to have been no purpose whatsoever in executing a benami assignment of this decree against the encumbered estate. Decrees against encumbered estates are often very difficult to realize, and Bansidhar would be far more likely to execute his decree against the plaintiff's house or shop property than against this decree for Rs. 9000 odd. According to Mr. Chatterji, however, the plaintiff executed the assignment in order to prevent Bansidhar attaching the decree held by the plaintiff. In other words, he has to admit that the assigment was made with a view to defrauding Bansidhar, one of the plaintiff's creditors. According to the plaintiff, Bansidhar eventually accepted Rs. 1000 in full satisfaction of his decree for Rs. 3000, and if that be so it would appear that the fraud was successful. The learned Subordinate Judge was not satisfied that Bansidhar had received anything; but in any event according to the plaintiff's own case, the fraud, if not wholly successful, had at least been partially successful. That being the case, the plaintiff cannot possibly ask this Court to declare this transaction in favour of Nagarmall to be a benami one. The plaintlff in putting forward such a case would be asking this Court to relieve him from the consequences of his own fraud which this Court would never do.

However I am satisfied in this case that there was no real motive for a benami transaction. As I have pointed out, the plaintiff on his own showing had ample property and there was no purpose whatsoever in protecting this decree and allowing the other property to be available for execution. The learned Subordinate Judge has further found that there was no such

relationship existing between Nagarmall and the plaintiff as would cause Nagarmall to become a benamidar of the plaintiff. In the plaint it is suggested that Nagarmall was a friend and a co-villager and fellow casteman of the plaintiff, and this was denied in the written statement. In evidence what plaintiff said was that Nagarmall was a co-villager and fellow casteman of the plaintiff. He did not say that they were on friendly terms. Further, it must be remembered that Nagarmall was carrying on business at Calcutta, and I can see nothing in their respective positions which would lead Nagarmall to act as a benamidar for the plaintiff. All the plaintiff says about the matter is that he discussed the necessity for protecting this debt with his wife, and they agreed that it should be transferred to Nagarmall benami. In my view the suggestion that Nagarmall readily became a party to this transaction is not supported by the evidence.

The learned Subordinate Judge further held that Nagarmall was in possession of this document throughout, and if that be so, it is against the contention that the transaction was a benami one. According to the defence, the whole Rs. 4000 mentioned as the consideration was not paid in cash. Rs. 1000 was paid in cash, and goods to the value of Rs. 3000 were supplied to the plaintiff by Nagarmall. It is common ground that at this time the plaintiff was carrying on a cloth business and did enter into transactions with a firm in which Nagarmall was a partner. The plaintiff himself admits that he still owes Rs. 900 for cloth, but the evidence of the defendant shows that over Rs. 3000 was owing on these transactions and what is more important is that the plaintiff was never sued for this sum. According to the defendant, he gave the plaintiff goods to the value of Rs. 3000 as part of the consideration of this document. The learned Subordinate Judge was satisfied that the plaintiff had received over Rs. 3000 worth goods; but he was not satisfied on the evidence that the remaining Rs. 1000 had been paid in cash. It may be that the whole of the consideration was not paid, but that does not make the transaction a benami one. If this was a genuine transaction, then Nagarmall would naturally be in possession of the document. The plaintiff is bound to explain this possession and he explains it in a somewhat extraordinary way. According to the plaintiff, shortly after this transaction he began to buy goods from Nagarmall's firm; but the two transactions were entirely independent. According to the plaintiff, Nagarmall demanded some security for the amount owing on these cloth transactions, and the plaintiff very shortly after the assignment was executed, handed over the assignment to Nagarmall by way of security. If the assignment was a benami one which gave Nagarmall no interest whatsoever in the decree in question, it is somewhat difficult to understand what value that assignment would be as a security. Mr. Chatterji has argued that the learned Judge has found that the document was given to Nagarmall as a security; but in my view he has misunderstood the Judge's finding. He does use the word "security" but what the learned Judge clearly meant was that the assignment was a sort of security for the prize of goods. In other words, Nagarmall was to obtain the price of the goods not from the plaintiff but by realization of the decree which had been transferred to him. The Subordinate Judge finds in the clearest terms that the assignment was a bona fide and genuine one and passed the interest in the decree to Nagarmall.

Lastly, the learned Subordinate Judge was satisfied that at least Rs. 3000 of the consideration was paid by Nagarmall. It was not paid in cash, but it was discharged by the plaintiff receiving goods to the value of over Rs. 3000. Mr. Chatterji has argued that it was not open to the defendants to show in this case that consideration was paid in any manner other than in cash. It is true that the assignment states that the consideration is Rs. 4,000 in cash; but in my view it was open to the defendants to show that the actual consideration was paid not actually in cash but in goods to the value of Rs. 3000. Mr. Chatterji has argued that to allow such proof is to allow evidence to vary the terms of a written contract, and he relies upon the terms of S. 92, Evidence Act. In my view, evidence of the manner in which the consideration was paid is not evidence tending to vary the terms of a written contract. The consideration is stated as Rs. 4000, and the defendants were entitled to show that this amount had in fact been paid.

However this case is looked at, the plaintiff's claim is bound to fail. If we accept the argument for the plaintiff that there was a motive for this transaction, namely defeating the claims of Bansidhar, then as those claims were defeated wholly or in part,

the plaintiff's claim must fail. On the other hand, if the findings of the learned Subordinate Judge be accepted, the assignment was for valuable consideration and was a bona fide and genuine transaction. In my view it is quite impossible in this case to say that the learned Subordinate Judge was wrong in holding that this was a genuine transaction for consideration. In my view the evidence amply supports the findings of the learned Subordinate Judge, and that being so this appeal must fail. If the transaction in favour of Nagarmall is held to be genuine, then the plaintiff cannot possibly obtain any relief with respect to the subsequent transaction by Nagarmall in favour of Saligram. For the reasons which I have given I am satisfied that no ground has been made out for interfering with the decree of the Court below, and I would therefore dismiss this appeal with costs.

Manohar Lall J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 382

ROWLAND J.

Domon Gope and others — Petitioners.

v.

Het Narain Singh and others — Opposite Party.

Criminal Revn. No. 507 of 1939, Decided on 2nd November 1939, against order of Dist. Magistrate, Monghyr, D/- 6th September 1939.

Criminal P. C. (1898), Ss. 144, 145—Summary procedure of S. 144 should not be substituted in cases where proceedings under S. 145 should have been taken.

If there is a dispute regarding possession of land likely to cause a breach of the peace and requiring a definite decision regarding the possession of land, the normal procedure for the Magistrate to follow is that laid down in S. 145, Criminal P. C. A summary procedure under S. 144 should not be substituted in cases in which without possible doubt proceedings under S. 145 should have been taken. Though a Magistrate's powers under S. 144 are very wide, the Court must deprecate the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145: *A I R 1918 Pat 663 and A I R 1922 Pat 435 (FB), Rel. on.* [P 383 C 1, 2]

B. C. De, Mahabir Prasad and S. S. Sinha — *for Petitioners.*

Baldeo Sahay, S. N. Sahay, N. C. Ghose, Lal Narain Sinha, K. K. Sinha, Sudhir Chandra Ghose and Braja Kishore Sinha — *for Opposite Party.*

Order.—This is an application to revise an order passed under S. 144, Criminal P. C., on 15th July 1939, which was confirmed against the petitioners on 6th September 1939 but on the same date withdrawn against the opposite party. In the application presented in this Court the propriety of the original order is not questioned, but it is said that by the subsequent order withdrawing it against the opposite party and keeping it in force against the petitioners the Magistrate has in effect given a decision intended to be permanent on a question of possession which ought to have been decided under S. 145 after hearing evidence. The dispute giving rise to the proceeding concerned 13.79 acres of land in village Jhakua entered in the record of rights as bakasht lands of the Maharaja Bahadur Raj Gidhour. The village, it appears, was in lease from 1332 to 1338 Fasli with one Biseswar Singh. Then from 1931 to 1937 A. D. it was in lease to a son of Biseswar named Basuki. Then from Asin 1345 Fasli the village was let to Jamuna Singh. A dispute arose as Het Narain Singh, a cousin of the former thikadar Biseswar, claimed to be in possession of most of the bakasht lands as a raiyat. Jamuna Singh on the other hand asserted that most of the lands were in the direct cultivation and possession of certain bataidars, Mahabir Singh, Lakho Singh, Ramsagar Singh, Bhuno Singh and Hari Misser. These persons claimed not to have been inducted on the land by Jamuna but to have been in possession from long before under the previous thikadars. On the other hand, Het Narain asserted that he had not been inducted on the land by his cousin Biseswar and propounded an alleged earlier settlement of land with him by the Raj itself.

On 1st November 1938, the local police reported for proceedings under S. 144 naming as first party Het Narain and as second party Jamuna Singh and the bataidars alleged to hold under him. The Magistrate drew up a proceeding under S. 145, Criminal P. C., and a compromise was entered into on 19th January 1939 between Het Narain of the first party and Jamuna Singh of the second party by which both of them disclaimed in favour of the Gidhour Raj all their alleged rights of possession over the land and accepted the position that the lands should be possessed by whichever party should obtain settlement from the Gidhour Raj. On that the proceeding was dropped. The lands were settled by the Court of Wards on behalf of Gidhour Raj with Het Narain on 29th June 1939 and the present proceedings were initiated by a

report dated 12th July 1939, by the Sub-Inspector who recommended that a proceeding should be taken under S. 145. The Magistrate passed urgent orders on 15th July under S. 144 directing both parties to keep away from the disputed land pending further orders. Thereafter the parties filed written statements and brought papers relevant to their respective cases on which the Magistrate could have proceeded under S. 145, Criminal P. C., after taking evidence so as to decide the dispute once for all. Instead, he took no evidence but took one of those short cuts in procedure which are so constantly found to be unsafe. He passed an order (presumably based on documents which were not exhibited or on submissions by advocates or pleaders who were not witnesses) reciting the history of the dispute, assuming the lands to be kamat or privileged proprietor's private lands, and drawing the inference that on the expiry of successive thikas the lands must have reverted to the malik in their original condition because he thought the malik was entitled to get them back in their original condition and to reject any persons who might be on the land. It was not, however, admitted that the land was true zirat and it is said to be entered in the Record of Rights as bakasht : that raises a question requiring evidence for its determination. The petitioners before me are persons who claim to have been bataidars from before the date of Jamuna's thika and to have not been in fact ejected either on the expiry of previous thikas or by the surrender on the part of Jamuna Singh to the landlord of his thika right.

Assuming that the landlord had a right to khas possession, that raises a question of fact whether the bataidars had actually been dispossessed. If there was a dispute regarding possession of land likely to cause a breach of the peace, and requiring a definite decision regarding the possession of land, the normal procedure for the Magistrate to follow was that laid down in S. 145, Criminal P. C., unless the claim of one party is on the face of it a mere pretence so that it can be said that there is no real dispute. There is a discussion of Ss. 107, 144 and 145 in 3 Pat L J 243[1] where it is pointed out that :

> In order to avoid the taking of evidence and the making of a definite order under S. 145 a summary procedure under S. 144 has been substituted in very many cases in which without possible doubt proceedings under S. 145 should have been taken . . . The substitution of proceedings under S. 144 for proceedings under S. 145 appear to us to have no logical object whatever save to avoid the labour of the taking oral evidence of possession.

These Sections were again considered by a Full Bench of this Court in 2 Pat 94[2] where it was pointed out that though a Magistrate's powers under S. 144 are very wide the Court must deprecate the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145. And if it is found that the use of Sec. 144 instead of S. 107 or S. 145 was a mere abuse of the process of the Court, or that owing to the exercise of that jurisdiction the order has resulted in something akin to the denial of the right of fair trial, then, as pointed out by Mullick J. this Court would have felt bound to interfere in the exercise of its powers of superintendence. The Magistrate's order does not show that there had been in January 1939 any admission by the present petitioners or disclaimer by them of rights to the land. The petition of compromise dated 19th January 1939 does not show whether the pleader who signed it had any authority to act for any members of the second party other than Jamuna Singh. In my view, this case is analogous to that in 3 Pat L J 243,[1] and I propose to pass an order similar to the order passed in that case. The notices issued to the parties calling on them to state their claims in respect of the land in dispute are, as in that case, in effect the notices contemplated in S. 145. In response to those notices the parties have appeared and filed written statements and documentary evidence in the manner indicated by S. 145. But, as was stated in that case,

> under the pretence that the proceedings were under S. 144 the Magistrate did not proceed under cl. 1 of S. 145 (4), but decided upon a summary inspection of the documents before him that one of the parties should remain in undisturbed possession for two months.

It was there held that the original order was in substance an effective order under S. 145 and the Magistrate was ordered to proceed to complete the proceedings instituted by that action. The written statements already filed are to be considered ; any documents filed, if they are to be used as evidence, must be marked as exhibits. The Magistrate must hear such evidence as the parties may adduce and he will then make an order under Section 145, (6) or

1. Mt. Kaniz Amina v. Emperor, (1918) 5 A I R Pat 663=47 I C 65=19 Cr L J 869=3 Pat L J 243.

2. Shebalak Singh v. Kamaruddin Mandal, (1922) 9 A I R Pat 435=68 I C 149=23 Cr L J 549 =2 Pat 94 (F B).

under S. 146 in accordance with his finding upon the question which of the parties was in possession on the date the notices issued that is 15th July 1939. The rule is made absolute.

D.S./R.K. *Rule made absolute.*

A. I. R. 1940 Patna 384

DHAVLE J.

Baijan Singh and others — Petitioners.

v.

Ramratan Prasad and others — Opposite Party.

Civil Revn. No. 467 of 1939, Decided on 10th January 1940, from order of Small Cause Court Judge, Gaya, D/- 15th June 1939.

Cosharers—Cosharers keeping other cosharer out of possession are liable to compensation to latter—Division of profits—Mode of.

The cosharers who keep the other cosharer out of possession are liable to pay compensation to the latter who is therefore entitled to institute a suit for compensation : *A I R 1928 Cal 216; A I R 1933 Pat 616 and A I R 1937 Pat 235, Rel. on.* [P 384 C 2]

In the circumstances of the case the plaintiff cosharer held was entitled to his proportionate share out of 50 per cent. of the value of the total produce of the thika land from the possession of which the plaintiff was excluded by his other cosharers: *A I R 1919 Pat 392, Rel. on.* [P 384 C 2; P 385 C 1]

Held further that no interest up to the institution of the suit could be awarded. [P 385 C 1]

Raj Kishore Prasad — *for Petitioners.*

B. N. Rai and Lal Narain Sinha — *for Opposite Party.*

Order. — This application in revision arises out of a Small Cause Court suit for recovery of compensation, corresponding to plaintiffs' proportionate share as joint thikadars, in respect of the use and occupation of 6 bighas 5 kathas and 12 dhurs of bakasht lands. The suit was decreed in part by the trial Court, and on behalf of the defendants who are petitioners before me, several points have been taken. The most important point is that the suit was not maintainable because there was no exclusion of the plaintiffs as joint thikadars. This point does not appear to have been raised below, and the learned advocate for the opposite party has referred to the suit that was brought by the plaintiffs against their exclusion and was decided in their favour in October 1936. In that suit the defence was a claim by Sadho Singh, defendant, 2 in the present suit and brother of the principal defendant, that he had a raiyati settlement in respect of the land in suit under his father or brother as among the thikadars. This suit was decided in favour of the plaintiffs. It is plain therefore that down to 1936 the plaintiffs were being kept out of the land by their cosharer thikadars under whom Sadho Singh had set up a raiyati title. I understand that the decision in that suit was appealed against not only by Sadho Singh but also by the present defendant 1. This was thus clearly a case where the defendants had kept their cosharers, the plaintiffs, out of possession, and were therefore liable to pay compensation in accordance with the principle laid down in the well-known decisions in 55 Cal 396,[1] A I R 1933 Pat 616[2] and A I R 1937 Pat 235.[3] The contention that the suit was not maintainable must therefore be overruled.

It has also been contended that sugarcane is grown in alternate years only and that as it was grown in 1342, no sugarcane should have been allowed for in 1343; but this contention seems to overlook the fact that the sugarcane that was grown in 1342 was reaped in 1343, and in any case I understand there is no evidence on the record regarding the growing of sugarcane in alternate years. The learned advocate for the petitioners has also urged that what should have been regarded as available for division between the cosharers was what witness 1 for the plaintiffs called the hakimi share of the produce after deducting the raiyati share from the total produce. The learned advocate for the opposite party has urged that what the witness was speaking of related to holding under an arrangement between the co-sharers and had no application to cases like the present where one set of co-sharers was excluded by the others. But even so we have in 4 P L J 301[4] a case where costs of cultivation and reaping to the extent of one-third were allowed in favour of a trespasser from whom mesne profits were recovered. The co-sharer thikadar is clearly entitled to more favourable treatment. Taking all the circumstances into account, I think that the fairest course in the circumstances of this case would be to allow to the plaintiffs their proportionate

1. Chandra Kishore v. Biseswar Pal, (1928) 15 A I R Cal 216=109 I C 747=55 Cal 396=32 C W N 291.
2. Shiva Narain Mahton v. Chandra Shekhar Prasad Singh, (1933) 20 A I R Pat 616=150 I C 251.
3. Shyam Sunder Koer v. Sheorachan Kuer, (1937) 24 A I R Pat 235=168 I C 597.
4. Baldeo Rai v. Ram Ekbal Singh, (1919) 6 A I R Pat 392=51 I C 747=4 P L J 301.

share out of fifty per cent. of the value of the total produce, the deduction offered by the plaintiffs in their plaint being on the face of it absurdly low.

The only other point raised on behalf of the petitioners was the question of interest. The lower Court awarded interest at 6 per cent. and a quarter per annum 'by virtue of the provisions of the Interest Act;' but it is common ground before me that under the Interest Act as authoritatively interpreted in recent decisions, no interest up to the date of the institution of the suit could be awarded in the present case at all. The result is that this application succeeds in part as indicated above, namely in respect of the amount available for division and as regards interest up to the date of the institution of the suit, which last must be disallowed.

G.N./R.K. *Order accordingly.*

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* * A. I. R. 1940 Patna 385
FULL BENCH

FAZL ALI, DHAVLE AND MANOHAR LALL JJ.

Tika Sao and others — Appellants.

v.

Hari Lal and others — Respondents.

Appeal No. 159 and Civil Revn. No. 241 of 1938, Decided on 12th April 1940, from original decree of Sub-Judge, Patna, D/- 22nd December 1937.

(a) Interpretation of Statutes — General rule is that Legislature enacts prospectively and not retrospectively.

The general rule is that any new law that is made should ordinarily affect future transactions, not past ones. Hence, unless there be something in the language, context or object of an Act showing a contrary intention, the duty and practice of Courts of justice is to presume that the Legislature enacts prospectively and not retrospectively : *10 C B (N S) 179 and A I R 1927 P C 242, Rel. on.* [P 387 C 1]

*** (b) Transfer of Property Amendment Act (20 of 1929), S. 63 (d)— Words "such remedy or proceeding as is hereinafter referred to" — Meaning.**

(Per Fazl Ali J.) — The words "such remedy or proceeding as is hereinafter referred to" mean "such remedy or proceeding" as has been saved in this Section or has been declared to remain unaffected by the 22 Sections mentioned in the Section and the other provisions of the Act. The Sections of the Transfer of Property Act not dealt with in the Sections enumerated in S. 63 have a retrospective effect at least where no action was pending on 1st April 1930 : *A I R 1938 Rang 306 (F B), Not approved; A I R 1937 All 588 (F B), Rel. on.* [P 388 C 1; P 389 C 1]

(Per Manohar Lall J.) — There is no justification whatever for holding that the expression "such remedy" means and includes only a remedy in a pending proceeding. Consequently, the conclusion would appear to be that S. 63 specifically provides that no provision of Act (20 of 1929) shall affect vested rights which were acquired or accrued before 1st April 1930 : *A I R 1938 Rang 306 (FB), Approved.* [P 398 C 2]

(c) Transfer of Property Amendment Act (20 of 1929), S. 63 (d) — Third part of S. 63 (d) is not misplaced.

The third part of S. 63 (d) has not been misplaced, because it contains not only the words "such remedy" which apparently refer to the "remedy" mentioned in the first part but also the words "such proceeding" which refer to the "proceeding" mentioned both in the first and the second parts : *AIR 1938 Oudh 127 (F B), Dissent.* [P 388 C 2]

(d) Transfer of Property Act (1882), S. 53-A — There is no inconsistency in the view that S. 53-A is retrospective while S. 27-A, Specific Relief Act, is not so *(Obiter — Per Fazl Ali J.)*

There is no inconsistency whatsoever in the view that S. 53-A, T. P. Act, is retrospective, while S. 27-A, Specific Relief Act, is not so. S. 27-A relates only to a contract to lease immovable property, whereas S. 53-A deals with contracts for the transfer of immovable property in general. S. 27-A enables a party to enforce a contract of lease which but for the new Section might not be enforceable, whereas S. 53-A enables a transferee with an incomplete title to use the doctrine of part performance as a shield to protect his possession. [P 392 C 2]

(e) Interpretation of Statutes — Alteration in rule of evidence shall ordinarily be deemed to be retrospective.

If any alteration is made in a rule of evidence, the alteration shall be ordinarily deemed to be retrospective. [P 392 C 2]

*** * (f) Transfer of Property Act (1882), S. 92 as amended in 1929—S. 92 is retrospective except in cases pending on 1st April 1930 and except as to rights and liabilities arising before 1st July 1882 :** *13 Pat 111 = A I R 1934 Pat 127 = 153 I C 602, Overruled* (Per *Fazl Ali and Dhavle JJ.; Manohar Lall J., Contra.)*

(Per Fazl Ali and Dhavle JJ.) — S. 92 will have retrospective operation in regard to transactions effected before 1st April 1930 except in cases pending on that day and except as to rights and liabilities arising before 1st July 1882 when the Transfer of Property Act came into force : *13 Pat 111 = A I R 1934 Pat 127 = 153 I C 602*, **Overruled ;** *Case law discussed.* [P 393 C 1]

(Per Manohar Lall J.)—S. 92 does not apply to transactions which were concluded before 1st April 1930 irrespective of the fact whether they were or were not the subject of any pending action on 1st April 1930: *Case law discussed.* [P 406 C 2]

*** * (g) Mortgage — Subrogation—Subrogee is entitled to enforce prior mortgage as plaintiff as well as use it as shield irrespective of fact that properties mortgaged to him are different from those covered by prior mortgage.**

A subsequent mortgagee, who pays up and redeems the earlier mortgages as a part of a covenant in his mortgage, is entitled to claim subrogation so as to give him the right to enforce the rights of the earlier mortgagees as a plaintiff in an action

and he can also use the earlier mortgages as a shield irrespective of the fact that the properties mortgaged to him are different from the properties covered by the earlier mortgages so redeemed: *Case law discussed.* [P 386 C 2 ; P 396 C 1]

(h) Interpretation of Statutes—Retrospective operation is different from interference with existing rights (Per *Manohar Lall J.*)

Retrospective operation is one matter, interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act would be retrospective. [P 396 C 2]

B. P. Sinha, G. N. Prasad and Brahmadeo Narain (in No. 159) — *for Appellants.*

Chaudhury Mathura Prasad (in No. 241) — *for Petitioner.*

Sarju Prasad, Choudhury Mathura Prasad, C. P. Sinha, B. P. Mahaseth, S. M. Mullick, Braja Kishore Prasad Sinha, Dhanukdhari Prasad, Pitambar Jha, Ramanugrah Narain Sinha and R. K. Sahay (in No. 159) — *for Respondents.*

Bhubaneshwar Prasad Sinha, Girijanandan Prasad and Tarakeshwar Nath (in No. 241) — *for Opposite Party.*

Fazl Ali J. — The facts of this case, so far as they are material to the questions to be decided by this Bench, may be briefly stated as follows : In the year 1924, defendants 1 and 2 in the action which has given rise to this reference executed two simple mortgage bonds in favour of one Sundar Sah and in 1925 they executed two other simple mortgage bonds in favour of one Kokil Sah, admittedly a benamidar for Saukhi Sah and others. Saukhi Sah and Sundar Sah belonged to the same family and there being a private partition between them, Sundar Sah acquired the right to realize all the dues under the first two bonds and Saukhi Sah similarly acquired the right to realize the dues under the last two bonds. Defendants 1 and 2 afterwards executed several mortgage bonds in favour of the appellants in the year 1926, and on 25th April 1927 they also executed a mortgage bond in favour of the plaintiffs and defendants 3 to 6 for a sum of Rs. 13,000. The points to be noted in regard to the last bond are firstly, that it provided among other things that the bulk of the consideration money was to be used by the plaintiff in paying off the four bonds executed by defendants 1 and 2 in favour of Sundar Sah and Saukhi Sah in the years 1924 and 1925 and secondly, that mauza Marsua was not one of the properties mortgaged under this bond, though it had been mortgaged under three of the bonds executed by defendants 1 and 2 in favour of Sundar Sah and Kokil Sah between 1924 and 1925. The plaintiffs claimed in their action that by payment of the prior mortgage bond of 1924 and 1925 they had been subrogated to the position of the mortgagees under those bonds and they were, therefore, entitled to sell Marsua to realize the sum paid by them to liquidate the incumbrance on it. The defendants, on the other hand, contended that the plaintiffs were not entitled to subrogation and could not proceed against Marsua. On these facts two questions have been referred to this Bench and they have been formulated as follows :

(1) Whether a subsequent mortgagee, who pay up and redeems the earlier mortgages as a part o the covenant in his mortgage is entitled to claim subrogation so as to give him the right to enforce the rights of the earlier mortgagees as a plaintiff in an action or whether he can use the earlier mortgages as a shield only irrespective of the fact that the properties mortgaged to him are different from the properties covered by the earlier mortgages so redeemed.

(2) Whether the provisions of S. 92 of the amended Transfer of Property Act are retrospective.

I propose to deal first with the second question which has assumed great importance in view of the conflicting decisions of the various High Courts upon it. It appears that the Allahabad, Calcutta and Bombay High Courts and the Chief Court of Oudh have held that the Section is retrospective whereas the opposite view has been expressed by the Madras, Rangoon and Nagpur High Courts. In 13 Pat 111[1] a Division Bench of this Court held that the Section was not retrospective and the same view was expressed by another Division Bench in A I R 1938 Pat 337=19 P L T 594[2] in regard to S. 53-A on a line of reasoning which is equally applicable to S. 92. On the other hand in A I R 1936 Pat 60[3] Luby J. agreeing with the Full Bench decision of the Allahabad High Court in A I R 1937 All 588[4] expressed the opinion that the Section was retrospective. A similar opinion was expressed by Courtney Terrell C. J. with regard to S. 53-A in 17 P L T

1. Jagdeo Sahu v. Mahabir Prasad, (1934) 21 A I R Pat 127=153 I C 602=13 Pat 111=15 P L T 73.
2. Jagadamba Prasad v. Anadi Nath Roy, (1938) 25 A I R Pat 337=176 I C 273=17 Pat 460=19 P L T 594.
3. Ramdayal Sen v. Chakrapani Nandi, (1936) 23 A I R Pat 60=160 I C 933.
4. Hira Singh v. Jai Singh, (1937) 24 A I R All 588=171 I C 153=I L R (1937) All 880=1937 A L J 840 (F B).

963.[5] Being myself a party to the judgments delivered in some of these cases, I must candidly admit that while dealing with those cases I had not the advantage of examining the question as fully as I have been able to do on the present occasion. S. 92 has been added to the Transfer of Property Act by S. 47 of Act 20 of 1929 and if there was nothing else in the Act, it would have been difficult to hold that it was intended to be retrospective. The general rule is that any new law that is made should ordinarily affect future transactions, not past ones, because as Earle C. J. pointed out in (1861) 10 C B (N S) 179[6] at p. 191:

> It manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

Lord Cranworth accordingly laid down in (1854) 1 Macq 736[7] that

> unless there be something in the language, context or object of an Act of Parliament showing a contrary intention, the duty and practice of Courts of Justice is to presume that the Legislature enacts prospectively and not retrospectively.

The same view was expressed by the Privy Council in A I R 1927 P C 242[8] in these words:

> While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.

The question to be decided therefore is whether there is anything in the language, context or object of the Amending Act to show that S. 92 was intended to be retrospective. For the purpose of deciding this question, it becomes necessary to consider the effect of S. 63 which is the last Section of the Amending Act and which runs as follows :

> Nothing in any of the following provisions of this Act, namely Ss. 3, 4, 9, 10, 15, 18, 19, 27, 30 cl. (c) of S. 31, Ss. 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect
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> (a) the terms or incidents of any transfer of property made or effected before the first day of April 1930,
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> (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,
>
> (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or
>
> (d) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provisions of this Act shall render invalid or in any way affect anything already done before the first day of April 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

It seems to me that if the Legislature intended that none of the provisions of the Amending Act should be retrospective, it was hardly necessary to insert this long and elaborate Section in the Act. It would have been enough to make a simple provision that none of the Sections was to have retrospective effect or to make no provision whatsoever in this respect, because the general rule is that a new law shall not ordinarily affect past transactions. It was also not necessary to discriminate between the 22 Sections, which are specifically mentioned in the Act, and the other Sections and to make separate provisions for them. As to the 22 Sections it is clearly stated that they should not have retrospective operation in any case whatsoever, whereas the provision with regard to the other Sections is that they shall not have retrospective operation in respect of anything already done before 1st April 1930 in any proceeding pending in a Court on that date. I think that this clearly implies that these other provisions of the Act shall affect transactions effected before 1st April 1930, if no proceeding was pending in a Court on that date or, in other words, if the action was brought after that date. This seems to me to be the only logical interpretation of cl. (d) of S. 63, but this clause is so clumsily worded that in A I R 1938 Rang 306[9] a Full Bench of the Rangoon High Court relying on the last part of this very provision, came just to the opposite conclusion. In that case one of the learned Judges, Dunkley J., tried to recast the latter part of cl. (d) as follows :

> Any remedy in respect of any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930, may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

These words, he pointed out, may well be construed to mean that no provision of Act 20 of 1929 shall affect any such rights as had already been acquired or had accru-

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5. John Gurney Wakefield v. Sayeeda Khatun, (1937) 24 A I R Pat 36=166 I C 797=15 Pat 786=17 P L T 963.
6. Midland Ry. Co. v. Pye, (1861) 10 C B (N S) 179=30 L J C P 314=4 L T 510=9 WR 658.
7. Kerr v. Ailsa, (1854) 1 Macq 736.
8. Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi, (1927) 14 A I R P C 242=106 IC 156=54 IA 421=9 Lah 284 (PC).
9. Bank of Chettinad Ltd. v. Maung Aye, (1938) 25 A I R Rang 306=177 I C 766=1938 R L R 430 (F B).

ed before 1st April 1930. With great respect, however, I venture to suggest that that is not the correct interpretation, because it altogether overlooks the meaning of the words "as is hereinafter referred to" which immediately follow the words "such proceeding or remedy." The words "such remedy or proceeding" as is hereinafter referred to" mean "such remedy or proceeding" as has been saved in this Section or has been declared to remain unaffected by the 22 Sections mentioned in the Section and the other provisions of the Act. It will be noticed that in cl. (d) the word "such" has been used at more than one place. It occurs before the words "right, title, obligation or liability" in the first part of the clause and before the words "remedy" and "proceeding" in the latter part of the clause. The use of the word "such" before "right, title, obligation or liability" suggests that the reference is to the same words used in cl. (c) which runs as follows:

> Any right, title, obligation or liability already acquired, accrued or incurred before such date (the date being the 1st April 1930).

The words "remedy" and "proceeding" obviously referred to the remedy or proceeding in respect of the right, title, obligation or liability mentioned in cl. (c) and the word "proceeding" also refers to the same word used in the middle part of the clause. Thus cl. (d) when it is read with the relevant words of the main Section which governs its first part may be recast as follows:

> Nothing in any of the following provisions of this Act . . . . . shall be deemed in any way to affect any remedy or proceeding in respect of any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930; and nothing in any other provisions of this Act shall render invalid or any way affect anything already done before 1st April 1930 in any proceeding pending in a Court on that date: and any such remedy and any such proceeding as is herein saved, may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

Section 63, cl. (d) is clearly divisible into three parts, the dividing line being indicated by the two colons (or semicolons which we find in some reprints of the Act) which occur at the end of the first and second parts. The first part must be read with the words "shall be deemed in any way to affect" with which the Section opens. The second part provides that the provisions of the new Act other than the 22 Sections mentioned therein shall not affect anything already done in pending actions. The third part provides that the remedy and proceeding referred to in the Section may be enforced, instituted or continued as if the Act had not been passed. In AIR 1938 Oudh 127,[10] a Full Bench of the Oudh Chief Court has expressed the view that by oversight the second part of the clause has been misplaced, its proper place being at the end of the clause. With this view also, I respectfully disagree, though I agree with the main conclusion arrived at by the learned Judges of the Oudh Chief Court as to the meaning of the Section. I do not think that for the proper construction of the Section it is at all necessary to suggest that the Legislature has made any mistake in drafting this Section. In my opinion, the third part has not been misplaced, because it contains not only the words "such remedy" which apparently refer to the "remedy" mentioned in the first part but also the words "such proceeding" which refer to the "proceeding" mentioned both in the first and the second parts. It substantially provides that the remedy and proceeding referred to in the first part may be enforced, instituted or continued and the proceeding referred to in the second part may be continued as if the Act had not been passed. This part is merely consequential and explains what is meant by the provision that the remedy or proceeding referred to in the Section shall not be affected by the provisions of the Act. It is in a sense redundant, because the meaning of the Section will not be affected in any way if it is omitted, but instances of such tautology will be found in the General Clauses Act and many other Acts where similar provision has been inserted to make the meaning of the preceding words absolutely clear. In A I R 1937 All 588[4] Sulaiman, C. J. has dealt with the very question which is now before this Bench as follows :

> No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so. In India there is the provision in the General Clauses Act, S. 6, to a similar effect. But in this Amending Act there is much more than a mere omission. There is an express reference to certain specified Sections which are not to be retrospective and there is an express reference to all the other provisions of the Act which are not to be retrospective in a certain contingency. It seems to follow that barring that contingency the other provisions of the Act were intended to have a retrospective effect. The reason is not far to seek. The Legislature had apparently thought that these other Sections are merely explanatory in their character and declare the law which had existed prior to this amendment.

10. Kundanlal v. Faqir Bakhsh, (1938) 25 A I R Oudh 127=174 I C 714=13 Luck 761 = 1938 O W N 401 and 489 (F B).

Whether the Legislature was right or wrong in this assumption is not a matter for us to consider. We must give effect to the language of the Act as it stands and hold that the Sections of the Transfer of Property Act not dealt with in the Sections enumerated in S. 63, have a retrospective effect at least where no action was pending on 1st April 1930.

With these observations I respectfully agree subject to this reservation only, that in my opinion it is not necessary even to suppose that the Legislature may possibly have been labouring under some misconception as to the effect of S. 92 and other Sections which are not mentioned in S. 63. It is true that by enacting S. 92 the Legislature has attempted to crystallize the law of subrogation as it was found on the date of the amendment, but it has also added something. This will be illustrated by reference being made to para. 3 of the new Section which deals with what is described by Mookerjee, J. in 36 Cal 193[11] as "conventional subrogation." Before this new Section was inserted in the Act, mere agreement between a mortgagor and the person who advanced money to him for redeeming a prior mortgage was sufficient to give him the right of subrogation, and all that was required was that there should be some evidence of the intention that the mortgage which had been paid off was to be kept alive: *see* 29 Cal 154[12] and 39 Cal 527.[13] Under the new Section however, it is necessary that this agreement should be made by a registered instrument. Thus, the view that S. 92 was intended to be retrospective and to affect old transactions if put in suit after the coming into force of the Act of 1929 may cause some hardship to persons who would have had the right of subrogation under the old law but cannot claim it under this Section, if there is no registered agreement in their favour; but this by itself would be no ground for holding that S. 92 was not intended to be retrospective. The majority of the cases where the right of subrogation arises fall under the first two paragraphs of the Section. Para. 3 is confined only to a limited class of cases where a creditor has not paid off a prior mortgage with his own money but with the money of his debtor or mortgagor. As was pointed out by Sir Rash Behari Ghosh in his Treatise on Mortgage, p. 364, Edn. 5:

> The real question in all such cases is whether the payment made by a person who is not in any way interested in the mortgaged property or the right of redemption was a mere loan to the debtor on his personal security or whether it was made under an agreement that he should be substituted for the creditor.

In many cases the Court had to rely merely upon the fiction of an agreement holding that the intention of the person who advanced the money must have been to keep alive the mortgage. The new Section leaves no room for any presumption or fiction. It says that there must be an express agreement in writing and it must be registered. The object of the new provision may have been to protect puisne mortgagees against a simple creditor who would acquire priority in many cases, if the old state of law was allowed to continue. It may well be that the Legislature did not look with favour upon retrenching the rights of a puisne mortgagee in favour of a simple creditor merely upon a fiction of law, where there was no clear agreement properly evidenced and decided that this provision should be retrospective except in cases which were already pending on 1st April 1930. The question, however, need not be pursued, because in my opinion whatever the reason for the change in the law may be, the intention of the Legislature to make S. 92 retrospective to the extent indicated above can be clearly implied from the language of S. 63 and the scheme of the Act.

An examination of the provisions of the Amending Act which was under consideration for several years shows that the important changes made by it in the existing Act were in regard to these matters: (i) the omission of the words "Hindus and Buddhists" in S. 2 whereby the provisions of Chap. 2 will apply to all cases except those governed by a special rule of Mahomedan law (S. 3 of the Amending Act); (ii) the provision making registration amount to notice of a registered document (S. 4); (iii) the validity of transfers in favour of a class when some members of that class are unable to take (S. 9); (iv) the validity of a direction as to accumulation for a certain period and for certain purposes (S. 10); (v) the statutory recognition of the doctrine of part performance (S. 16); (vi) the abolition of the remedy of foreclosure in the case of all mortgages except a mortgage by conditional sale or an anomalous mortgage

11. Gurdeo Singh v. Chandrika Singh, (1909) 36 Cal 193=1 I C 913=5 C L J 611.
12. Dinobandhu Shaw Choudhury v. Jogmaya Dasi, (1902) 29 Cal 154=29 I A 9=6 C W N 209 (P C).
13. Mahomed Ibrahim Hussain Khan v. Ambika Pershad Singh, (1912) 39 Cal 527=14 I C 496 =39 I A 68=16 C W N 505=15 C L J 411 (P C).

providing expressly for foreclosure (S. 31); (vii) the provision compelling a mortgagee to exhaust his remedies against the mortgaged property before enforcing his personal remedy (S. 33); (viii) the amendment of the provisions regarding sale without the intervention of the Court (S. 34); (ix) insertion of a new S. 69-A providing for the appointment of a receiver in cases where a mortgagee is competent to exercise a power of sale under S. 69 of the Act (S. 35); (x) the principle of 'subrogation' (S. 47); (xi) the modification of the law of 'merger' (S. 51); (xii) the provision requiring leases to be executed by both parties (S. 55).

It is significant that all the Sections which introduced these amendments excepting Ss. 16, 47 and 51 have been specifically referred to as being not retrospective. S. 16 gave effect to the doctrine of part performance and S. 47 deals with the question of 'subrogation.' It is difficult to suppose that the exclusion of these Sections was merely accidental. In my opinion, it was deliberate and was designed to show that these Sections would have retrospective operation. These two Sections were made retrospective, because they give clear statutory recognition to two important doctrines of equity, the doctrines of part performance and subrogation for which there was no complete or adequate provision in the existing Act. In A I R 1940 Bom 90,[14] Beaumont C. J., dealing with S. 53-A made the following observations :

> No doubt the general principle is that Acts of the Legislature are not given retrospective effect, unless the language makes it clear that such was the intention, but I apprehend that in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered ex-hypothesi to be lacking in equity, one should not assume that the Legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions. I therefore read S. 53-A without any pre-conceived idea that in all probability the Legislature did not intend it to have any retrospective operation.

Section 51 of the Amending Act which has also not been specifically referred in S. 63 makes certain changes in S. 101, T. P. Act, and substantially provides that where a mortgagee or a charge-holder acquires the rights of the mortgagor or owner, the merger of the two interests shall not be the rule but an exception. Ss. 101 and 92 are in a sense complementary Sections and that was probably the reason why they were both made retrospective. It has been brought to our notice that Act 20 of 1929 was not brought into operation until 1st April 1930, though it had received the assent of the Governor-General in Council on 1st October 1929, and was promulgated for general information on 12th October 1929. Thus, there was sufficient time for intending suitors to institute their suits before 1st April 1930, if they did not want the new provisions of the Act other than those specifically mentioned in S. 63 to affect anything done before that date. In (1852) 21 L J (N S) M C 193[15] Lord Campbell dealing with 11 and 12 Vict., Chap. 43 observed as follows :

> If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention, on the part of the Legislature, not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal . . . . . a certain time was allowed before the Act was to come into operation and that removes the difficulty.

The principle laid down by Lord Campbell has been applied in this country by Mookerjee J. in 17 C W N 889[16] and by Sir Lawrence Jenkins in 41 Cal 1125[17] and this Court has also adopted it in 1938 P W N 975[18] and 1939 P W N 108.[19] I do not see why the principle should be applicable only to cases where there has been a change in the law of limitation and not apply to other cases where vested rights have been affected by the new legislation. But, it is not necessary at all to resort to this principle in the present case, as, in my opinion, the language of S. 63 and the scheme of the Amending Act show that S. 92 and many of the other Sections not specifically included therein were intended to have retrospective operation. A few of the Sections have either made only verbal changes

14. Rustomji Dossabhai Billimoria v. Bai Moti, (1940) 27 A I R Bom 90 = 41 Bom L R 1310 = I L R (1940) Bom 50.

15. Queen v. Leeds and Bradford Ry. Co. (1852) 21 L J (N S) M C 193=16 Jour 817.

16. Manjhoori Bibi v. Akel Mahmud, (1913) 17 C W N 889=19 I C 793=17 C L J 316.

17. Gopeshwar Pal v. Jiban Chandra, (1914) 1 A I R Cal 806=24 I C 37=41 Cal 1125=18 C W N 804=19 C L J 549 (F B).

18. Reyasat v. Gopi Nath, (1939) 26 A I R Pat 122 =180 I C 414=18 Pat 1=20 P L T 38=1938 P W N 975.

19. Biranchi Singh v. Nand Kumar, (1939) 26 A I R Pat 282=183 I C 212=18 Pat 355= 1939 P W N 108=20 P L T 139.

in the old Act or deleted some of the old provisions already covered by the new amendments and so no question of their retrospective operation really arises.

Our attention has been drawn to the decision of the House of Lords in 1878 A C 582[20] which has been greatly relied upon by the Rangoon and Madras High Courts in A I R 1938 Rang 306[9] and A I R 1938 Mad 779[21] respectively. One of the questions which arose in that case was whether an agreement for a lease which was not in proper form according to the old law of Scotland could be given effect to in view of the Conveyancing (Scotland) Act, 1874 which had dispensed with several requirements as to form. The answer to this question depended on whether S. 39 of that Act was retrospective in operation so as to govern the agreement which had been executed prior to the commencement of the Act. Lord Cairns, on examination of the Statute of 1874, found that with regard to some of the Sections, there was a clear statement that they shall apply only to instruments written after the passing of the Act; and with regard to other Sections, there was an equally clear statement that those Sections shall apply to things done both before and after the passing of the Act. There was a third class of cases of which S. 39 was an example, in regard to which the Act contained no clear and explicit statement as to whether it was to be retrospective or merely to be prospective. Lord Cairns pointed out that having regard to the provisions of the Act the effect of holding S. 39 to be retrospective would have been to make those documents valid which under the law as it stood at the time they were executed had no validity at all. His observations as to these documents were as follows :

> They were not things which were voidable, or things as to which there could be any question; they were absolutely removed out of nature, as it were, just as much as if the paper on which they were written never had been in existence. They did not require therefore to be struck out or to be sentenced to condemnation; they were things which, for the purpose of title, or any property or persons they might affect, were as though they never had been written.

The other noble Lords expressed the same view in different words and they all came to the conclusion that S. 39 was not retrospective. Lord Hatherley, in dealing with an argument which was advanced to show that the Act was retrospective observed as follows :

> I think Mr. Benjamin pointed out one clause which said that it should not have any effect upon any matter anterior to the passing of the Act. I can only say in the language of conveyancing, it was *ex majore cautela* that that should be put in. I do not think we could found any inference upon that, but that we should rather be led to expect the same phraseology employed in the particular clause in question, were such meaning sought to be conveyed.

Lord O'Hagan pointed out the dangerous consequences of giving retrospective operation to the Section in these words :

> A man who, on the faith of the construction ... had advanced a large sum of money on a purchase would, if the view of the appellants were adopted, be deprived of all his outlay. An heir or next of kin, who for a number of years had possessed property in the assurance that the law of the land had given it to him and would protect him in it, might find himself all at once deprived of that property by an *ex post facto* decision, and his family are beggared by a construction of which nobody perhaps had ever thought before.

He then proceeded to observe as follows :

> With such consequences staring us in the face, we are required to give a retrospective meaning to this Act of Parliament: and this, I repeat, although we have not only no express words capable of such a meaning, but we have *in the Act of Parliament itself, in one of its Sections, a clear declaration that, save where otherwise expressed, it shall be of future operation; and then we have the Act pointing out in express words the circumstances in which it was intended to be retrospective.*

These italicised words will show that there is a marked difference between the Conveyancing (Scotland) Act of 1874 and the Act with which we are now dealing. In the Act of Scotland as was noticed by Lord Hatherley no express words were used to make S. 39 retrospective while such words had been used with regard to certain other Sections. In the present Act, none of the Sections has been expressly made retrospective. Here, we find a clear cut division of the Act into two parts, one consisting of Sections which are not to be retrospective in any case pending or future, and another consisting of other Sections, which are not to be retrospective only in pending cases. It is true that there was a saving clause in the Act of Scotland also to the effect that nothing in the Act would affect pending actions, but that clause had a different significance when read with the other Sections many of which contained within themselves words showing whether they were to be retrospective or to be merely prospective. The learned advocate for the appellant has put forward two further arguments to show that the Sections other than

20. James Gardner v. Edward A. Lucas, (1878) A C 582,
21. Srinivasulu Naidu v. Damodaraswami Naidu, (1938) 25 A I R Mad 779=182 I C 937.

the 22 Sections specified in the Act are not retrospective. One of these arguments relates to S. 92, and the other to S. 53-A. As to S. 92 it is contended that inasmuch as it expressly refers to S. 91 which is not retrospective, it must also be held to be not retrospective. There is however a very simple answer to this argument. The only reference to S. 91 to be found in S. 92 is in these words :

> Any of the persons referred to in S. 91, etc. shall have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

It is obvious that S. 91 has been referred to in this Section merely to avoid repetition and the reference is of no greater consequence than a reference to a Section containing definition of certain words and phrases. Such a reference can raise no such presumption as the learned advocate asks us to raise. The argument with regard to S. 53-A was a twofold one. It was pointed out firstly that Act 21 of 1929, which was an Act passed to supplement the Transfer of Property (Amendment) Act of 1929, has made two notable changes, one in the Specific Relief Act and another in the Registration Act. In the Specific Relief Act a new S. 27-A has been inserted which provides that where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other where there has been part performance of the contract except in certain cases specified in the Section. The Act expressly provides that this provision will apply to contracts entered into after 1st April 1930. S. 10 of the Act has made an important amendment in the Registration Act by adding the following proviso :

> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chap. 2 of the Specific Relief Act, 1877 or as evidence of part performance of a contract for the purpose of S. 53-A, T. P. Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

As the effect of S. 15, Act 21 of 1929, is to render the Act prospective where it affects rights already acquired, it is contended that S. 53-A also could not have been intended to be retrospective, because otherwise the three supplementary Sections cannot be worked together. Speaking for myself, I find no inconsistency whatsoever in the view that S. 53-A, T. P. Act, is retrospective, while S. 27-A, Specific Relief Act, is not so. S. 27-A relates only to a contract to lease immovable property, whereas S. 53-A deals with contracts for the transfer of immovable property in general. S. 27-A enables a party to enforce a contract of lease which but for the new Section might not be enforceable, whereas S. 53-A enables a transferee with an incomplete title to use the doctrine of part performance as a shield to protect his possession. As has been pointed out by the Judicial Committee of the Privy Council in 66 I A 293[22]:

> Section 53-A, T. P. Act, confers no right of action on a transferee in possession under an unregistered contract of sale. The right conferred by the Section is one available only to a defendant to protect his possession. The Section is so framed as to impose a statutory bar on the transferor and it confers no active title on the transferee.

Section 27-A, Specific Relief Act, on the other hand, confers an active title on the lessee, provided that the contract of lease was entered into after 1st April 1930. That being so, I do not see how there can be any conflict between the two Sections, if one of them is held to be retrospective and the other to be not retrospective. There may, however, appear at first sight to be some difficulty in working together the new provisions of S. 49, Registration Act, and S. 53-A, T. P. Act, if it is held that the former is not retrospective and the latter is retrospective. The suggestion made by the learned Chief Justice of the Bombay High Court in A I R 1940 Bom 90[14] is that the Legislature has by oversight omitted to make the new proviso to S. 49, Registration Act, retrospective, but I think that there may be another explanation also. The new proviso to S. 49 relates to a matter of evidence only and there is ample authority for the view that if any alteration is made in a rule of evidence, the alteration shall be ordinarily deemed to be retrospective. S. 15 of Act 21 of 1929 provides that nothing in the Act shall be deemed to affect the validity or invalidity, effect or consequence of anything done before 1st April 1930 or any right, title, obligation or liability already acquired, accrued or incurred before such date. This Section cannot affect the retrospective operation of S. 53-A, Act 20 of 1929, which is a different Act, if that Section can otherwise be held to be retrospective. Nor does

22. Probodh Kumar Das v. Dantamara Tea Co. Ltd., (1940) 27 A I R P C 1=185 I C 217=66 I A 293=I L R (1940) 1 Cal 250 (P C).

it, in my judgment, affect the retrospective operation of S. 10 of Act 21, because S. 10 merely introduces a change in the rule of evidence.

Section 49, Registration Act, lays down that no document requiring registration shall (i) affect any immovable property comprised therein or (ii) be received as evidence of any transaction affecting such property. The change introduced by the new Act by adding a new proviso to S. 49 does not supersede the law of registration, nor does it in any way affect the first part of S. 49 which says that no document requiring registration which is not registered shall affect any immovable property comprised therein. The new proviso does not say that the person who has an incomplete title will acquire a complete title notwithstanding the non-registration of his document of title. It merely affects the second part of S. 49 which is a pure rule of evidence. On general principles therefore, such a provision may be retrospective specially when it is not covered by the words used in S. 15 of the Act. This view, I am glad to know, is supported by the decision of Ghose J., in 43 C W N 956[23] which was brought to my notice after I had independently come to the same conclusion as that learned Judge. I do not, however, wish to pursue the matter, because I think that for the purpose of construing S. 63 one must confine oneself to the language of the particular Act of which it is a part and not refer to the provisions of any other Act.

In my opinion, therefore, S. 92, T. P. Act, must be held to be retrospective subject to certain qualifications, but as the word "retrospective" is sometimes used in a loose sense, I wish to add a word of explanation. A statute may be retrospective in relation to a suit, that is to say, it may be applied to suits brought before it was passed, or in relation to transactions which were entered into before its commencement. This being made clear, I would formulate my reply to the question with which we are dealing as follows : S. 92 will have retrospective operation in regard to transactions effected before 1st April 1930 except in cases pending on that day and except as to rights and liabilities arising before 1st July 1882 when the Transfer of Property Act came into force. This last qualification seems to be necessary in view of S. 2, T. P. Act, which lays down that :

> Nothing herein contained shall be deemed to affect any right or liability arising out of a legal relation constituted before this Act comes into force or any relief in respect of any such right or liability.

The second question which we have to answer reads thus :

> Whether a subsequent mortgagee, who pays up and redeems the earlier mortgages as a part of the covenant in his mortgage, is entitled to claim subrogation so as to give him the right to enforce the rights of the earlier mortgagees as a plaintiff in an action or whether he can use the earlier mortgages as a shield only irrespective of the fact that the properties mortgaged to him are different from the properties covered by the earlier mortgages so redeemed.

As this question is to be answered with reference to the present law, there is no difficulty in answering it. Before S. 92 was enacted, subrogation was nowhere defined in the Transfer of Property Act. The new Section, however, explains the meaning of this expression as well as defines the rights of the person who may be subrogated. The first two paragraphs of the Section run as follows :

> Any of the persons referred to in S. 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.
>
> The right conferred by this Section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

It is clear from these two paragraphs that the person who is subrogated to the position of a prior mortgagee has the same rights as that mortgagee. In other words, he cannot only use the earlier mortgages as a shield but also enforce the rights of the earlier mortgagee. If the case however falls under para. 3, S. 92 and not under para. 1, then all that is necessary is that the mortgagor should have agreed by a registered agreement that the person advancing money to him should be subrogated to the position of an earlier mortgagee. It is to be noted that even before S. 92 was introduced into the Transfer of Property Act the right of subrogation was allowed to two classes of persons, viz. (1) persons who having a pre-existing interest in the property paid off a prior charge for the protection of their own interest and (2) persons who acquired an interest in the property by reason of their advancing money to pay off an existing mortgage debt. The law of subrogation was to be found partly in Ss. 74 and 75 of the old Act and partly in judicial decisions. S. 74 merely enacted that every

23. Sm. Swarnamayee Basu v. Saraju Bala Debi, (1939) 43 C W N 956.

second or subsequent mortgagee on discharging the next prior mortgage would be entitled to all his rights. By reading S. 74 with S. 75 this rule was extended to all cases where a prior mortgage had been discharged.

Apart from these Sections, however, and even before they were enacted, the Courts used to allow subrogation to persons other than a second or a subsequent mortgagee in special cases on principles of equity, justice and good conscience. One of those cases was where a person acquired an interest in some property only by reason of his advancing money to pay off an existing mortgage debt thereon. The law so far as can be gathered from the judicial decisions on the subject prior to the enactment of S. 92 was briefly this: If a person advanced money for the purpose of paying off a mortgage and took a mortgage or sale, ordinarily the mortgage which was paid off was deemed to be discharged, because money received in consideration of a mortgage or sale of property was the property of the mortgagor or the vendor though the hand which paid the money was the hand of the vendee or the mortgagee. But on this general rule was engrafted an important exception in regard to those cases where there was an implied or express agreement between the mortgagor and the person who advanced money to him for payment of an earlier mortgage that the mortgage which is paid off would be kept alive for the benefit of the latter. In such cases the practice in England was that the purchaser or mortgagee who advanced the money to pay off an earlier mortgage had it assigned to a trustee for himself or had a declaration inserted in the deed that the charge should be treated as kept alive for the purpose of protecting him against any incumbrances. But as was pointed out by the Judicial Committee:

> In India the art of conveyancing has been and is of a very simple character and so a formal transfer of a mortgage is seldom made and intention to keep it alive also seldom formally expressed.

In view of this fact the Judicial Committee held in 10 Cal 1035[24] that we must look to the intention of the person who paid off the earlier mortgage and if he intended to keep it alive for his own benefit, it must be treated as having been kept alive. In that case Sir Richard Couch observed as follows:

> The obvious question to ask in the interest of justice, equity and good conscience is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interest in the property is by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid.

The same view was expressed by the Judicial Committee in 29 Cal 154;[12] 39 Cal 527.[13] In 29 Cal 154,[12] one Mustafi had advanced a sum of Rs. 40,000 for the purpose of discharging two prior mortgages which were discharged and a question arose as to whether the mortgage in favour of Mustafi had priority over an attachment of property which had come into effect before the date of the mortgage. Their Lordships of the Privy Council held that in the circumstances the intention of the parties was that the earlier mortgages should not be extinguished by merely being paid off but were to be kept alive for the benefit of the respondent. Lord Lindley after referring to the decisions in 9 Cal 961[25] and 10 Cal 1035[24] stated that the effect of these decisions was that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or kept alive for his benefit is a simple question of intention and the intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot. He then observed as follows:

> Here the mortgagor was paying off his own debts, but he was doing so for the benefit of Mustafi and in performance of the agreement with him.

In 39 Cal 527[13] there was a mortgage in favour of one Alfan effected on 17th February 1888 for the purpose of discharging a zarpeshgi debt dated 20th November 1874. Their Lordships after referring to the facts of that case observed as follows:

> The Rs. 12,000 lent by Mt. Alfan were in accordance with the agreement between Mt. Alfan, and Kishan Kumar Singh, applied in paying off the zarpeshgi debt, that on payment of that debt the zarpeshgi deed of 20th November 1874 was handed over to Mt. Alfan and that Mt. Alfan when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the zarpeshgi deed of 20th November 1874.

24. Gokaldass Gopaldas v. Puranmal Premsukdas, (1884) 10 Cal 1035.

25. Mohesh Lal v. Bawan Das, (1883) 9 Cal 961 = 10 I A 62 = 13 C L R 221 (P C).

As I have already stated in 36 Cal 193[11] Mookerjee J. referred to this class of subrogation as conventional subrogation, that is to say, subrogation arising out of an agreement whether express or implied. Thus, the Courts in India recognized conventional subrogation even before S. 92 or S. 74 was enacted, and S. 92 has merely crystallized the law on the subject with this difference only, that now subrogation will not be granted unless the mortgagor has by registered instrument agreed that the person who has advanced money to him with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed.

The next question which may be considered is whether under the old law a person who was subrogated could enforce as a plaintiff the rights of the earlier mortgagee or he could use it as a shield only. A careful examination of the authorities on the subject will show that the law in this respect was the same as we find embodied in S. 92 now. I am fortified in this view by several authoritative decisions and I shall first refer to 27 All 325[26] the facts whereof were these: On 20th July 1899 one Fateh Chand executed a mortgage on conditional sale in favour of Bansidhar and Kunj Behari Lal. A few months later Fateh Chand executed a second mortgage in favour of Anant Ram and Bansidhar. Anant Ram sold his half share to Gaya Prasad with the result that Bansidhar and Gaya Prasad became the second mortgagees. In 1893 two suits were brought by the first and the second mortgagees respectively for foreclosure on both the mortgages and these suits were decreed on 3rd January 1896 which was within the period fixed for redemption. Gaya Prasad paid into Court the decretal amount under the first mortgage and thereafter made an application that the decree for foreclosure of the mortgaged property may be prepared in his favour. This application was dismissed on the ground that the proper remedy for Gaya Prasad was to institute a suit. Gaya Prasad then instituted a suit which was dismissed by the High Court on the ground that the suit was misconceived and his proper remedy was to apply in the execution department for an order of foreclosure. The Judicial Committee reversed this decision and held that Gaya Prasad was entitled to maintain the suit. In the whole of this proceeding it was not questioned that Gaya Prasad by reason of having paid off the prior mortgagee acquired the same rights as those of the prior mortgagee and could enforce that right.

In 29 Cal 154[12] to which reference has already been made the facts were these: In 1891 certain property which was subject to two mortgages was attached by the Sheriff of Calcutta at the instance of a creditor. At the time of the attachment the mortgagor was making arrangements with one Mustafi for an advance to enable him to pay off the two mortgages and this arrangement was duly carried out in October 1891. The result was that the old mortgages were paid off and the properties comprised in them were re-conveyed to the mortgagor and the deeds by which they were re-conveyed were made over by him to Mustafi and he executed a mortgage bond in favour of the latter. In July 1892 part of the property mortgaged was sold under execution to Dinobandhu who claimed to be entitled to the property bought free from encumbrance. Thereupon, Mustafi having died, his widow brought a suit claiming a lien over the full amount of the mortgage bond. This claim was upheld and it was held that though the mortgagor had paid off his own debts out of the money received from Mustafi, he had done so for the benefit of the latter and in performance of the agreement with him. Mustafi was thus allowed to enforce his charge upon the property. What is to be noted is that Mustifi did not merely use his right to subrogation as a shield, but he was allowed to enforce it by means of a suit.

In 39 Cal 527[13] it was recognized that the right of subrogation acquired by Mt. Alfan on payment of the zarpeshgi debt of November 1874 could be enforced by means of a suit, but as the suit had been brought after the right of the prior mortgagee to enforce his mortgage had been barred it could not succeed. This case also confirms the view that the right of subrogation could be enforced even under the old law. In 38 All 398[27] a suit was brought by a puisne mortgagee and a preliminary decree was passed in that suit. The plaintiff was given the right to redeem a prior mortgage covering the mortgaged property as well as other property. The preliminary decree, however, did not specify this property as the property to which the mortgagee-plaintiffs were entitled in the event of non-payment.

26. Gopi Narain v. Bansidhar, (1905) 27 All 325=32 I A 123=2 A L J 336=8 Sar 799 (P C).

27. Udhister Singh v. Mt. Kausilla, (1917) 4 AIR All 443=34 I C 79=38 All 398.

The plaintiff-mortgagees having paid off a prior mortgage it was held that they were entitled, notwithstanding this omission, to final decree for sale of the property comprised in both mortgages. In this case strictly speaking the question as to whether the subrogee could enforce his right by means of a suit or use it as a shield did not directly arise, but it does not seem to have been questioned throughout the proceeding that his right could be enforced.

Other cases cited on the subject were 8 P L T 255[28] and 1939 P W N 8,[29] but I think that I have said enough to show that a person who is subrogated to the position of a prior mortgagee has all the rights of that mortgagee including the right of enforcing the mortgage. S. 74 of the old Act, though it contained only an incomplete statement of the law of subrogation, makes this clear and the expression "subrogation" itself means the substitution of one creditor for another by operation of law. In my opinion, therefore the answer to the second question should be that a person who is subrogated is entitled to enforce the prior mortgage, in respect of which he acquires a right of subrogation, as well as use it as a shield. It may be that in most cases he will be satisfied with using it as a shield only but the right to enforce it is there and can be exercised when necessary.

Dhavle J.—I have had the advantage of reading the judgments prepared by Fazl Ali and Manohar Lall JJ. S. 63 is a saving clause, and if there had been no saving clause at all, none of the provisions of Act 20 of 1929, so far as they purport to affect the acquisition of rights would have been held applicable to rights acquired before the passing of the Act. What the saving clause does in form is to limit what may be called the retrospective operation of the new provisions. The first part of S. 63 is restricted to the 22 Sections specified in it, and provides that no rights already acquired will be affected by the provisions of this group of Sections. It is important to notice that in this part the question of whether the saving is to extend to future litigation or is to be confined to pending litigation is not raised. In the second part of the Section it is provided that the other Sections shall not affect (to put it very briefly) pending litigation. The non-saving of past transactions as regards future litigation in relation to these other Sections does contrast not only with the saving in the first part of the Section but also with that in the second part; and the third part of the Section merely puts these two savings together. It seems to me that in the very nature of things these savings cannot run into each other; that for instance, no question could arise whether the right of subrogation now mentioned in S. 92 could in any event be affected by any of the 22 Sections specified in part 1 of S. 63. Being expressed in somewhat general terms the Section is undoubtedly not very easy to follow, but I find it a little difficult to agree in the view expressed in Lucknow and suggested in other places, that the three parts of the Section are not logically arranged. My learned brother Fazl Ali J. has not only examined the structure of the Section very closely but also dealt in detail with the position under the old Transfer of Property Act and the case law as we find it at the time of the passing of the Amendment Act 20 of 1929. I do not think it necessary to develop that point over again, but consider it sufficient to express my entire agreement with Fazl Ali J., as regards both the points referred to this Full Bench.

Manohar Lall J.—I regret that I have the misfortune to differ from the views expressed by Fazl Ali J., upon the second question which invites a decision as to whether the provisions of S. 92 of the amended T. P. Act are retrospective. It is unnecessary to state the facts of the present case because the question which requires to be answered is an abstract question of law wholly independent of the facts. It should be stated at the outset that the word retrospective is inappropriate, and the question is not whether the Section is retrospective. Retrospective operation is one matter, interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. *See* the observations of Buckly L. J. in (1911) 2 Ch D 1[30] at page 11. The illustration at page 12 makes the distinction clear :

> Take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares

28. Mohammad Tabarak Ali Khan v. Dalip Narain Singh, (1927) 14 A I R Pat 117=98 I C 968=8 P L T 255.

29. Kamalapati Devi v. Jageshwar Dayal, (1939) 26 A I R Pat 375=183 I C 400=18 Pat 342=1939 P W N 8.

30. West v. Gwynne (1911) 2 Ch D 1=80 L J Ch 578=104 L T 759 = 55 S J 519 = 27 T L R 444.

to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in (1848) 2 Ex 22[31] and (1893) 1 Q B 41.[32] But if at the date of the passing of the Act the event has not happened then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys *A*'s right in an event to become a creditor of *B*.

The question to be decided here is whether the third part of the provisions embodied in S. 92, which confer the right of subrogation on a person who has advanced to a mortgagor money with which the mortgage has been redeemed provided there is an agreement by a registered instrument is addressed to the case of all agreements or only of some, namely those agreements embodied in documents registered after the passing of the Act on 1st April 1930. The question therefore is as to the ambit and the scope of the Act and not as to the date from which the new law as enacted by the Act is to be taken to have been the law. Numerous authorities have followed the dicta of eminent Judges in England who have laid down the principles that should be kept in view by the Courts when they are called upon to construe a statute which professedly alters the law affecting the rights of the litigants. These cases are quoted in the judgment of Roberts C. J., in the Full Bench case reported in A I R 1938 Rang 306[9] and establish the canons of construction which I ventured to point out in the case dealing with the applicability of S. 53-A of the amended T. P. Act in 17 Pat 460[2] at p. 493. In every case the Court is required to find out the intention of the Legislature as expressed by the words deliberately and carefully adopted by it. In many cases it will be a useful guide to see the state of law which existed before the amendment was introduced and then to see if the amending Act has taken away the rights which existed in a litigant before the Act was passed or, as it is sometimes expressed, whether the act, legal at the time of doing it, has been rendered unlawful by the new enactment, always keeping in mind that as a matter of principle an Act is not without sufficient reason taken to be retrospective because there is a presumption that it speaks only as to the future. It is common ground that a person who had advanced before the passing of the amending Act to a mortgagor money with which the mortgage has been redeemed was under the old law subrogated to the rights of the mortgagee whose mortgage has been redeemed even though the mortgagor had not agreed by a registered instrument that such person shall be so subrogated provided the Courts could infer such an agreement upon the facts of the case in circumstances which are amply illustrated by the decisions of their Lordships of the Judicial Committee reported in 10 I A 62[25] and 39 I A 68.[13] The question to be determined is whether such a person who has advanced money to the mortgagor before 1st April, 1930 under circumstances which secured to him the right of subrogation is to be debarred from exercising that right by reason of the fact that he has not taken the precaution of having an agreement with the mortgagor by a registered instrument, which precaution was unknown to him and which is being introduced for the first time by S. 47 of Act 20 of 1929 which received the assent of the Governor-General on 1st October 1929 but came into force on 1st April 1930. The difficulty which has arisen in the applicability of this Section to transactions which took place before 1st April 1930 arises from the demonstrably ambiguous words used by the Legislature in S.63 of the Amending Act. By that Section the provisions of the Amending Act contained in the 22 enumerated Sections are expressly declared not to affect the terms or incidents of any transfer of property, or the validity, invalidity, effect or consequences of anything already done, or any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930 nor any remedy or proceeding in respect of such right, title, obligation or liability. Then reference is made to the other provisions of the Amending Act and it is provided that

> nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April, 1930 in any proceeding pending in a Court on that date.

The intention and meaning of the Legislature up to this place is clear, namely that the provisions of the 22 Sections shall not affect what has happened before 1st April 1930 and that the provisions of the other part of the Act shall not affect anything already done in any proceeding pending on that date. But it will be noticed that nothing

31. Moon v. Durden, (1848) 2 Ex 22=12 Jur 138.
32. Knight v. Lee, (1893) 1 Q B 41=62 L J Q B 28 =5 R 54=67 L T 688=41 W R 125.

is stated as to whether the other provisions of this Act shall apply so as to affect the validity of anything already done or the right, title and obligation already acquired before such date. It is, however, suggested that the Court must necessarily draw an inference that the Legislature intended that the other provisions of this Act shall operate so as to affect everything which has not been brought before a Court in any proceeding pending on 1st April 1930. Then follows the concluding portion of S. 63 which enacts that

> any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

It is argued that it is unreasonable to think that the Legislature took the trouble of expressing itself in such an elaborate way if its intention was not that the provisions of the Sections other than the 22 Sections enumerated in the opening words of S. 63 were to apply to all transactions effected before 1st April 1930, unless these have been made the subject of any proceeding pending on that date. Therefore, in some reported cases the learned Judges, feeling the apparent difficulty in construing the concluding portions of this Section, have attempted to re-cast the Section by transposing the words that follow from the second line of sub-cl. (d) : for instance *see* A I R 1938 Oudh 127.[10] But, in my opinion, this mode of the construction of a statute is novel and with respect it is not permissible to the Courts to do so. If the Legislature has taken the trouble to enact the Section in an elaborate way it must be assumed to have also taken the trouble to express its meaning in and by the words which it has chosen to put in the Section.

The critical question to consider is what is the meaning of the words "any such remedy and any such proceeding as is herein referred to." It seems to me that the words are capable of one meaning only. The word "such" necessarily implies that the remedy and proceeding referred to has been already dealt with. Proceeding therefore from the concluding words of this Section I look above and find that in sub-cl. (d) the words used are "any remedy or proceeding in respect of such right, title, obligation or liability." Here again, the word "such" is used and therefore I have to look above for seeing the right, title, obligation or liability which is referred to and I find that the right, title, obligation or liability is expressly mentioned just above in sub-cl. (c), that is to say, "any right, title, obligation or liability already acquired, accrued or incurred before such date." It seems to me therefore on a pure grammatical and plain reading of the Section that the words of S. 63 are a positive direction to the Courts that any remedy and any proceeding in respect of any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930 may be enforced, instituted or continued, as the case may be, as if this Act had not been passed. I see no difficulty in so understanding the Section because this satisfies the requirements of the ordinary rules of construing a statute and also avoids the shocking of one's sense of justice if it was not held that the act of payment to a mortgagor which was legal at the time of doing it in such circumstances as gave the right of subrogation to the creditor is still kept lawful. It may be observed that the last line of this Section is "as if this Act had not been passed" and not as if the 22 Sections enumerated in the opening paragraph of S. 63 had not been passed. I therefore find myself in agreement with the views expressed by the learned Judges of the Rangoon High Court and in particular I agree respectfully with the observations of Dunkley J. where he arrives at the same conclusion in these words :

> There is no justification whatever for holding that in this sentence the expression "such remedy" means and includes only a remedy in a pending proceeding. Consequently, the conclusion would appear to be that S. 63 specifically provides that no provision of Act 20 of 1929 shall affect vested rights which were acquired or accrued before 1st April 1930.

Let me read S. 63 by using the word "subrogation," with which we are concerned at the relevant places. The Section would read thus : "Nothing in any of the following provisions of this Act (namely the 22 Sections) shall be deemed in any way to affect any right of subrogation already acquired or accrued before the first day of April 1930 or any remedy or proceeding in respect of such right of subrogation and nothing in any other provisions of this Act shall render invalid or in any way affect anything already done before 1st April 1930 in any proceeding pending in a Court on that date and any remedy of subrogation may be enforced, instituted or continued as if this Act had not been passed." I do not see any difficulty in so reading the Section. This is at least one plain reading of the Section and if the Legislature chooses to employ

ambiguous words the Courts will refuse to give a construction which would interfere with the existing rights. An instructive case is reported in 31 I A 30.[33] In that case the suit was brought by the heirs of Imtiaz Fatima to recover certain villages which were in her possession when she died in December 1894. She was the surviving widow of one Murtaza Bakhsh, who died in 1865. The defence to the action was that as provided by Act 1 of 1869 which came into operation in January of that year the name of Murtaza Bakhsh was entered in certain lists as required by that Section and by virtue of S. 10 of the Act the Courts were compelled to regard such lists as conclusive evidence that the persons named therein were talukdars or grantees within the meaning of the Act and therefore it was contended that as S. 10 provides that the Court shall take judicial notice of these lists and shall regard them as conclusive evidence that the persons therein named are such talukdars, it must be held that on the death of Murtaza Bakhsh the estate vested in the widows for life and on the death of the surviving widow, namely Imtiaz Fatima, the defendants as the next heirs of her husband were entitled to succeed. Lord Lindley in dealing with this contention while delivering the judgment of the Board observed as follows :

> The whole case turns on the entry of Murtaza Bakhsh's name in two of the lists ordered to be made by the Act of 1869. S. 10 of the Act compels the Courts to regard such lists as conclusive evidence that the persons named therein are taluqdars or grantees within the meaning of the Act. When the lists referred to are looked at, it will be found that there are six lists: see S. 8. Murtaza Bakhsh's name is in the first and third. The entries therefore by Ss. 8 and 10 are conclusive evidence (1) that he is to be considered as having been a taluqdar within the meaning of the Act: see Ss. 2, 8, list 1, and (2) that he was a taluqdar to whom a sanad had been made declaring that the succession to the estates comprised in it should be regulated by the rule of primogeniture: see Ss. 2, 8, list 3.
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> These enactments are clear and peremptory, and would be decisive if they applied to this case. It is not however in accordance with sound principles of interpreting statutes to give them a retrospective effect. The Court cannot construe Ss. 8 and 10 so as to deprive the successors of the estates of a person who had died before those Sections came into operation of rights which they acquired on his death.

It may be useful to consider the language of S. 92 itself and find out if the terms of the Section themselves indicate whether the Court is bound to construe this Section so as to make it applicable to transactions before 1st April 1930 and thus interfere with vested rights. The first part of S. 92 refers to S. 91 which is expressly omitted from the operation of transaction before 1st April 1930. I agree that it cannot be reasonably argued that by reason of this fact alone all the provisions of S. 92 should be held to have a similar effect but observe the true import of the provisions thereafter. The second clause states that the right conferred by this Section is called the right of subrogation. But there existed what was called a conventional right of subrogation in favour of a person if he satisfied the requirements laid down by the decisions already referred to irrespective of the fact whether the mortgagor had agreed with that person by a registered instrument or not. There was no statutory right of subrogation to be found anywhere within the four corners of the unamended Transfer of Property Act and a restricted kind of right is now being inserted for the first time by S. 92. The Legislature is therefore recognizing a limited right which they are conferring by this Section. It is reasonable therefore to assume that the Legislature intended to confine this new right to events that had happened after 1st April 1930. The Section does not profess to deal with rights which existed already before 1st April 1930. It seems to me therefore that the language of S. 92 itself suggests that it cannot apply to transactions which had happened before 1st April 1930.

I may at this stage conveniently and shortly deal with the arguments which were accepted in some cases that where an interval of time is left between the date of the publication of the Act in the Gazette and the date on which it comes into force it must be assumed that the Act has retrospective operation on earlier transactions because, so it is argued, it was open to the litigants to enforce their right of action if they so chose before the date upon which the Act came into operation. This argument has been authoritatively rejected in (1878) A C 582.[20] In that case the instruments which had failed in the formalities required by the earlier Act would have become valid and operative upon property or upon persons by the passing of the Act of 1874. Therefore it was argued that, in the words of Lord Cairns :

> the whole of the subjects of Scotland upon whose property the shadow of any instrument which had failed in its formalities had fallen before the Act

33. Mohammad Abdus Samad v. Kurban Husain, (1906) 26 All 119=7 O C 254=31 I A 30=8 Sar 593 (P C).

passed, would be subject to have that instrument springing into validity and operating upon their property or upon their persons unless within the two or three months to which I have referred — the commencement of the Act was two or three months after the date of the royal assent — they instituted an action of declarator to have the instrument declared invalid,

but Lord Cairns repelled the argument observing :

The thing might have passed out of their recollection, it might have been treated years before the Act of 1874 had passed as a document which went pro non scripta, and yet they might find that under the ambiguous words of S. 39 the instrument came again into validity. The proposition only requires to be stated in that way to show that this is a construction which your Lordships would not arrive at unless compelled by the strongest and clearest words of the statute. It is admitted that the words are not clear, that they are ambiguous, and if so it appears to me that these considerations to which I have adverted would at once lead your Lordships to refuse to adopt that construction which would produce the gross injustice and the gross anomalies to which I have referred.

These observations apply *a fortiori* to the present case when it is remembered that the right of subrogation is both an offensive and a defensive weapon, that is to say, it can be used as a sword or as a shield. I fail to understand how a person who has a right of subrogation and wants to use it as a defence to an action can exercise that right by becoming a plaintiff in the action between October 1929 and April 1930 because unless a suit is instituted by a third person over whom he has no control he cannot exercise the right of subrogation as a defence. I cannot conceive that the Legislature would take away the existing rights without saying so in clear, unambiguous and express terms. I wish to draw attention at this place to the observations of of Lord O'Hagan at p. 601 in (1878) A C 582[20] where he assumed that up to the year 1874, when the Act in question was passed, there was absolutely no validity in the deed and proceeded :

Can we suppose that in that year, no right existing, as the conditions of a valid execution had not been fulfilled, the Legislature intervened, and by equivocal words, without any expression or clear intention, and in direct opposition apparently to public policy and private interest, established a right that never before had any existence? I shall not occupy your Lordships' time by saying again what has been already said of the evils resulting from such an interpretation and the unreasonable consequences attaching to it. A man who, on the faith of the construction which, as I think, must now be taken to be correct, had advanced a large sum of money on a purchase would, if the view of the appellants were adopted, be deprived of all his outlay. An heir or next of kin, who for a number of years had possessed property in the assurance that the law of the land had given it to him and would protect him in it, might find himself all at once deprived of that property by an ex post facto decision, and his family are beggared by a construction of which nobody perhaps had ever thought before. Those are consequences of a very serious kind; and although Mr. Benjamin said that in a matter of this sort there are no vested interests which your Lordships should regard, I cannot concur with him. The vested interests are those of a man who, acting upon the law as he understands it, and as it really turns out to be, has advanced his money or changed his position; and it cannot be said that in these circumstances such interests do not deserve protection.

Lord Blackburn in concluding his speech in that case observed :

My ground for saying that S. 39 is not retrospective is, that if it were retrospective it would have the effect of making that a valid contract which, as the law stood at the time it was executed, was not valid at all.

Although this case deals with a converse situation, in my opinion, the observations of these noble Law Lords who took part in the discussion are of great assistance in supporting me in the conclusion at which I have arrived because the construction that S. 92 must apply to all past transactions would involve the consequence, as was forcibly pointed out by Lord O'Hagan at p. 601, of depriving the rights which undoubtedly existed to a person who on the faith of the law which obtained before 1st April 1930 had advanced a large sum of money to a mortgagor by which the mortgage had been redeemed under circumstances giving the person so advancing the right of subrogation. Such a person has a vested interest because acting upon the law as he understood it and as was laid down by the highest judicial tribunal in the Empire he advanced the money and changed his position. In these circumstances it must be held that such interest deserves protection. With such consequences staring in the face are we necessarily required to give a retrospective meaning to this Act although we not only have no express words capable of such meaning, but we have in the Act itself a clear indication that any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930 shall remain as if this Act had not been passed ? These words seem to apply to a future judgment upon a future instrument brought for judgment after the passing of the Act.

As the result of the amendment of the Transfer of Property Act another Act (Act 21 of 1929) was passed to supplement the Transfer of Property Amendment Act of 1929. This Act received the assent of the Governor-General on 4th October 1929,

that is to say, three days after the Act 20 of 1929 received the assent of the Governor-General; but the two Acts came into force on the same day, namely 1st April 1930, and therefore it must be taken that the two Acts are parts of the same enactment. By S. 3 of Act 21 of 1929, S. 27, Specific Relief Act, 1877 was amended and rights have been given to the lessor and the lessee for suing the other for specific performance of the contract to lease immovable property made in writing under certain conditions, but at the end of S. 3 it is stated that this Section applies to contracts to lease executed after 1st April 1930. This Section was necessary because of the provisions of S. 53-A which is to be found in S. 16 of Act 20 of 1929 which again is one of the Sections not enumerated in the opening clause of S. 63. The Legislature has therefore itself given indication that a suit for specific performance of contract to lease can be brought provided the contract to lease is after 1st April 1930 thereby affirming the proposition which I have taken pains to establish that where rights and obligations have already accrued before 1st April 1930, the Amending Act of 1929 was not intended to interfere therewith. By S. 10 of Act 21 of 1929 the provisions of the Registration Act, 1908, have also been amended. By sub-s. (3), sub-cl. (b) of S. 49, Registration Act, has been amended by inserting a proviso that an unregistered document affecting immovable property and required by the Registration Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under the Specific Relief Act, or as evidence of part performance of a contract for the purposes of S. 53-A, T. P. Act. Then follows S. 15 which expressly provides that

> nothing in this Act shall be deemed to affect the terms or incidents of any transfer or disposition of property made or effected before 1st April 1930.

The succeeding sub-cls. (b), (c), (d) and (e) expressly keep intact the validity, invalidity, effect or consequences of anything already done or suffered before that date. It seems to me very clear from these provisions that the operation of S. 53-A cannot be extended to those transactions which existed before 1st April 1930. It will be noticed that in order to give a person the benefit of S. 53-A he must be able to prove the terms of the contract by which any person has contracted to transfer for consideration any immovable property by any writing signed by him. S. 49 as it stood required such a contract to be registered and the amendment of S. 49 is by the express terms of S. 15 of Act 21 of 1929 not to affect the terms or incidents of any transfer of property made before 1st April 1930 with the result that the terms of that contract upon which the person wishes to found the benefit of S. 53-A cannot be proved. My brother Wort and myself took this view of the operation of S. 53-A in the case already referred to. In A I R 1940 Bom 90[14] Beaumont C. J. noticed this aspect of the matter but suggests that the Legislature has made a slip in the drafting of the amending Acts. With great respect I do not agree with this view. The Legislature has been careful in so amending the Acts that it is made clear that S. 53-A is not retrospective. The learned Chief Justice observes:

> As I have pointed out S. 53-A expressly provides that in the contracts referred to in spite of non-registration the transferor is debarred from enforcing his rights. If no amendment had been made in the Registration Act, it seems to me clear that S. 53-A would have overridden S. 49, Registration Act, in respect of contracts falling within the former Section. But, I suppose from excess of caution the Legislature thought it desirable to amend S. 49 and accordingly a proviso was added to that Section as from 1st April 1930 which so far as material enacts that an unregistered document affecting immovable property and required by this Act to be registered may be received as evidence of part performance of a contract for the purposes of S. 53-A, T. P. Act, 1882. Now, that proviso was added by S. 10, Act 21 of 1929, and S. 15 of that Act is expressed in terms almost identical with those of S. 63 of Act 20, but it applies to the whole Act and not merely to enumerated Sections.

I am unable to agree that if S. 49, Registration Act, had not been amended S. 53-A would have overridden S. 49, Registration Act. The Legislature itself did not think so and therefore had to amend the Registration Act. The reception of a document embodying contract in evidence affecting immovable property was forbidden by the then Registration Act. The learned Chief Justice then proceeds:

> It is argued that as the transfers in this case were made before 1st April 1930 and had not been registered they could not be relied upon nor used in evidence and that the amendment of S. 49, Registration Act, was expressly given no retrospective effect. If that is correct as it seems to me to be and if I am right in thinking that S. 53-A, T. P. Act, has retrospective effect then there would seem to have been a slip in the drafting of the amending Acts. It cannot have been intended to make the amendment of the Transfer of Property Act retrospective and to make the consequential amendment of the Registration Act non-retrospective and one has to consider which of the amending Acts represents the true intention of the

Legislature. It seems to me that the amendment of S. 49, Registration Act, was only passed *ex abundante cautela* and was not necessary and the fact that that amendment was not made retrospective cannot, I think, have any great weight in considering whether S. 53-A, T. P. Act, is made retrospective.

With very great respect, the easy solution of the difficulty which presented itself to the learned Chief Justice was to hold that S. 53-A, T. P. Act, was not retrospective. If this view had been adopted, there was no conflict between the two amendments deliberately and necessarily made by the Legislature. In a recent decision of this Court to which my brother Fazl Ali J. was a party a similar view has been taken. That case is reported in 19 Pat 90[34] and dealt with the question as to whether the plaintiff could claim specific performance of an agreement for sale of certain property executed in 1928. The plaintiff had paid a sum of Rs. 200 in part payment and had obtained possession of the land. He had not paid the remaining sum of Rs. 100 though he was willing and ready to do so. In the meantime the defendants had settled the lands with the other defendants. It was held by Agarwala J., who first heard the appeal, that the agreement sought to be specifically enforced could not be put into evidence by reason of the fact that it had not been registered. An appeal was then preferred under the Letters Patent of the Patna High Court. His Lordship the Chief Justice in delivering the judgment with which Fazl Ali J. agreed, made these observations after quoting the proviso which has been inserted in S. 49 of the amending Act of 1929 :

> There can be no question that if this latter proviso applied to this case, the agreement, though unregistered, could be adduced in evidence. It has however been contended on behalf of the respondents that this proviso cannot affect the case by reason of the fact that it only came into force in the year 1930. The proviso was added to S. 49, Registration Act, by S. 10, T. P. (Amendment) Supplementary Act, 1929; and S. 15 of that Act expressly provides that nothing in the Act shall be deemed to affect (b) the validity, invalidity, effect or consequences of anything already done or suffered before the Act came into force; and S. 1 (2) provides that the Act should come into force on 1st April 1930.
>
> The respondents argue that one of the effects or consequences of non-registration of the agreement in question was that it could not be adduced in evidence and such was undoubtedly the case until this amending Act was passed. If the amending Act applied to transactions which took place before the passing of the Act, then the consequences of non-registration would no longer apply. However as the Act is not to affect the validity, invalidity, effect or consequences of anything already done, it is urged that any document executed before the Act, which could not be adduced in evidence by reason of non-registration, is not affected by the amending Act. On behalf of the appellant however it is contended that the High Court at Allahabad has taken a different view. It is urged that this proviso relates only to procedure, and there is no reason why the proviso should not be considered to be retrospective. In 56 All 142[35] a Bench of the Allahabad High Court held that a document executed before the Amending Act 21 of 1929 could be adduced in evidence after the passing of that Act though it had not been registered as required by the Registration Act at the time when it was executed. The learned Judges stated that the matter was one relating to procedure, and therefore the amending Act could be regarded as retrospective. It was not brought to the notice of the learned Judges however that S. 15, Amending Act 21 of 1929 makes this provision applicable only to transactions entered into after the passing of the Act and, in the absence of any reference to S. 15, Amending Act, 21 of 1929, this case cannot be considered as any authority in support of the appellant's contention. Rowland J. in 14 P L T 628[36] held that the amendment of the Transfer of Property Act by the Amending Act 21 of 1929 cannot assist a plaintiff whose suit was commenced before that Act came into force, as such proceedings were expressly saved by S. 15 of the Amending Act. In my view the reasons given by Rowland J. in that case apply equally to this case. S. 15 of the Amending Act 21 of 1929 expressly says that any remedy or proceeding or anything done in the course of any proceeding pending in any Court when the Act came into force, was not to be affected by the Act. The same Section also says that the validity, invalidity, effect or consequence of anything already done or suffered before the Act came into force was not to be affected by the Act. As I have stated, one of the consequences of failure to register this document was that it could not be adduced in evidence. That was a consequence which the Act expressly states should not be affected. In my view therefore the proviso to S. 49 did not have retrospective effect and therefore cannot affect this agreement which was executed four years before the Amending Act 21 of 1929 came into force.

I respectfully agree with these observations. It is then argued that if the provisions of the Amending Act (20 of 1929) are examined they show that important changes were made in the existing Act. These have been enumerated in the judgment of my learned brother Fazl Ali J., and it is argued that all the Sections which effect these amendments, excepting Ss. 16 and 47, have been specifically referred to as being not retrospective. S. 16 gives effect to the doctrine of part performance by inserting S. 53-A, and S. 47 deals with the question of subrogation by inserting S. 92. It is therefore

34. Kubad Mia v. Guhi Mia, (1940) 27 A I R Pat 92=187 I C 198=19 Pat 90.

35. Sohan Lal v. Atal Nath, (1933) 20 A I R All 846=148 I C 229=56 All 142=1933 A L J 1584.

36. Dharichhan Singh v, Mahabir Singh, (1933) 20 A I R Pat 544=147 I C 1057=14 P L T 628.

contended that the exclusion of these two last named Sections was deliberate and was designed to show that these two Sections shall have retrospective operation. But instances are found in numerous cases where the Legislature has inserted a provision *ex abundante cautela*, and it may be that the Legislature was very careful in stating that these 22 Sections, though they may appear to have retrospective operation, are not to have retrospective operation and that the Courts were left to decide if Ss. 53-A and 92 should at all be applied to cut into existing rights. The General Clauses Act (10 of 1897) itself embodies this well known rule of construction in S. 6. I now proceed to examine some of the cases decided by other High Courts. In 54 All 897[37] the Court when considering the argument of Mr. Panna Lal that S. 92 had no application to the case before the Court because of the provision contained in S. 63 of Act 20 of 1929 observed :

> These Sections (that is to say, Ss. 92 and 101) are to have retrospective effect except in so far as they are not to have that effect according to the rule laid down. Now is there anything in this case which has already been done before 1st April 1930, in any proceeding pending in a Court on that date? Then again, is there any remedy and any such proceeding as is referred to in Act 20 of 1929 which is being affected by the new provisions of Ss. 92 and 101? We do not find that such is the case. Indeed, Mr. Panna Lal has not been able to point out to us what has been done in this case before 1st April 1930, which is being undone by the new rule of law and what is the remedy or proceeding which is being affected by the new provisions of Ss. 92 and 101. All that has been done is to lay down a rule of subrogation which was not contained in the unamended Act. The rule was based on general ideas of equity, and it cannot be said that the new Act is going to affect any remedy or any proceeding which was lawful under the old Act. In our opinion, therefore, Ss. 92 and 101 of the amending Act have retrospective effect.

With great respect, these observations do not even attempt to deal with the situation which I have endeavoured to point out above. If the provisions of S. 92 of the amending Act are held to have retrospective effect, it undoubtedly affects the remedy of subrogation which was available to the person in the position of a subsequent mortgagee. The learned Judges, it may be pointed out respectfully, failed to consider that they were applying the provisions of S. 92 to a case which had already commenced before the Act was passed, as I find at the bottom of p. 897 that the second appeal was filed in the High Court in 1930 from a decree of the Subordinate Judge which was dated 27th March 1930 and which had confirmed the decree of the first Munsif bearing date 5th April 1929. It seems to me, therefore, that the learned Judges applied the provisions of the Act even against the express provisions of the second part of the concluding portion of sub-clause (d) of S. 63.

The case which is more direct to the point is the later Full Bench case of the Allahabad High Court, I L R (1937) All 880.[38] In that case Sir Shah Muhammad Sulaiman C. J., considered the identical question at p. 897 and appears to doubt the opinion expressed by the Full Bench in 54 All 897[37] that the fact that the suit was already pending did not exclude the applicability of S. 92, and pointed out that Mukerji J. who delivered the judgment in that Full Bench case[37] decided in AIR 1934 All 701[39] that S. 53-A, T. P. Act, was not retrospective in its operation, although the reasoning in I L R (1937) All 880[38] applied with equal force to S. 53-A just as much as to S. 92. The learned Chief Justice while examining the provisions of the amending Act thought that if S. 63 had not included the words "and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st April 1930 in any proceeding pending in a Court on that date" it might well have been argued that the Legislature was merely inserting *ex majore cautela* a provision in the opening words of S. 63 about the 22 Sections but concluded from this addition that the other provisions of the Act were made inapplicable only when anything had already been done before 1st April 1930 in any proceeding pending in a Court on that date and that the Legislature obviously intended that if there was no proceeding pending in a Court on 1st April 1930 the retrospective character of the other provisions of the Act should not be excluded and observed:

> No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so. In India there is the provision in the General Clauses Act, S. 6, to a similar effect. But in this amending Act there is much more than a mere omission. There is an express reference to certain specified Sections which are not to be retrospective and there is an express reference to all the other provisions of the Act which are not to be retrospective in a certain contingency. It seems to follow that barring that

37. Tota Ram v. Ram Lal, (1932) 19 A I R All 489 =139 I C 107=54 All 897 = 1932 A L J 627 (F B).

38. Hira Singh v. Jai Singh, (1937) 24 A I R All 588=171 I C 153=I L R (1937) All 880=1937 A L J 840 (F B).

39. Gauri Shankar v. Gopal Das, (1934) 21 A I R All 701=151 I C 388.

contingency the other provisions of the Act were intended to have a retrospective effect. The reason is not far to seek. The Legislature had apparently thought that these other Sections are merely explanatory in their character and declare the law which had existed prior to this amendment. Whether the Legislature was right or wrong in this assumption is not a matter for us to consider. We must give effect to the language of the Act as it stands and hold that the Sections of the Transfer of Property Act not dealt with in the Sections enumerated in S. 63 have a retrospective effect, at least where no action was pending on 1st April 1930.

With the utmost respect I do not agree with this reasoning. If it is possible from the language of the Act to get the other view which I have ventured to express, I do not see any reason why the Court should necessarily adopt the construction that the Legistature has intended to take away the existing rights. If the Legislature was merely declaring the law which existed prior to the amendment there would be no controversy at all, but the Legislature has not declared the law which existed before the amendment. The Legislature is presumed to know the law which existed before the amendment and the very language adopted by it in S. 92 shows that it is so aware and therefore is now declaring the law which should exist as to future transactions after 1st April 1930. The language of the Section, as already pointed out states that the right conferred by this Section is called the right of subrogation and applies where an agreement is evidenced by a registered document. In A I R 1931 Mad 110,[40] Sundaram Chetty J. merely observed:

> It is clear that S. 74, T. P. Act, has no application to the present case, as it deals only with the right of subrogation, declared in favour of a subsequent mortgagee, by his discharging a prior mortgage. The plaintiff has therefore no statutory right of subrogation. S. 92, T. P. Act, (as amended by Act 20 of 1929) has no retrospective effect, and cannot govern the present case.

But no reasons are given for this opinion. In 56 Mad 169,[41] Cornish J., in delivering the judgment of the Bench held that S. 53-A has no application to an agreement to transfer immovable property which was made prior to 1st April 1930, the date on which S. 53-A is expressed as coming into force and observed:

> The Transfer of Property (Amendment) Act (20 of 1929), which introduced S. 53-A into the Transfer of Property Act, says that the Act, viz. the amending Act, shall come into force on 1st April 1930, and the language of S. 53-A itself does not indicate an intention that it should come into force on any other date. But it has been contended, in view of the provisions in S. 63 of the Act, that certain specified Sections (which do not include S. 53-A) shall not affect the terms and incidents of transfers of property made prior to 1st April 1930, and that the inference is that S. 53-A was intended to have retrospective effect on transfers of property. Their Lordships of the Judicial Committee in (1898) A C 469[42] have stated that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Judged by that test, the Transfer of Property (Amendment) Act (20 of 1929), in our opinion, fails to disclose an intention that S. 53-A was to have a retrospective effect. In support of the contention reference has been made to Act 21 of 1929, which is entitled "An Act to supplement the Transfer of Property (Amendment) Act (20 of 1929)." This Act is likewise expressed to come into force on 1st April 1930. It does not amend the Transfer of Property (Amendment) Act (20 of 1929) but it amends S. 49, Registration Act, by enabling an unregistered document to be received as evidence of part performance of a contract for the purposes of S. 53-A, T. P. Act. The Act to supplement the Transfer of Property (Amendment) Act 20 of 1929 (Act 21 of 1929) is supplementary of the Transfer of Property (Amendment) Act (20 of 1929) and its provisions must be construed accordingly. And if, as we think, S. 53-A is applicable only to transfers of immovable property made after 1st April 1930, it must follow that the operation of the amendment made by Act 21 to S. 49, Registration Act, should be similarly restricted.

In 59 Mad 359[43] Varadachariar J. held that in the view he took of the construction of S. 92, it was not necessary to come to a decision on the question of its retrospective operation but made these important observations:

> It is true that in 54 All 897[37] a Full Bench of the Allahabad High Court held that the provision had retrospective effect but a contrary opinion has been expressed by a Bench of this Court in 56 Mad 169.[41] I would only add that, in deciding how far an inference in favour of "retrospective operation" is to be drawn from the fact that S. 63 of Act 20 of 1929 expressly excludes retrospective operation in respect of certain specified Sections, the remarks of Lord Hatherley in (1878) 3 A C 582[20] at p. 599 might have to be borne in mind, viz., that it may well be a provision inserted *ex majore cautela*. With reference to the concluding words of S. 63 of Act 20 of 1929, the learned Judges of the Allahabad High Court observed that in that case nothing had already been done before 1st April 1930 in any pending proceeding and no remedy or proceeding was being affected by the new provisions. I beg leave to doubt the correctness of this statement. If the learned Judges were right in their view that the law was the same even prior to Act 20 of 1929, or that Act 20 of 1929 must only be understood as having declared the previous law (with a view to set conflicting decisions at rest), no exception could be taken to their relying on Act 20 of 1929,

40. Pichaiyappa Chetti v. Govindaraju Mudaly, (1931) 18 AIR Mad 110=130 I C 506.
41. Kanjee and Mooljee Brothers v. Shanmugam Pillai, (1932) 19 AIR Mad 734=139 I C 870=56 Mad 169=63 M L J 587.
42. Young v. Adams, (1898) A C 469=67 L J P C 75=78 L T 506=14 T L R 373.
43. Lakshmi Amma v. Sankara Narayana Menon, (1936) 23 AIR Mad 171 = 160 I C 137 = 59 Mad 359=70 M L J 1 (F B).

because there will then be no question of "retrospective operation" at all. If, on the other hand, Act 20 of 1929 must be held to have changed the law prevailing prior thereto, it is difficult to agree that the learned Judges were giving full effect to the concluding words of S. 63 of Act 20 of 1929, because in that case the suit was undoubtedly pending when the Act of 1929 came into force and that Section not merely provides that the Act shall not affect "anything already done" in any pending proceeding but goes on to say that such proceeding may be continued "as if this Act had not been passed.

I have independently arrived at the same conclusion and with respect I agree with these observations. In A I R 1938 Mad 779[21] Venkatasubba Rao J., who delivered the judgment of the Bench, examined the question as to the applicability of S. 92, T. P. Act, in a suit which was instituted on 11th November 1931 to enforce a mortgage of 1922 where the mortgagor had on 24th May 1925 sold a portion of the property to the defendant and the purchaser was directed to retain the sale price with himself and apply it to paying off in part the amount due on the earlier mortgage of 1918. While considering the argument based upon S. 63 of the Amending Act, 20 of 1929, he pointed out that the general rule is that

> the portions of a statute which are silent in that regard, are to be taken prima facie as clearly indicating prospective intention, and prospective intention only, acting from the time the Act comes into operation : (Per Lord Hatherley in (1878) 3 A C 582[20] at p. 598 citing Lord Granworth

and drew attention to the observations of Lord Cairns that

> any Court will be slow to construe an enactment as retrospective, and thereby as disturbing existing rights, unless Parliament has said that the enactment is to be construed retrospectively.

He then deals with the argument which was advanced before us on behalf of the respondents based upon the words of cl. (d) in S. 63 and observed :

> There was a similar provision in the statute then under discussion, in the case before the House of Lords already adverted to, and referring to it Lord Hatherley observes that it should be deemed to have been put in, in the language of conveyancing, *ex majore cautela*. Lord Blackburn groups the Sections of the statute, which was being considered, under three headings : (a) Some expressed in terms that left no doubt that they were intended to be retrospective ; (b) Some as to which it was equally clear, that they were not intended to be retrospective ; (c) Others expressed in ambiguous terms. Referring to group (c), his Lordship says that the general rule of every civilized nation is, in the absence of express words to the contrary, that any new law that is made, affects future transactions, not past ones ; the opposite rule applies in regard to procedure and possibly in matters of evidence,

and then referred to observations of Lord Watson in (1898) A C 469[42] :

> It may be true that the enactments are declaratory in form ; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law.

After referring to the observations of Earle C. J., in (1861) 10 C B (N S) M C 179[6] that it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment, he came to the conclusion that he must reject the contention that S. 92 is retrospective. In my opinion, this is the correct view, if I may say so with respect. In A I R 1938 Bom 115[44] Wadia J. in delivering the judgment of the Bench took the view that upon the language of S. 63 of the amending Act it would appear that S. 92 has retrospective effect and agreed with the opinion expressed in 54 All 897[39] in the same terms, namely that even if that view was not correct the principle underlying S. 92 should be accepted as a guide in deciding what the equitable doctrine with regard to subrogation prior to the introduction of S. 92 was. This case therefore is not a clear authority in favour of the opposite view. In the same volume, A I R 1938 Bom 508,[45] another Bench of the Bombay High Court had to deal with the identical question. In that case the transactions in question were all prior to the coming in force of the amending Act 20 of 1929 and in considering the argument advanced that in view of the language of S. 63 of the amending Act the new S. 92 should be regarded as retrospective, Broomfield J. observed :

> Although we consider that there is considerable difficulty in construing S. 63, we are on the whole in agreement with the view taken by the Allahabad High Court in 54 All 897[37] and AIR 1937 All 588,[4] both Full Bench decisions, and the Calcutta High Court in 42 C W N 38,[46] that S. 92 is to be regarded as retrospective, as against the view taken by the High Courts of Madras, Patna and Rangoon : 56 Mad 169,[41] 59 Mad 359,[43] 13 Pat 111[1] and 10 Rang 465 ;[47]

but went on to observe that the learned

44. Isap Bapuji v. Umarji Abraham, (1938) 25 AIR Bom 115=174 I C 188=39 Bom L R 1309.
45. Subraya Kuppa Joshi v. Timmanna Subraya Bhatta, (1938) 25 A I R Bom 508 = 178 I C 974=40 Bom L R 1001.
46. Mahammad Hushen v. Jamini Nath, (1938) 25 A I R Cal 97=176 I C 41=I L R (1938) 1 Cal 607=42 C W N 38.
47. Ko Po Kun v. C. A. M. A. L. Firm, (1932) 19 A I R Rang 197=140 I C 156=10 Rang 465.

Judges did not propose to discuss the point in detail because in their opinion S. 92, even if it was retrospective, did not help the appellants in the case before them. In 42 C W N 38[46] which was referred to in the Bombay case just cited, the question for decision was whether S. 53-A, T. P. Act, would apply to a suit commenced after 1st April 1930, even though the transaction itself was earlier in point of time. Nasim Ali J. took the view that the necessary implication of the words employed in S. 63 was that the provisions of S. 53-A would apply to transactions completed before 1st April 1930 even though the action was brought after that date. Mukherjea J. reluctantly agreed with this conclusion because he observes that

> the Legislature no doubt speaks in a voice which is not very clear but is somewhat dubious like that of the ancient oracles, but no other inference seems possible from the language used.

The cases decided by this High Court are not of much assistance. In 13 Pat 111[1] Wort J. merely observed :

> In this case however we are not bound by S. 92 as this Section came into force in April 1930. All such rights as the defendant had were already vested before that date. The matter therefore depended upon the law as it stood before S. 92 was enacted.

It may be observed that the suit had been instituted on 5th April 1928. In A I R 1936 Pat 60[3] Luby J. was inclined to take the view that the language of S. 63 of the Amending Act 20 of 1929 seemed to suggest that S. 92 could be applied retrospectively but felt it really unnecessary to decide this point. In 17 Pat 666[48] the right of subrogation was claimed by the transferee from the mortgagor of the year 1930 and it was accepted by both the parties before the Bench that the transaction was governed by S. 92, T. P. Act, as amended in 1929. A review of all these authorities indicates the difficulty which arises in construing S. 63 of the amending Act. The truth of the matter is, as observed by Bowen, L. J. in (1836) 31 Ch D 402[49] :

> We are dealing, it is true, with an Act which is in some sense and to some extent retrospective, and with a Section that is to some degree retrospective. The Section applies to and affects marriages contracted before the commencement of the Act .... Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non præteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act, which is to a certain extent retrospective, and in construing a Section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the Section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a Section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

I am therefore constrained to hold that the Section does not apply to transactions which were concluded before 1st April 1930 irrespective of the fact whether they were or were not the subject of any pending action on 1st April 1930. For these reasons I would answer the second question in the negative. For the reasons given by Fazl Ali J. I agree to the answer proposed to the first question.

D.S./R.K. *Answer accordingly.*

48. Bansidhar Dhandhania v. Kalroo Mandar, (1938) 25 A I R Pat 532=176 I C 655=17 Pat 666=19 P L T 500.
49. Reid v. Reid, (1836) 31 Ch D 402=55 L J Ch 294=54 L T 100=34 W R 332.

A. I. R. 1940 Patna 406

AGARWALA AND ROWLAND JJ.

Central Co-operative Bank Ltd., Barh — Appellant.

v.

Dasrath Pandey — Respondent.

Appeal No. 1030 of 1938, Decided on 30th January 1940, from appellate decree of Sub-Judge, Patna, D/- 29th August 1938.

(a) Jurisdiction — Existence and exercise of —Distinction.

A Court is necessarily always clothed with jurisdiction to decide whether the matter before it is within its competence or not. But the existence of jurisdiction must be distinguished in all cases from the exercise of it. When the Court has jurisdiction to deal with the matter before it the decision of all other questions in the cause is only an exercise of that jurisdiction : *11 Bom 488, Rel. on.* [P 408 C 1]

(b) Jurisdiction — Cannot be conferred by consent or waiver.

Jurisdiction cannot be conferred by consent or waiver : *25 Bom 337 and 9 All 191 (PC), Ref.* [P 408 C 1]

(c) Jurisdiction —Question not raised in trial Court cannot be raised after conclusion of proceedings provided question of jurisdiction depends on decision of fact or point of law.

Ordinarily, if a party does not raise the question of jurisdiction during the trial he should not be allowed to do so after the proceedings have been carried to conclusion, provided the question

of jurisdiction depends upon the decision of some fact or point of law : *AIR 1933 Pat 104, Rel. on.* [P 408 C 1, 2]

(d) Execution — Order in —How far binding — In execution of award obtained by Bank against Co-operative Society individual property of members thereof sold — Objection to jurisdiction of Court to sell not raised in execution proceedings — Though sale was illegal judgment-debtor held could not treat it as nullity.

An application for execution of the award obtained by the Central Co-operative Bank was made to the Court which had jurisdiction to entertain the same. The manner in which the holder of the award sought the assistance of the Court was by sale of a property that did not belong to the judgment-debtor Co-operative Society but by the sale of property belonging to the individual members of that society. The power of the Court to render the decree-holder the assistance which he sought depended upon the question whether the property of the individual members of the society was liable to be sold in execution of a decree against the society. That question of law was wrongly decided in favour of the decree-holder :

Held that although the view of law taken by the executing Court was not correct, the wrong decision not having been challenged by the judgment-debtors in the execution proceedings, they could not subsequently treat the result of the execution proceedings as a nullity : *AIR 1931 Pat 321, Ref.* [P 408 C 2]

(e) Compromise — Party giving up for consideration right which it subsequently transpires he had — That right cannot prevail against agreement of parties.

The members of the co-operative society so far as their liability was concerned under the impression that their individulal property could be sold in execution of a decree against the society entered into compromise with the decree-holder bank whereby the bank gave up its rights to have the question of liability of the members decided by the Civil Court and also gave up a portion of its claim. By a subsequent decision of the High Court it was established that the individual property of the members of the society was not liable in execution of a decree against the society :

Held that the members could not assert their right which they had given up and which was subsequently found that they had in contravention of the terms of the compromise : *1 White & Tudor's L C 234; 24 E R 586; (1886) 32 Ch D 266 and 2 I A 219 (P C), Rel. on.* [P 409 C 2]

Lal Narain Sinha and G. P. Singh — *for Appellant.*

Ch. Mathura Prasad — *for Respondent.*

Agarwala J. — This appeal by the defendant is from a decision of the Subordinate Judge of Patna confirming a decision of the Munsif of Barh. The appeal arises out of a suit for a declaration that an auction sale at which the defendant purchased the property of the plaintiff was a nullity and for confirmation of the plaintiff's possession over the property that was the subject-matter of the sale or in the alternative for recovery of possession of that property if it should be found that defendant was in possession.

The facts giving rise to the litigation were that the defendant Bank (the Barh Central Co-operative Bank, Ltd.) obtained an award on 17th August 1928 against the Maranchi Partabpur Co-operative Society. Under the Co-operative Societies Act this award had the force of a decree. The decree-holder, that is to say the Bank, applied for execution of the award in the Court of the Subordinate Judge of Patna. The particular manner in which the decree-holder sought to execute the award was by attachment and sale of the property of individual members of the Maranchi Partabpur Co-operative Society. Dasrath Pandey, the plaintiff (a member of the Society), objected to the execution, on amongst other grounds, that the Court had no jurisdiction to sell the property of individual members of the Society in execution of a decree against the Society, and also disputed the amount claimed, alleging that a sum of Rs. 474.8.0 had been claimed in excess of what was due. After this objection had been raised, a petition was filed in the executing Court signed by Dasrath Pandey, one of the persons against whom it was proposed to proceed in the execution, and the manager of the Barh Central Co-operative Bank Ltd., which was the decree-holder. This petition stated that the judgment-debtor had withdrawn all objections to the execution and that the Bank had agreed to remit Rupees 474.8.0 and to allow the judgment-debtor a month's time for payment of the balance. The petition then went on :

> There is no need of issuing a fresh sale proclamation and your petitioner, the judgment-debtor, will not object on the ground of any irregularity.

There was no payment by the judgment-debtor either in December or at any other time, with the result that the property was put up to sale and purchased by the decree-holder. This sale was confirmed in January 1930. On 26th June 1931, this Court, in another case, namely in 11 Pat 174,[1] decided that the property of individual members of a co-operative society was not liable to be sold in execution of a decree against the society. In 1937 the present suit was instituted by Dasrath Pandey for the reliefs

1. Harihar Prasad v. Bansi Missir, (1931) 18 A I R Pat 321=134 I C 421= 11 Pat 174=12 P L T 619 (F B).

stated above. The Courts below have agreed in decreeing the plaintiff's suit, holding that the Subordinate Judge of Patna had no jurisdiction to sell the property of the plaintiff in execution of the decree against the Maranchi Partabpur Co-operative Society. The first question that arises in this appeal is whether the execution sale is a nullity by reason of the absence of jurisdiction in the Subordinate Judge of Patna to sell the plaintiff's property. The decision of the Court below, in my opinion, proceeds on a confusion between the existence of jurisdiction and the exercise of jurisdiction. "Jurisdiction" as was pointed out by West J. in 11 Bom 488[2] at p. 490.

> consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon it. An inquiry into whether the jurisdiction exists is not an exercise of jurisdiction over the case itself, but an investigation of another question altogether, that of whether the conditions of cognizance are satisfied.

A Court is necessarily always clothed with jurisdiction to decide whether the matter before it is within its competence or not. But the existence of jurisdiction must be distinguished in all cases from the exercise of it. When the Court has jurisdiction to deal with the matter before it the decision of all other questions in the cause is only an exercise of that jurisdiction, and as Lord Hobhouse observed in 25 Bom 337[3] at page 347:

> A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed.

It is clear that jurisdiction cannot be conferred by consent or waiver :

> When a Judge has no inherent jurisdiction over the subject-matter of the suit the parties cannot by their mutual consent, convert it into a proper judicial process; but when in a cause which the Judge is competent to try, the parties, without objection join issue and go to trial upon the merits, the defendants cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit: *see* 9 All 191[4] at p. 203, per Lord Watson.

Ordinarily, if a party does not raise the question of jurisdiction during the trial he should not be allowed to do so after the proceedings have been carried to conclusion provided the question of jurisdiction depends upon the decision of some fact or point of law: *see* 12 Pat 117[5] at page 127.

These being the general principles relating to the question of jurisdiction it is now necessary to apply these principles to the facts of the present case. The facts are that the Subordinate Judge of Patna had jurisdiction to entertain the application for execution of the award obtained by the Barh Central Co-operative Bank Ltd. The manner in which the holder of the award sought the assistance of the Court was by sale of a property that did not belong to the judgment-debtor society but by the sale of property belonging to the individual members of that society. The power of the Court to render the decree-holder the assistance which he sought depended upon the question whether the property of the individual members of the society was liable to be sold in execution of a decree against the society. That question of law was decided in favour of the decree-holder. It was subsequently held in 11 Pat 174,[1] already referred to, that the view of law taken by the executing Court was not correct. That wrong decision of the executing Court was not however challenged by Dasrath Pandey in the execution proceedings. In my view he cannot now treat the result of the execution proceedings as a nullity.

The next question is with respect to the compromise petition filed in the execution proceeding. It was contended by the learned advocate for the plaintiff-respondent that the written statement of the defendant in the present suit did not refer to this petition. That appears to be so but the petition itself was proved in the suit on behalf of the defendant and both the Courts have dealt with its legal effect. The question therefore was agitated by the parties and decided in their presence. The effect of such a compromise, that is to say, of a compromise by which a party gives up for consideration a right which it subsequently transpires that he had, has been the subject-matter of many decisions in the Courts. The leading case on the subject is 1 White & Tudor's L C 234.[6] It was there held that :

2. Amritrav Krishna v. Balkrishna Ganesh, (1887) 11 Bom 488.
3. Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=2 Bom L R 927=7 Sar 739 (P C).
4. Ledgard v. Bull, (1887) 9 All 191= 13 I A 134 =4 Sar 741 (P C).
5. Girwar Narayan v. Kamla Prasad, (1933) 20 A I R Pat 104=142 I C 113=12 Pat 117=13 P L T 737.
6. Stapilton v. Stapilton, 1 White & Tudor's L C 234.

> An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

This case followed the earlier decision in 1 P Wms 723=24 E R 586[7] where it was held

> that where two parties are contending in this Court, and one releases his pretentions to the other there can be no colour to set this release aside, because the man that made it had a right ; for by the same reason there can be no such thing as compromising a suit, nor room for any accomodation ; every release supposes the party making it to have a right; but this can be no reason for its being set aside, for then every release might be avoided.

The law was expressed as clearly as it is possible to state by Bowen L. J. in (1886) 32 Ch D 266[8] at p. 291 :

> It seems to me that if an intending litigant bona fide forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise, you would have to try the whole cause to know if the man had a right to compromise it and with regard to questions of law it is obvious you could never safely compromise a question of law at all.

So far as the liability of individual members of a co-operative society to have their property sold in execution of decrees against the society is concerned it was, until the decision of the Full Bench already referred to, generally thought that the property of individual members was liable and it is in that state of things that the parties to the execution proceedings had to decide for themselves whether they would risk a decision of the Courts on the question of law that was raised or would forgo the benefit of that decision and decide the matter themselves in a manner which suited their interest best. It will be remembered also that the decree-holder not only gave up his right to a judicial decision of the question of law involved but, in addition, remitted to the judgment-debtor a sum of Rs. 474-8-0 and gave him time for payment of the balance. In 2 I A 219[9] the facts were that the appellant had obtained a decree for land with mesne profits up to the date of the suit. In execution proceedings he applied for subsequent mesne profits with interest thereon as well as for interest on the amount already decreed. As regards the subsequent mesne profits, the defendant (pending his appeal) had executed certain security bonds to the Court in which he had undertaken to account in respect thereof in the suit. It was held that the obligation made the accounting in respect thereof "a question relating to the execution of the decree" and that, in any case, the defendant was estopped from saying that the mesne profits were not payable under the decree. The reason given was that

> if the respondent (that is to say the defendant) had contracted an obligation to account in this suit for the subsequent mesne profits claimed, he cannot escape from it, because when he contracted it the course and practice of the Courts proceeded upon a construction of a statute which has since been pronounced to be erroneous.

In my opinion, the plaintiff's claim in the present suit fails with the result that this appeal by the defendant must be allowed and the decree of the Court below vacated. The defendant-appellant is entitled to his costs throughout.

Rowland J.—I agree.

G.N./R.K. *Appeal allowed.*

7. Cann v. Cann, 1 P Wms 723=24 E R 586.
8. Miles v. New Zealand Alford Estate Co., (1886) 32 Ch D 266=55 L J Ch 801=54 L T 582=34 W R 669.
9. Sadasiva Pillai v. Ramalinga Pillai, (1875) 2 I A 219=24 W R 193 = 15 Beng L R 383=3 Sar 519 (P C).

A. I. R. 1940 Patna 409

VARMA J.

Sahebjan and others — Petitioners

v.

Emperor.

Criminal Revn. No. 659 of 1939, Decided on 4th January 1940, against order of Sessions Judge, Patna, D. 16th October 1939.

Criminal P. C. (1898), S. 522—Order under S. 522 can be passed in revision or appeal—Application under S. 522 made two days after conviction — Order passed more than two months after date of conviction—Delay not due to fault of applicant—Order is not bad.

In a proper case, the Court of appeal or the Court of revision can pass an order under S. 522, if such Court is satisfied that an order of the nature is necessary in the interest of justice. [P 410 C 2]

Where an application under S. 522 is made by the complainant two days after the conviction of the accused and an order on that application is passed by the Court more than two months after the date of the conviction, the delay in passing the order not being due to any fault on the part of the complainant, the order is not bad : *A I R 1925 Pat 689, Rel. on; A I R 1932 Cal 750, Disting.* [P 410 C 2]

Rajeshwari Prasad — *for Petitioners.*

Qazi Nazrul Hasan — *for the Crown.*

Order.—This is an application against an order passed by a Magistrate under S. 522, Criminal P. C., restoring possession to the opposite party, after the conviction of the petitioners under S. 448, Penal Code. The original convictions were under Ss. 143 and 448, Penal Code, against five persons two of whom were acquitted, with the result that the charge under S. 143 failed in the absence of proof that five or more than five persons were engaged in the crime, but the conviction under S. 448 was upheld by the Appellate Court, from whose judgment it is clear that the present petitioners managed to turn out the complainant after beating her. Now, the trial Court judgment was delivered on 20th July 1939, and on a petition by the complainant the present petitioners were asked on 22nd July 1939, to show cause why the house should not be restored to the complainant's possession, but by the time cause was shown, the Magistrate who had convicted the petitioners had ceased to be a Magistrate and therefore they showed cause before the Sub-divisional Magistrate of Dinapore on 3rd August 1939. In the meantime the petitioners had gone up in appeal and the judgment of the Appellate Court is dated 22nd August 1939, by which the conviction of the present petitioners was upheld under S. 448. Cause was more fully shown on 28th August 1939, before the Sub-divisional Magistrate, and the order complained against presently was passed on 31st August 1939.

Mr. Rajeshwari Prasad, appearing on behalf of the petitioners urges that the order passed on 31st August 1939, was made more than two months after 20th July 1939, on which date the petitioners were convicted by the trial Court, and therefore it is not in order, and for this purpose he refers to the decision in 59 Cal 1153,[1] where an order of this nature was set aside. In the present case the petition was filed before the Honorary Magistrate only two days after the conviction, and it must be noted that the delay in passing the order was not due to any fault on the part of the complainant. In a proper case, the Court of appeal or the Court of revision can pass an order under S. 522, Criminal P. C., if such Court is satisfied that an order of the nature is necessary in the interest of justice. I have gone through the judgments of the Courts below and I have no hesitation in my mind that this was a fit case in which the power under S. 522, Criminal P. C., should have been exercised. Even if there be any defect in the order of the Magistrate who had passed it, I would make that order following the procedure in 4 Pat 438,[2] where an order under S. 522, Criminal P. C., was passed by this Court. The rule is discharged.

G.N./R.K. *Rule discharged.*

1. Aswini Kumar Das v. Sasanka Mohan Bose, (1932) 19 A I R Cal 750=1932 Cr C 745=140 I C 66 = 33 Cr L J 868 = 59 Cal 1153 = 36 C W N 624.

2. Rameshwar Singh v. Emperor, (1925) 12 A I R Pat 689=91 I C 809=4 Pat 438 = 27 Cr L J 137=7 P L T 285.

A. I. R. 1940 Patna 410

FAZL ALI AND MEREDITH JJ.

Karu Kandu — Petitioner

v.

Emperor.

Criminal Revn. No. 595 of 1939, Decided on 18th January 1940, from order of Sess. Judge, Monghyr, D/- 20th September 1939.

(a) Criminal P. C. (1898), S. 109 — Accused being questioned by police officer stating that he was going to marriage party with other companions—S. 109 does not apply in absence of proof that statement is untrue.

Where the accused while walking along a bandh, used as a thoroughfare, at about midnight on being questioned by a police officer (dafadar) replied that he was going to a marriage party and that he had other companions with him and later on three other persons came out of a reservoir :

Held that the provisions of S. 109 could not apply to the case in absence of evidence to show that the statement was untrue. [P 411 C 1]

(b) Evidence Act (1872), S. 26 — Confession by accused that he had agreed to commit theft with another made after arrest is inadmissible.

A confession by an accused that he had agreed to commit theft with other persons made to the dafadar after his arrest is inadmissible in evidence under S. 26. [P 411 C 1, 2]

R. S. Chatterji — *for Petitioner.*

C. P. Sinha for Assist. Govt. Advocate — *for the Crown.*

Fazl Ali J. — In my opinion this application should be allowed. The case for the prosecution is that one Ramnarayan Singh, who is the dafadar of village Mahna, was on the night of 12th June 1939 on patrol duty along with several chaukidars and that about midnight he found the petitioner Karu Kandu walking on a bandh known as the Gupta bandh which is apparently used as a thoroughfare. The petitioner being questioned by the dafadar replied that he was going to a marriage party and he also stated that he had other companions with him. Later on three other persons came out of a reservoir. All these four persons were taken to the police station where the dafadar made a report. The dafadar stated to the Sub-Inspector how he had met the petitioner and his companions and added that the petitioner had subsequently stated to him that he had been asked by one Rambaran Singh to commit theft and it was for this reason that he and the other three persons had come to the place where they were discovered by the dafadar. The Sub-Inspector after investigation reported for action against the petitioner and the other three persons under S. 109, Criminal P. C. Now on the facts stated above it seems to me to be quite clear that cl. (a) of S. 109 has no application to this case. As to cl. (b) we cannot overlook the fact that the petitioner has examined several witnesses in support of the version he gave before the Magistrate. The statement of the dafadar that the petitioner had stated before him that he had been invited by Rambaran Singh to commit theft appears to me to be inadmissible under S. 26, Evidence Act, but even if it is held to be admissible, it is not a statement which should be readily accepted. That being so, there is no positive material on the record to show that the statements made by the witnesses examined on behalf of the petitioner, some of whom at least appear to be independent persons, are not true. Thus S. 109 also is not applicable to this case. I would therefore allow this application and set aside the order requiring the petitioner to furnish security for good behaviour.

Meredith J. — I agree. The ruling reported in 50 All 909[1] shows in what deep waters one may become involved if one tries to lay down general rules for the application of cls. (a) and (b) of S. 109, Criminal P. C. It is entirely unnecessary to venture into those waters in the present case, or to lay down any general principle, since it is apparent that the Courts below have really proceeded entirely upon the alleged confession that the petitioner had agreed to commit theft, a statement which, if not inadmissible under S. 25, Evidence Act, was clearly inadmissible under S. 26, Evidence Act, since it is apparent that it was made, if made at all, after the arrest had been effected. When that alleged confession goes, there is no material at all on which a finding can be based that the petitioner had given an account of himself which was false or in any way unsatisfactory. That is enough to dispose of the case.

G.N./R.K. *Application allowed.*

1. Emperor v. Phuchai, (1929) 16 A I R All 33 =113 I C 417=30 Cr L J 145 = 50 All 909= 26 A L J 1257 (F B).

A. I. R. 1940 Patna 411

WORT AND MEREDITH JJ.

Dwarka Prasad — Petitioner —

Appellant.

v.

Dharamnath Sah and others —

Opposite Party — Respondents.

Appeal No. 344 of 1938, Decided on 12th December 1939, from original order of Addl. Dist. Judge, Chapra, D/- 6th September 1938.

Provincial Insolvency Act (1920), Ss. 54 and 6 (c) — Conditions to be proved under S. 54 stated — Creditor must prove that debtor was unable to pay debts at date of transfer—Actual pressure from creditor is not necessary.

The conditions necessary for S. 54 and hence for S. 6 (c) are first, that the payment or transfer is made by a person unable to pay his debts, as they become due, from his money. Secondly, that it in fact prefers one creditor over others and thirdly, that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made. Actual threat or pressure from the transferee creditor is not necessary. [P 412 C 2; P 413 C 2]

Where therefore at the time of transfer there is more than sufficient to pay the debts of the debtor he cannot be described as a person who is unable to pay his debts : *(1924) 2 Ch D 515 and (1899) A C 419, Foll.; (1786) 1 T R 155, Rel. on.* [P 412 C 2]

B. N. Rai and Kaushal Kishore Sinha — *for Appellant.*

Jaleshwar Prasad — *for Respondents.*

Wort J. — This is an appeal from the order of the Additional District Judge of

Chapra made on 6th September 1938, dismissing a creditor's petition to declare one Dharamnath Sah an insolvent. It appears that Dharamnath Sah was the debtor of Narayan Prasad, the father of the petitioner before us, who is now dead and who filed the petition in the Court below with the result I have stated. The petition in the Court below was opposed by one other creditor who has been described in these proceedings as the transferee. By a deed of sale, dated 7th September 1937, certain properties were transferred to the transferee for a consideration of Rs. 1500. On the same day, there was an assignment of a usufructuary mortgage for a consideration of Rs. 1880. It was contended by the petitioning creditor in the Court below that it was the transfer of the whole of the judgment-debtor's property and that it was a fraudulent preference within the meaning of S. 54, Provincial Insolvency Act. I should state that the petitioning creditor rested his petition on these transfers as being acts of insolvency under S. 6 (c) read with S. 54, Provincial Insolvency Act. It would appear from the case which has been argued before us and from the order sheet in the Court below that the case in its initial state was based upon the act of insolvency contemplated by cl. (b) of S. 6 but at a later stage the petitioner relied upon clause (c) of that Section. The learned Judge in the Court below has come to the conclusion, as a reason for dismissing the petition of the creditor, that even after the transfers on 7th September 1937, the debtor had more than sufficient property to pay his debts. It appears that only two known creditors of the debtor were the present appellant and the respondent and that the property remaining after the transfers to which I have referred was more than sufficient to pay the debts of the petitioner. It was on 8th April 1937, that the transferee, who is a respondent before us, obtained a decree for the sum of Rs. 847-5-0 and again on 2nd August of the same year he obtained a mortgage decree valued at Rs. 2520-10-6. The appellant on the other hand obtained a Small Cause Court decree on 13th August 1937, for the sum of Rs. 504-14-6. With regard to these debts or the petitioner's portion thereof, the learned Judge in the Court below was of the opinion that the property left over after the transfers was sufficient to pay off the same.

Mr. Rai, the learned advocate for the appellant at first argued that the debtor had transferred the whole of his properties. He also argued that, on a proper construction of S. 54, Insolvency Act, it was sufficient for him to show that by the transfer itself the debtor was reduced to the condition of being unable to pay his debts. In my judgment the contention of the appellant cannot possibly be supported on a plain reading of the Section. S. 54 of the Act provides:

> Every transfer of property, every payment made, every obligation incurred, etc., etc., by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

That it was necessary for the petitioner in this case to have established that the debtor was unable to pay his debts at the time when he executed the transfers, there could be no doubt. S. 44, Bankruptcy Act, in England is in almost the precise words of S. 54, Provincial Insolvency Act. They have been construed on many occasions, and it would perhaps be convenient to refer to the words of the Master of the Rolls (1924) 2 Ch D 515[1] at p. 533 for the purpose of a concise statement of what is necessary to be proved in circumstances such as the present:

> The conditions which S. 44 requires are plain. First that the payment is made by a person unable to pay his debts as they become due from his own money. Secondly, that it in fact prefers one creditor over others. Thirdly, that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made.

The answer to the appellant's case is first, (although the learned Judge does not deal precisely with the first point) that there was more than sufficient to pay the debts of the debtor, and therefore he could not be described as a person who was unable to pay his debts. Secondly, that there was no reason for the debtor to prefer the transferee to his other creditor (the appellant). And if that is a correct reasoning, it necessarily follows that it could not be said that the dominant motive of the debtor was to prefer the transferee to his other creditor.

Now, during the course of the argument Mr. Rai (as I understood his case) abandoned very largely the argument which he had addressed to us in his opening and it

1. In re Cohan, (1924) 2 Ch D 515 = 69 S J 35 = (1924) B & C R 143.

came to a question in the result whether the learned Judge in the Court below was right in coming to the conclusion that the debtor had sufficient money to pay all his creditors. I propose only to refer to certain facts very briefly. Mr. Rai contended that one of the difficulties under which his client (the appellant) was working in the Court below was the fact that the evidence upon which the learned Judge in the Court below relied for the purpose of determining the question to which I have just referred, was produced at a late stage and that he was unable therefore to meet the case of the respondents. The learned Judge came to the conclusion that the debtor had sufficient property on the footing of a decree of March 1937 in a partition suit, under which the judgment-debtor was entitled to Rupees 1467 odd in cash, hand-notes of the value of Rs. 969. Mr. Rai's argument was this that there was no evidence on the part of transferee to show that these debts owing to the debtor were still subsisting. With regard to this I would make one statement, and that is that even supposing that this partition decree was produced at a late stage of the proceedings and after the first argument in the case had been concluded (which I believe is not a fact as my learned brother pointed out during the course of the argument), it seems to me that the appellant took no steps to have an opportunity of meeting the case which the partition decree disclosed. In my judgment, it was clearly for him to show that the decree of March 1937, was not available to the judgment-debtor. It must be remembered that if the decree was subsisting, there is no reason why the present appellant should not have attached it and by that means paid off the debt owing to him by the debtor. I would dispose of this case by stating that in my judgment the appellant has not proved that the debtor was unable to pay his debts; he has not established any fact which would entitle us to come to the conclusion that the debtor intended to prefer the transferee, the mere fact of the transfers to the transferee being insufficient ; and he certainly has not established that the dominant motive of the debtor was to prefer the transferee amongst his creditors.

There is one matter to which I would like to refer and that is a question which was briefly referred to by Mr. Rai in his reply, namely the question of pressure. It was contended, as I understood the argument, that the mere fact that the transferee had a decree out against the debtor was not sufficient to make the transfer anything but a voluntary act. In this connexion I would refer to the decision of the House of Lords in the leading case in (1899) A C 419[2] at p. 425. The Lord Chancellor in delivering one of the judgments of their Lordships, referred to the judgment of Lord Mansfield in (1786) 1 T R 155,[3] and then made this observation :

> My Lords, it seems to me that after that decision which, as I say, has now lasted more than a hundred years, and has never, so far as I know been controverted or qualified, it is idle to suggest that you must have an actual threat or the actual pressure of a creditor.

In my judgment the necessary matters which the appellant was under an obligation to establish in this case have not been established, and in my view the decision of the learned Judge in the Court below was right and must be affirmed and the appeal must be dismissed with costs.

Meredith J. — I agree. In order to establish an act of insolvency under S. 6 (b), it was necessary to prove that the transfers were made to defeat or delay the creditors. In order to prove an act of insolvency under S. 6 (c), it was necessary to establish that the debtor had made transfers with a view to give some of the creditors preference over others (such being the dominant motive), and, secondly, that when he made these transfers, he was unable to pay his debts. The onus to prove these things was entirely on the appellant, and in my opinion, he did not succeed in establishing any one of the three. Indeed, with regard to the contention, that when he made the transfers, the debtor was unable to pay his debts, there was no evidence at all, nor was it even pleaded. I was at first impressed with the argument put forward for the appellant, that he was prejudiced by the fact that after the case had been argued, a partition decree was put in to show that the debtors still had property after the transfers, and that thereby the appellant was taken by surprise and was given no opportunity to rebut that evidence.

I find however that there was actually no laches on the part of the opposite party, and no case of prejudice at all. The appel-

2. Sharp v. Jackson, (1899) A C 419=68 L J Q B 866=80 L T 841=6 Manson 264 = 15 T L R 418.
3. Thomson v. Freeman, (1786) 1 T R 155=1 R R 169.

lant had ample notice of this partition decree. It was mentioned in the petition of rejoinder of the opposite party; a certified copy was put in at an early stage of the case, and the original was called for from the record-room and kept on the record. When the case was taken up for hearing, the pleader for the appellant opened it by saying that he was going to rely on S. 6 (b), Insolvency Act, and evidence was led on this supposition. Now under S. 6 (b), the question of the inability of the debtor to pay his debts is not directly relevant, though it would be relevant in considering the application of S. 6 (c) which depends on S. 54. In these circumstances, it appears that the pleader for the opposite party did not ask that the partition decree should be formally marked as an exhibit though it had been actually on the record for a long time. Next day when the case came to be argued after the conclusion of the evidence, the pleader for the applicant stated that he proposed to rely, not on S. 6 (b), but on S. 6 (c). The pleader for the opposite party then got up and said that in that case the question of the remaining property of the debtor was a material circumstance, and the partition decree which had been long on the record might therefore be marked. This was accordingly done. It does not appear that the appellant made any objection or made any application to adduce rebutting evidence. Further argument was of course allowed. I find, moreover, that the document was actually marked at that stage without any objection by the appellant, as the exhibit list shows. In these circumstances there is no substance whatever in the contention that the appellant was in any way prejudiced, and there is no case for a remand to give him the opportunity of adducing further evidence.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 414

DHAVLE J.

Amir Hassan and others
Petitioners

v.

Emperor.

Criminal Revn. No. 585 of 1939, Decided on 6th December 1939, against order of the Magistrate, 1st Class, Bihar D/- 28th July 1939.

(a) Penal Code (1860), Ss. 297 and 295 — Accused entering complainant's house and throwing away into drain pindi of deity worshipped by complainant and his family—Charge under S. 295 is erroneous—Still accused can be convicted under S. 297 by reason of Ss. 236 and 237, Criminal P. C.

The accused entered the house of the complainant, demolished the wall which he was constructing and took away the pindi of Naika Gossain worshipped by the complainant and his family from the niche and threw it into a drain. On a charge having been framed under S. 295, the accused was convicted thereunder :

Held that the framing of the charge and conviction under S. 295 was erroneous as the complainant and his family could not be said to constitute a class within the meaning of S. 295. Nevertheless the accused could be convicted under S. 297 by reason of Ss. 236 and 237, Criminal P. C. [P 415 C 2 ; P 416 C 1]

(b) Penal Code (1860), Ss. 34 and 297—One of accused demolishing complainant's wall and throwing away pindi of deity worshipped by complainant from niche into drain — In absence of common intention of throwing away pindi all accused cannot be convicted under S. 297.

Where one of the four accused alone demolished the complainant's wall and also took the pindi of the Naika Gossain worshipped by the complainant and his family from the niche and threw it into the drain, it is only if the throwing away of the pindi and thereby insulting the religion of the complainant can be shown to have been in furtherance of the common intention of all the accused that under S. 34 they can all be held liable for that act. [P 416 C 1]

(c) Penal Code (1860), Ss. 297 and 448 — Accused found guilty under S. 297 — It is doubtful whether he can be convicted under S. 448 as well *(Quære)*.

It is very doubtful whether those accused who are guilty of an offence under S. 297 can be convicted under S. 448 as well and awarded a separate sentence on a charge of trespass so framed. [P 416 C 2]

Jafar Imam and Azizullah — *for Petitioners.*

Awdhesh Nandan Sahay — *for the Crown.*

C. P. Sinha — *for Complainant.*

Dhavle J. — The four petitioners have been convicted of offences under Ss. 295 and 448, Penal Code and sentenced under the former section to four months' rigorous imprisonment and under the latter to a fine of Rs. 20 each. The first information in the case was lodged shortly after the occurrence by Ruplal Shah, who has been referred to below as the complainant. The northern part of Ruplal's house was what he calls a deorhi, a small room, 5ft. 5 in. by 3ft. 8 in., which had no wall on the north and was connected

with the rest of the house by an opening in the southern wall. The main entrance to the house was on the east, towards a road, while the north faced a lane. In a niche in the eastern wall of the deorhi Ruplal kept his deity known as the Naika Gossain. Ruplal was constructing a wall to close up the northern end of the deorhi, when on the morning of 25th January last the petitioners came there with a large number of other men. The petitioner Usman asked Ruplal why he was closing the northern end, and Ruplal said that he had a right to do so. The petitioners said that there was a saint's tomb in the room and that the Muhammadans were entitled to access to it. Ruplal denied this and said that he had his family deity in the deorhi. Upon this there was an altercation, and the petitioners Usman and Naim caught hold of Ruplal, and on the orders of the petitioner Amir Hassan, the petitioner Zafir demolished the wall and took the pindi of the Naika Gossain from the niche and threw it into a drain running by the side of the lane. This prosecution story has been accepted by the lower Courts, rejecting the defence story that there was a saint's tomb in the deorhi and that the Muhammadans of the place used to to hold their Urs there every year.

The Sub-Inspector, who happened to be a Mahomedan officer and investigated the case at once, found no marks of a tomb in deorhi and was shown a small, partly wet lump of earth lying in the drain which Ruplal claimed as his Naika Gossain, a deity referred to, as the learned advocate who appears for the Crown has pointed out, at p. 62 of the Gazetteer of this district. In the niche in the eastern wall he found marks of vermilion, milk, and oil which supported Ruplal's story of the worship of the deity and did not fit in with the defence story of a tomb, as a tomb ought to have a light on the north. Evidence was given by a local mukhtar, who was a Municipal Commissioner at one time, that when Ruplal's father applied for permission to build a latrine near about this spot, he made an enquiry at the instance of the Municipal authorities and reported that permission should be refused because there was a tomb there. As a matter of fact, the Municipality did some years afterwards give permission to Ruplal to build his latrine, after further inquiries; and the lower Courts have found that there could have been no tomb in the deorhi. Learned counsel for the petitioners has contended that the conviction of the petitioners under S. 295 is unwarranted because the Section speaks of insulting the religion of any class of persons, while the charge as framed against the petitioners said that they had destroyed

> a pindi of Naika Gossain alias Babaji held sacred by Ruplal Shah and his family members with the intention and knowledge of thereby insulting the religion of Ruplal Shah and his family members.

If the learned Magistrate had S. 295 before him when he framed this charge, he must have been under the impression that Ruplal Shah and his family members constituted a class of persons within the meaning of S. 295. The learned Sessions Judge was inclined to take the same view, though he observed that

> the deity was undoubtedly worshipped by the complainant and the members of his family, but it was also an object held in veneration by the entire Hindu community.

The learned Sessions Judge may have been right, but it does not appear that this latter was the case that the complainant set out to prove. On the contrary, he spoke in his examination-in-chief of his religion being insulted. His mother carried it no further, and it is remarkable that none of the other prosecution witnesses, who are strangers to the family, spoke of their religious feelings being insulted. The Crown had not put in an appearance in this case in the beginning, but at my instance, the learned advocate who appeared for the complainant communicated with the law officers of the Crown. The learned advocate who then appeared for the Crown was quite properly not prepared to maintain that Ruplal and his family formed a class of persons within the meaning of S. 295. But he argued that on the facts alleged against the accused and found by the trial Court to have been proved, the case was well within S. 297, I. P. C., the relevant parts of which for present purposes are:

> Whoever with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits trespass in any place of worship . . . .

The trespass alleged against the petitioners formed the subject-matter of the charge under S. 448, and this charge also spoke of intent to "insult and annoy Ruplal and his family members by destroying the pindi of Naika Gossain and thus insulting their religion." The charge under S. 295 also, as I have already shown, spoke of "the intention and knowledge of . . . . insulting

the religion of Ruplal Shah and his family members." The learned advocate in this connexion referred to the provisions of Ss. 236 and 237, Criminal P. C., which authorize the Court, where it is doubtful which of several offences has been committed, to frame charges in the alternative, and even in the absence of alternative charges, to convict the accused of the offence which he is shown to have committed, although he was not charged with it, provided that this offence was one for which he might have been charged under S. 236, that is to say, provided the single act or series of acts charged is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute. It seems to me that in the circumstances of this case, the contention of the learned advocate for the Crown must be accepted and the petitioners dealt with for an offence, not under S. 295, but under S. 297, I. P. C., as all the ingredients of this latter offence were charged against them.

Mr. Jafar Imam has also contended that an offence under S. 297 has not been brought home to all the four petitioners, as it was the case of the prosecution that the petitioner Zafir alone demolished the wall as asked by the petitioner Amir Hassan and also took the pindi of the Naika Gossain from the niche and threw it into the drain. It is only if the throwing away of the pindi could have been shown to have been in furtherance of the common intention of all the petitioners that under S. 34, I. P. C., they could all have been held liable for that act. But the lower Courts do not seem to have considered this aspect of the matter at all, to say nothing of the careless way in which the charges were framed. The circumstances do not very clearly point to a common intention of doing anything beyond stopping the erection of the wall by the complainant on the ground that there was a saint's tomb in the deorhi ; neither the findings of the lower Courts nor the evidence in the case points to an intention, shared by all the four petitioners, of insulting the religion of Ruplal. The learned advocate who appears for the Crown has drawn attention to the evidence of two prosecution witnesses, Chamari Shah and Sohrai Shah, that Zafir acted on Amir Hassan saying that the wall should be demolished and the pindi thrown away. It is true that Ruplal does not attribute to Amir Hassan any direction or remark about the pindi, but this is not unintelligible in view of Ruplal's excitement. The cross-examination of Chamari and Sohrai does not furnish any adequate reason for disbelieving the detail mentioned by them concerning Amir Hassan, and I take it that this evidence was not noticed in detail by the lower Courts, because they did not concern themselves with the individual acts of the several petitioners but wrongly proceeded on the implied assumption that if an offence under S. 295 was committed, it was committed by them all. The learned advocate for the Crown has, however, not been able to establish any connexion of the petitioners Usman and Naim with the offence which the lower Courts placed under S. 295 but must now be placed under S. 297.

As to the charge under S. 448, learned counsel for the petitioners has drawn attention to the object stated in the charge, which is largely a repetition of the object stated in the charge under S. 295. It seems to me very doubtful whether those petitioners who are guilty of an offence under S. 297, Zafir and Amir Hassan, can be convicted under S. 448 as well and awarded a separate sentence on a charge of trespass so framed. The deorhi was part of the house of Ruplal but was also, having regard to the niche of the Naika Gossain, a place of worship so as to come within S. 297. But the two petitioners Usman and Naim, to whom no charge under S. 297 has been brought home, were undoubtedly guilty of trespass under S. 448 with the object of interfering with the personal liberty of Ruplal Shah and catching hold of him, while the other two petitioners committed an offence under S. 297. The result is that the conviction of the petitioners Usman and Naim under S. 295 must be set aside, together with the sentence passed upon them for that offence. The conviction of the other petitioners, Amir Hassan and Zafir under S. 295 must be replaced by a conviction under S. 297, the sentence passed upon them on the charge, however, remaining unaltered. The conviction of these two petitioners under S. 448 must, however, be set aside, while that of Usman and Naim, with the sentence passed upon them under this Section, will remain unaltered.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 417

FAZL ALI AND MEREDITH JJ.

Judagi Gope and others—Appellants

v.

Emperor.

Criminal Appeal No. 237 of 1939, Decided on 10th January 1940, from decision of Addl. Sess. Judge, Patna, D/- 19th September 1939.

Penal Code (1860), Ss. 302, 147 and 148 — Jury trial — Deceased's death caused by effect of all injuries inflicted by several accused combined — Common object specified in charges under Ss. 147 and 148 was not to kill deceased but to assault him—Charge under S. 302 framed and explained to jury — No alternative charges framed under Ss. 304, 326 or 325, nor principles of S. 34 or S. 149, explained — All accused convicted under S. 302—Conviction is illegal—Whole procedure amounts to misdirection and non-direction.

The death of the deceased was due to the effect of all the injuries inflicted by several accused combined. The common object specified in the charges under Ss. 148 and 147 was not to kill the deceased but merely to assault him and yet all the accused were charged under S. 302. The provisions of Ss. 300 and 299, were explained to the jury which ultimately convicted all the accused under S. 302:

Held that the conviction was illegal and the whole procedure amounted to misdirection and non-direction to the jury inasmuch as no alternative charges for lesser offences under Ss. 304, 326 or 325, were framed nor was the jury explained the principles of S. 34 or S. 149, and particularly because the charge was put before the jury in such a way that they might have thought that they could only convict or acquit wholesale under S. 302.

[P 418 C 1, 2]

Jafar Imam, K. Sahai and Prem Lall — *for Appellants.*

Advocate-General, Awadhesh Nandan Sahay and Mehdi Imam — *for the Crown.*

Meredith J. — The five appellants have been convicted by the learned Additional Sessions Judge of Patna, in agreement with a 6 to 1 majority verdict of a jury, under Ss. 302, 148 and 147, I. P. C. Under S. 302 all five have been sentenced to undergo transportation for life and have further been sentenced to pay fines of Rs. 50 each, in default to undergo further six months rigorous imprisonment. Two of them have been convicted under S. 148, and the other three under S. 147, but there have been no separate sentences under these Sections. The case arose out of an occurrence which took place on 16th May 1939, at village Rupaspore, police station Hilsa. The prosecution case was that there was enmity between one Bilfa Dusadh and his brother Kirpali Dusadh on the one side of Ramsaran Das and his people on the other. According to the story of the prosecution, on Tuesday, 16th May, Bilfa Dusadh went to his khalihan in village Rupaspore and found his heap of straw (punj of newari) disturbed and partly removed. Seeing this he started abusing the unknown persons who had done that. Ramsaran Das was in his own khalihan nearby, and hearing the abuse he shouted that Bilfa was abusing him and that he should be beaten. Thereupon, Ramsaran's son Judagi came along and threw Bilfa down, and then Ramsaran, Judagi, Ramsaran's cousin Kamal, Kamal's sons Madan and Ramdeo, and also Gopi Das, brother of Ramsaran, all started assaulting Bilfa. Hearing the noise Bilfa's brother Kirpali was coming to save his brother when a mob of 15 or 20 persons, most of whom were said to be related to Ramsaran Das, surrounded Kirpali and severly assaulted him. After the assault on the two brothers, Ramsaran led the whole mob to Kirpali's house where Kirpali's wife Bulkania was injured, and the mob looted away various things belonging to Kirpali. It was also said that Bilfa's wife had attempted to protect Kirpali when he was assaulted and had received injuries. It was said that Bilfa Dusadh died within a few hours as a result of the injuries received in the assault.

The defence case which was not however put forward expressly by any of the accused in their statements, or in a written statement, and had to be gathered from the suggestions in cross-examination, was that the assault on the deceased Bilfa took place some time on the Monday night and nobody saw the assault or the assailants. When the assault was discovered in the morning, the wife of the deceased Bilfa and the wife of Kirpali started abusing some persons whom they suspected and these persons assaulted the two women and Kirpali on the morning of Tuesday, the 16th. The defence case further was that none of the accused took any part in either of the two occurrences and that they had been implicated falsely on account of enmity borne to them by Sanehi (P. W. 1), Mahadeo (P. W. 2) and others. Originally 23 persons were placed upon trial in respect of the entire series of incidents, but two of them were discharged by the committing Magistrate. The remaining 21 came before the learned Additional Sessions Judge who ordered the trial to be split up and that the five appellants together with Ramsaran Das, the alleged assailants of Bilfa, should be tried separately in the case now before us; the assailants of

Kirpali and the women being placed for separate trial. As I have already indicated, the trial was held with the aid of a jury, and Ramsaran, who had set up a defence of alibi, was acquitted by the jury by a 4 to 3 majority verdict. The Judge accepted that verdict. With regard to the appellants, accepting the 6 to 1 majority verdict he convicted the appellants in the manner I have already described, Madan and Gopi being convicted under S. 148 besides S. 302 and Judagi, Ramdeo and Kamal under S. 147 as well as S. 302. He further directed that out of the fines, if realized, Rs. 100 should be paid as compensation to Marachhia, the widow of the deceased Bilfa.

In appeal it is urged that there were serious misdirections and non-directions in the charge preventing the appellants from having a fair trial. I may say at once that I consider that this is so; that there is the possibility in this case that the appellants were prejudiced by misdirection and non-direction and that the verdict therefore cannot be upheld and the convictions must be set aside. I shall refer only to two of the misdirections or non-directions which have been alleged. The common object specified in the charges under Ss. 148 and 147 was not to kill Bilfa but merely to assault him, yet all the accused were charged with the substantive offence of murder under S. 302. The learned Judge took much trouble in explaining to the jury the provisions of Ss. 300 and 299, Penal Code, and in endeavouring to make them understand the exact difference between murder and culpable homicide not amounting to murder. On the whole I am not prepared to say that he did not perform this difficult task competently and correctly. He did not however frame any alternative charges under Ss. 304, 326 or 325, Penal Code, nor did he explain to the jury that it was open to them to convict for one of these lesser offences. In my view he should have told the jury clearly that even if they believed that the accused had jointly killed Bilfa, still it was open to them to convict, not under S. 302, but merely under S. 304, or even under S. 326 or S. 325, if they considered that the necessary intention or knowledge to constitute the offence of murder had not been established on the part of the accused.

Moreover, this was a case where it was not proved, or even alleged, that any individual accused had inflicted an injury which could have been fatal in itself. The case was that death was due to the effect of all the injuries, inflicted by all the accused, combined. Therefore if a conviction was to be made under S. 302 it could only be by the application of the principle laid down in S. 34, Penal Code, or under the provisions of S. 149 of the Code, yet not only was no mention of either of these Sections made in the charges, but the Judge said nothing at all about them, and made no attempt to explain their provisions to the jury. It is, in my opinion, absolutely necessary that a Judge in a case of this kind where S. 34 is really being applied, should explain to the jury that before that Section can be applied it must be shown that the offence was committed by the accused in furtherance of the common intention of all. It was never put to the jury that the intention of different accused persons might have been different. Some might have intended murder, while some might have intended no more than assault, and might not have realized that anything more than assault was intended by any of them. Those who had not the common intention of committing murder or the knowledge of its likelihood (and the S. 147 charge only involved the common intention to assault) could not be convicted of murder under S. 302, Penal Code, either substantively or by the application of S. 34 or S. 149. There is nothing at all in the charge from which the jury could have appreciated this vital fact.

It was essential that the nature of S. 34 at least should have been clearly explained, and it would in my opinion have been better to explain S. 149 also. It was necessary to explain this, and, as I have already indicated, it was also essential to explain to the jury the possibility of convicting under the lesser Sections. I would go so far as to say that in my view it is better in case like this actually to frame the alternative charges under the lesser Sections and also to incorporate S. 34 or S. 149 therein. No doubt, it may not be legally necessary to do this, but if it is done the risk of the explanation being overlooked, and of the jury not understanding the position, is avoided. If the Sections are included in the charges the jury are much more likely correctly to appreciate the legal position. As matters stand, it seems to me possible that this jury considered it their duty either to convict under S. 302 or to acquit. They might perhaps even have considered that they must either convict all the accused under S. 302 or acquit all of them; that is to say, the charge was put in such a way that they might have thought

that they could only convict or acquit wholesale under S. 302.

The course which I have recommended was all the more necessary in the present case in view of certain curious features in the medical evidence. The doctor has described ten external injuries. Of these all but two were on the arms or legs, and the two exceptions were both apparently minor injuries. One was an abrasion $1\frac{3}{4}'' \times \frac{3}{4}''$ on the left side of the forehead. There was no fracture of the skull, and this injury in itself could not have been fatal. The other was an echchymosis $3\frac{1}{2}'' \times \frac{1}{2}''$ on the right side of the back which was probably a lathi weal. This also could not have been a fatal injury. The curious feature of the evidence is that the doctor also says that four of the ribs on the left side and six ribs on the right side, that is to say, no less than ten ribs in all, were fractured. As far as can be told from the evidence as it stands, there were no external injuries to account for the fracture of these ribs, unless the single lathi weal on the back could account for them, and that seems hardly possible. The doctor has stated that the ribs might have been fractured by being forcibly thrown on the ground or by blows of fists. That explanation, if I may say so as a layman, seems distinctly inadequate, especially in view of the fact that as there was mud and sand all over the chest, the ground must have been comparatively soft. The opinion of the doctor was that the death of the deceased was due to shock and haemorrhage as a result of the injuries mentioned by him, and from what the Sub-Inspector found at the spot it also appears that there must have been extensive haemorrhage, but we are not told exactly what was the cause of this extensive haemorrhage and whether the fracture of the ribs had anything to do with it. The doctor was never asked whether the injuries described by him were sufficient in the ordinary course of nature to cause death. It was certainly desirable that the doctor should have been questioned at length with a view to determining what must have been the exact intention or knowledge of Bilfa's assailants, and the fact that the evidence was incomplete in this respect made it all the more necessary that the jury should understand the principles of collective responsibility for such crimes, and the possibility of convicting upon minor Sections.

The other defect in the charge to which I shall refer concerns the cases of individual accused. It is necessary in cases like this that the evidence against such individual accused to show his complicity should be placed separately before the jury, but the learned Judge has nowhere done this. That it was essential to do so is borne out by the fact that two of the appellants at least were old men. The appellant Gopi is said to have been aged 55 or 56. Moreover, one witness, P. W. 7, says that he was in his house unarmed when the cry of assault was raised. He added that thereupon Gopi came out armed with a garansa, but it appears that the witness has not said this before the police. No witness, it seems, definitely ascribed any particular part in the assault or any particular blow to this appellant Gopi. The appellant Kamala was even older. His age is put between 60 and 65. The evidence is that when the occurrence started he was digging with his sons. In the Court of the committing Magistrate it was said that he took part in the assault armed with a lathi. In the Sessions Court, however, while one witness (P. W. 7) said he had a lathi, another witness (P. W. 3) merely said that he had a basket. I do not intend to refer to the cases of the other appellants: it is sufficiently clear from what I have said that there were features in the evidence as regards individual accused which it was necessary to place before the jury if they were to take a just view of the case against each. This, however, was never done.

For the reasons I have stated the conviction must, in my opinion, be set aside. The question is, in these circumstances, what should now be done. Should we proceed to consider the evidence and come to our own finding upon the facts, or should we order a retrial? The Appellate Court may or may not have the power under S. 423, Criminal P. C., to go into the facts in a case like this. I do not propose to express any opinion upon this point. There are rulings in which both views have been taken. Even if we have the power to come to our own decision upon the facts, and to decide the case ourselves as if we were a jury, it does not follow that it is expedient or advisable to do so. The present is a case where, in my opinion, the only proper course is to order a retrial. We have ascertained that this is the course which the appellants themselves would prefer. That means that they wish to stand upon their right of jury trial. That, in my opinion, settles the matter, and it would not be proper for us to deprive

them of that right merely because of a mistake on the part of the presiding Judge. I would allow the appeal, set aside the verdict of the jury and the convictions and sentences based thereon and direct that the case be retried so far as the appellants are concerned. We are informed that the appellants were on bail during their trial. Pending the result of the fresh trial they may be allowed to remain upon the same bail.

Fazl Ali J. — I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 420

ROWLAND AND CHATTERJI JJ.

Prabhu Ram and others — Appellants.

v.

Kameshwar Prasad Singh Bahadur — Respondent.

Appeals Nos. 247 and 248 of 1939, dated 15th February 1940, from appellate order of Sub-Judge, Monghyr, D/- 31st May 1939.

Transfer of Property Act (1882), Secs. 60 and 82 — *A*, eight annas co-sharer in tenure, mortgaging his share to landlord — Landlord obtaining mortgage decree against share of his mortgagor and also obtaining rent decree against *A* and his co-sharer *B*—In execution of mortgage decree landlord putting up half share to sale and notifying that properties were being sold subject to charge of rent decree—Landlord purchasing eight annas share of his mortgagor and then applying for execution of rent decree —Rent decree held should be deemed to have been satisfied to extent of one-half.

A, an eight annas co-sharer in a tenure, mortgaged his interest to the landlord who obtained a mortgage decree against that half share. He also obtained rent decrees against *A* and his co-sharer *B* for the rent of the entire tenure and when he executed his mortgage decree, he put up the half share of *A* to sale and notified at the time of the sale that the properties were being sold subject to a charge for rent under the rent decrees. The decree-holder himself became the purchaser of that eight annas share. Thereafter he applied to execute the rent decrees against the half share of *B* for the full amount of the decrees:

Held that the result of the whole amount of the rent charge having been notified in the sale proclamation was not that the whole liability passed to the property auction-purchased so as to relieve the other property from liability. The rent decree should be deemed to have been satisfied to the extent of one-half. But if the whole charge was enforced against either of the properties the holder of that property would have the right of contribution to the extent of half against the holder of the other property. [P 422 C 1]

S. M. Mullick, Sarjoo Prasad and R. K. Sahay — *for Appellants.*

R. Misra — *for Respondent.*

Rowland J. — The appellants are eight annas co-sharers in a tenure of which the other eight annas co-sharers mortgaged their interest to the landlord of the tenure. The landlord obtained a mortgage decree against that half share. He also obtained rent decrees against the appellants and their co-sharers for the rent of the entire tenure and when he executed his mortgage decree, he put up the half share of his mortgagors to sale and notified at the time of the sale that the properties were being sold subject to a charge for rent under four decrees. The amount of the charge was stated to be Rs. 7780-15-1½. The decree-holder himself became the purchaser of that eight annas share. Thereafter he applied to execute the rent decrees against the half share of the appellants for the full amount of the decrees. An objection was taken that by the sale of the other half share in execution of the decree-holder's own mortgage decree, the entire rent charge had been satisfied and execution could not proceed. The Munsif dismissed the objection holding that the rent decree had not been satisfied or the charge extinguished. On appeal, the Subordinate Judge has held that the rent decree should be deemed to have been satisfied to the extent of one-half, because the decree-holder had purchased half of the tenure with notice of the encumbrance of the rent decrees from which decision which governed two execution cases, appeals have been presented by the judgment-debtors claiming that the decrees should be considered to be fully satisfied and cross-objections by the decree-holder claiming that he should be permitted to execute his decrees for the entire amount.

In the appeal reliance is placed on the Full Bench decision of this Court in 17 Pat 694.[1] It was there held that when in a sale proclamation it was notified that the arrears of rent for subsequent years were an incumbrance, the result would be that the auction-purchaser purchased the holding subject to the incumbrance. It was held further that a landlord auction-purchaser was in no better position than a stranger purchaser and therefore he was debarred from bringing a suit for rent for the years of which the rent was stated to be a charge on the holding. That decision follows a decision of the Calcutta High Court in 18

1. Nripendra Nath v. Kuldip Misra, (1938) 25 A I R Pat 545=178 I C 10=17 Pat 694=19 P L T 723 (F B).

C L J 29[2] where it was held that a landlord, who purchases the defaulting tenure in execution of his money decree subject to rent charge, cannot execute his decree for rent as the judgment-debt in his favour for rent is extinguished. The principle on which these decisions proceed was laid down in an earlier decision of the Calcutta High Court in 6 C W N 877,[3] the effect of which is that where a tenure or holding is purchased subject to the notification of its liability to arrears the purchaser will be liable for the arrears in question and to hold otherwise would be to make him a gainer at the expense of the defaulting tenant, because the bidding at the sale may be presumed to be affected by the notification.

All these however were cases in which the entire tenancy was sold up and the case before us was where the auction-purchase was of half the property only. To decide the rights of the parties in such a case, we shall have to go beyond the Tenancy Act and consider the principles applicable in the case of mortgages where the mortgagee has acquired a part of the mortgaged property. The principles applicable can be deduced from Ss. 60 and 82, T. P. Act. The rule in the last portion of S. 60 recognizes the right of a person interested in a share of the mortgaged property to redeem his own share on payment of a proportionate part of the amount remaining due on the mortgage when the mortgagee has acquired the share of another mortgagor; and in S. 82 it is laid down that where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are liable to contribute rateably to the debt. The effect of the purchase by a mortgagee of a part of the mortgaged property has been considered in a series of cases. In 22 Bom 304[4] the Bombay High Court said: When the plaintiff purchased the equity of redemption in the house, he purchased it subject to its due proportion of the mortgage debt. That proportion of the mortgage debt thus ceases to exist and the plaintiff's right as mortgagee to recover the money secured by his mortgage was reduced to that extent. What proportion of the mortgage debt was thus wiped out depends on the proportion of the value of the house to the value of the rest of the mortgaged properties.

In 20 All 23[5] the question arose whether the purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage had the effect of fully discharging the mortgage. There had been an opinion expressed in an earlier decision of the same Court that such a purchase would extinguish the whole mortgage debt; but the Full Bench held otherwise and said that this was not necessarily the result, but that a person interested in a share only of the property could redeem his own share on payment of a proportionate part of the amount remaining due on the mortgage. This they said was a clear recognition that the mortgage debt in part still subsists. This pronouncement was followed and amplified in 22 All 284[6] where the purchase by a mortgagee of a part of the mortgaged property was said to have the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. This decision was accepted in 26 Bom 88[7] where the contention that the entire mortgage had been extinguished was rejected and it was held that the house in the hands of defendant 1 was liable to a proportionate share of the mortgage debt. This was a case in which the mortgagee had purchased a part of the mortgaged property at auction sale after notifying its liability for the mortgage debt.

A similar view was taken by a Full Bench of the Madras High Court in 43 Mad 372[8] overruling a former decision of the same Court in which the view had been taken that the purchase by a mortgagee at auction of a part of the property, the entire amount of the mortgage debt having been notified as an incumbrance on the property, would have the effect of extinguishing the entire mortgage. Wallis C. J. said that the

2. Sailoja Prosad v. Gyani Das, (1913) 18 C L J 29=16 I C 355.
3. Haradhan Chattoraj v. Kartik Chandra, (1902) 6 C W N 877.
4. Lakhmidas Ramdas v. Jamnadas Shankarlal, (1898) 22 Bom 304 (F B).
5. Nand Kishore v. Raja Hari Raj Singh, (1897) 20 All 23=1897 A W N 163 (F B).
6. Bisheshur Dial v. Ram Sarup, (1900) 22 All 284=1900 A W N 69 (F B).
7. Fakiraya v. Gadigaya, (1902) 26 Bom 88 = 3 Bom L R 628.
8. Ponnambala Pillai v. Annamalai Chettiar, (1920) 7 A I R Mad 375=55 I C 666=43 Mad 372=38 M L J 239 (F B).

rights of parties are those set forth in the last clause of S. 60 which recognizes the mortgagor's right to redeem his own share in such a case upon payment of a proportionate amount of the mortgage debt. To the same effect is the view taken in the Calcutta High Court in 59 Cal 76.[9] We cannot therefore accept the argument that the whole amount of the rent charge having been notified in the sale proclamation, the result would be that the whole liability passed to the property auction-purchased so as to relieve the other property from liability. To accept that argument would be unsound in principle, for, the whole of the rent is a charge on both the properties; but if the whole charge is enforced against either of the properties the holder of that property would have the right of contribution to the extent of half against the holder of the other property. Therefore, if we were to say in this case that the Maharaja must first satisfy his own decree, we must at the same time allow him the right of contribution to the extent of half against the appellants, his co-sharers. It has been argued in reply by Mr. Sarjoo Prasad that on the view we take of the rights of the parties this should be the result and that the Maharaja should be required to enforce his claim against the appellants by a separate suit; but that would be contrary to the salutary provisions of S. 47 which says in the clearest terms that all questions between the decree-holder and the judgment-debtor relating to the discharge, execution and satisfaction of the decree are to be determined in execution and not by a separate suit. It is the Court's duty in a proceeding like the present to give effect finally to the rights of the parties. The decision of the Subordinate Judge was correct, and I would dismiss the appeals and cross-appeals, parties bearing their own costs in this Court.

Chatterji J.—I agree.

D.S./R.K. *Appeals dismissed.*

9. Krishnachandra Bhoumik v. Pabna Model Co. Ltd., (1932) 19 A I R Cal 319=137 I C 260=59 Cal 76.

A. I. R. 1940 Patna 422

JAMES AND ROWLAND JJ.

Sri Kant Lall — Appellant.

v.

Ram Bhajan Singh and others — Respondents.

Appeal No. 146 of 1938, Decided on 25th April 1939, from original order of Sub-Judge, Gaya, D/- 11th June 1938.

Civil P. C. (1908), O. 21, R. 66 — Mahal — Sale must be held village by village—Valuation village by village as given by judgment-debtor must be inserted in sale proclamation without being altered by decree-holder—Proclamation of sale need not be made in every village.

For purposes of sale under O. 21, R. 66 a single mahal must be broken up into lots and the sale must be held village by village and not in one block. It is proper that in preparation for this the valuation village by village given by the judgment-debtor should be inserted in the sale proclamation. This valuation has to be inserted as given by the judgment-debtor and must not be altered or corrected by the decree-holder before insertion. [P 423 C 1]

It is not necessary to make proclamation of sale in every village affected. [P 423 C 1]

Rai Gurusaran Prasad, Rai Paras Nath and Raj Kishore — *for Appellant.*

L. K. Jha, N. K. Prasad II and K. N. Varma — *for Respondents.*

James J. — This is an appeal by one of the judgment-debtors from the order of the Subordinate Judge of Gaya in execution proceedings. The decree under execution is a final decree in a mortgage suit. The mortgaged property consists of an estate contained in forty-eight villages which was comparatively recently constituted a separate mahal by collectorate partition. When the sale proclamation was being prepared, one of the judgment-debtors, Shama Kant Lal, put in separate valuation of each village for inclusion in the sale proclamation as the judgment-debtors' valuation; but the decree-holder objected and the Subordinate Judge decided in the end that a single sum should be stated as the valuation of the whole estate. After this objection had been disposed of, and another sale proclamation issued, the brother of judgment-debtor 1, Sri Kant Lal, took the same objection, which has again been overruled by the Subordinate Judge. He also objected that the sale proclamation ought to have been published in each village affected by the decree. The villages lie in thanas Sherghati, Barachati and Aurangabad. Sale proclamation was published in nine villages in Sherghati, in six villages in Barachati and in one village in Aurangabad. The Subordinate Judge held that there had been sufficient local publication. Mr. Rai Gurusaran Prasad on behalf of the appellant does not now contend that there ought to have been a separate sale proclamation published in each village affected; but he argues that the valuation given by the judgment-debtor ought to have been inserted in the sale proclamation, giving a separate valuation for each village; and that the sale ought to be held village by village

and not of the mahal in one single block. Mr. L. K. Jha suggests on behalf of the decree-holders that these objections can no longer be raised because the matter is made res judicata by the decision of the Subordinate Judge in the objection preferred by Sham Kant Lal.

Whatever may have been decided by the Subordinate Judge on the objection preferred by Sham Kant Lal, the fact remains that he has to insert in the sale proclamation under O. 21, R. 66 the valuation given by the judgment-debtor. This valuation has to be inserted as given by the judgment-debtor and must not be altered or corrected by the decree-holders before insertion. Mr. L. K. Jha on behalf of the decree-holders suggests that the application of Sri Kant Lal is imperfect because it was not accompanied by a separate valuation for the sale proclamation; but the valuation put forward by Sham Kant Lal was already on the record and he was entitled to press for its insertion in the sale proclamation. When the sale is held it must be held village by village and not in one block; and it is proper that in preparation for this the valuation village by village given by the judgment-debtor should be inserted in the sale proclamation. The sale must be held village by village; but this is the sale of a single mahal which for purposes of sale must be broken up into lots. It does not follow that there is any necessity to make proclamation of sale in every village affected; and the publication of the kind which was found to have been made by the order now under appeal may be regarded as sufficient publication, if it should be necessary again to issue the sale proclamation. The appeal partly succeeds and partly fails and each party may bear his own costs in this Court.

Rowland J. — I agree.

G.N./R.K. *Appeal partly allowed.*

A. I. R. 1940 Patna 423

AGARWALA AND ROWLAND JJ.

Baijnath Thakur and another — *Defendants* — Appellants.

v.

Sarwan Chaudhury and others, Plaintiffs and others, Defendants — Respondents.

Appeal No. 872 of 1938, Decided on 8th January 1940, from appellate decree of Dist. Judge, Muzaffarpur, D/- 3rd June 1938.

(a) Hindu Law—Alienation—Karta — Karta can hypothecate ancestral property.

The karta of a joint family is entitled to hypothecate ancestral lands for the purpose of acquiring other lands for the benefit of the family: *A I R 1920 Pat 70; A I R 1934 Pat 699; A I R 1939 Pat 370; A I R 1935 All 221 (F B) and A I R 1938 Pat 562, Rel. on; A I R 1932 P C 182, Disting.; A I R 1935 Bom 295 (F B), Expl.* [P 424 C 2]

(b) Bihar Money Lenders Act (3 of 1938), S. 8—Reduction of rate of interest under S. 8 is discretionary with Court.

There is nothing in S. 8 to indicate that the Court is bound to exercise the discretion for reducing interest in favour of the debtor in every case. What is contemplated by the Section is that the Court shall reduce the interest to 9 per cent. per annum as indicated in the Section in cases where the Court considers that the circumstances justify taking such a course. But where the original rate of interest is not exorbitant, and there is nothing to indicate that the debtor has not been fairly treated by the creditor, the Court can refuse to exercise the discretion. [P 424 C 2]

Sarjoo Prasad — *for Appellants.*

Ganesh Sharma — *for Respondents.*

Agarwala J. — This is a second appeal by the defendants from a decision of the District Judge of Muzaffarpur confirming a decision of the Munsif. The facts were that in January 1923, defendant 1, who was the karta of a joint family consisting of himself and his son, defendant 2, took a mukarrari patta of 3 bighas of paddy land for a consideration of Rs. 812-8-0. In December of the same year, he borrowed on mortgage Rs. 900 to pay for the mukarrari patta and for the joint family expenses to the extent of Rs. 87-8-0. The property given in security for this mortgage was the property of the joint family and the 3 bighas of land covered by the mukarrari patta. In 1927, Rs. 850 of the mortgage debt was paid. This appeal arises out of a suit to enforce the balance of the mortgage debt. The first Court accepted the plaintiffs' evidence that the produce from the 3 bighas covered by the patta is about 20 maunds per bigha besides other catch crops and held that the transaction was one by which the family had benefited. This finding was endorsed by the Court below which was also satisfied that the family benefited by the mukarrari patta. In second appeal it is contended on behalf of the defendants that the karta of a joint family is not entitled to hypothecate ancestral lands for the purpose of acquiring other lands. A number of cases of this and other Courts have been cited to us but it is clear that in this Court the decisions are almost unanimous. In 1 P L T 136[1] a Division Bench held that the manager of a

1. Sheotahal Singh v. Arjun Das, (1920) 7 A I R Pat 70=56 I C 879=1 P L T 136.

joint Hindu family always has the power to alienate joint family property in the ordinary course of management and for the benefit of the joint family, and that the test in each case is whether the transaction was such as a prudent owner would enter into in order to benefit the estate. In that case a mortgage bond executed to pay the premium in respect of a lease taken for the benefit of a joint family was held to be binding upon all the members of the family. In A I R 1934 Pat 699[2] a Division Bench held that augmenting the means of livelihood of the family, unless speculative or risky, must be taken to be beneficial to the family. In the recent case in 20 P L T 663,[3] it was held that where all the adult members of a joint family had mortgaged the ancestral property and applied the money raised by the mortgage towards part payment of the purchase price of a property purchased for the family, the transaction was one for the benefit of the family, and the mortgage was for legal necessity and therefore that it could not be challenged by minor members of the family. Reliance was placed for the appellants on the decision of the Privy Council in 54 All 564[4] where the question before the Board was with respect to a sum of Rs. 4000 which had been borrowed for the purpose of financing a contracting business and the question arose whether an alienation of joint family property to raise money for this purpose was binding on the joint family. That decision has been explained by a Full Bench of the Allahabad High Court in 57 All 605[5] where the present Chief Justice of Allahabad said:

> In my judgment in 54 All 564[4] the Privy Council never intended to lay down the general proposition that a loan taken by the manager of a joint Hindu family for the purpose of starting a new business could never be binding upon the minor members of the family.

The decision of their Lordships of the Privy Council in that case was also referred to by a Division Bench of this Court in 17 Pat 386.[6] The facts of the Privy Council case are quite distinct from the facts of this case where the object of the loan was not for the purpose of entering into a speculative transaction but purely for the purpose of adding to the lands of the family some paddy lands in which they were deficient. Reference was also made to the Full Bench case of the Bombay High Court in 59 Bom 525[7] in which it was held that the manager of a minor under Hindu law is not entitled to sell the minor's property merely for the purpose of enhancing the value of the property or for increasing the minor's income. But the learned Chief Justice in that case was careful to point out that it would be inaccurate to say that no transaction could be for the benefit of the minor which was not of a protective or preservative character. In my view, the decisions of this Court are clear that a transaction of the kind with which we are dealing in this appeal is one which binds a member of a joint family, provided that it is for the benefit of the family. The concurrent findings of the Courts below are that the transaction was for the benefit of the family. I see no reason why that finding should not be accepted and acted upon.

The only other point in the case relates to interest. The bond provided for interest at the rate of 1 per cent. per mensem. It is contended that the mortgagor is entitled to have the amount reduced to 9 per cent. per annum under S. 8, Bihar Money Lenders Act, 1938. That Section provides that the Court may re-open a transaction, and, in a proper case, reduce the interest in the case of a secured loan to 9 per cent. per annum, and in the case of an unsecured loan, to 12 per cent. per annum. There is nothing in the Section to indicate that the Court is bound to exercise this discretion in favour of the debtor in every case. What appears to be contemplated is that the Court shall reduce the interest to 9 per cent. per annum as indicated in the Section in cases where the Court considers that the circumstances justify taking such a course. But where the original rate of interest is not exorbitant, and there is nothing to indicate that the debtor has not been fairly treated by the creditor, I see no reason why in second appeal this Court should exercise this discretion. The result therefore is that I would dismiss this appeal with costs.

Rowland J. — I entirely agree.

G.N./R.K. *Appeal dismissed.*

2. Lalji Singh v. Muchkund Singh, (1934) 21 A I R Pat 699=154 I C 97.
3. Sital Prasad v. Ajablal Mander, (1939) 26 A I R Pat 370=183 I C 323=18 Pat 306=20 P L T 663.
4. Benares Bank Ltd. v. Hari Narain, (1932) 19 A I R P C 182=137 I C 781=59 I A 300=54 All 564 (P C).
5. Ramnath v. Chiranji Lal, (1935) 22 A I R All 221=155 I C 136=57 All 605=1935 A L J 177 (F B).
6. Chhotey Lal v. Dalip Narain Singh, (1938) 25 A I R Pat 562=178 I C 837=17 Pat 386.
7. Hemraj Dattubuva v. Nathu, (1935) 22 A I R Bom 295=157 I C 406=59 Bom 525=37 Bom L R 427 (F B).

A. I. R. 1940 Patna 425

WORT AND MEREDITH JJ.

Ramdas Bhagat — Plaintiff —
Appellant.

v.

Krishna Prasad Tewari and others —
Defendants — Respondents.

Appeal No. 757 of 1938, Decided on 8th January 1940, from appellate decree of Sub-Judge, Gaya, D/- 12th July 1938.

(a) Civil P. C. (1908), S. 92—Conditions necessary to invoke application of S. 92 stated.

Four conditions are necessary in order to invoke the operation of S. 92 : (1) the trust must be for a public purpose of a charitable or religious nature: (2) the plaint must allege that there is a breach of such a trust or that the direction of the Court is necessary for the administration of the trust, (3) the suit must be not only in the interest of the plaintiff individually but in the interest of the public or in the interest of the trust itself (for where the trust is a public one, the interest of the trust will be interest of the public), and (4) the relief claimed in the suit must be one of the reliefs mentioned in the Section. [P 428 C 1]

(b) Civil P. C. (1908), S. 92—Applicability —Substance and not wording of plaint should be looked to.

In considering the application of S. 92 it is the allegations in the plaint alone that should be looked to. But the Court must look to the substance of the claim and not merely to its wording : *A I R 1926 Mad 1029 and A I R 1927 Mad 886, Rel. on.* [P 428 C 2 ; P 429 C 2]

(c) Civil P. C. (1908), S. 92—S. 92 applies to suit for removal of trustee de son tort.

Section 92 applies to a suit for the removal of trustees de son tort, i. e. for the removal of persons who are trustees de facto but not de jure : *Case law relied on.* [P 429 C 2]

Sir Sultan Ahmad, Syed Mehdi Imam, Radha Krishna Saya, Sarjoo Pd., Lalnarayan Sinha and Khurshaid Husnain — *for Appellant.*

Sir Manmatha Nath Mukherji and Raj Kishore Pd. — *for Respondents.*

Meredith J. — This is an appeal by plaintiff from a decision of the learned Subordinate Judge of Gaya, dated 12th July 1938, confirming a decision of the Munsif of Gaya, dated 6th January 1938, dismissing the suit. For reasons which will presently appear, it is necessary to set out the allegations in the plaint clearly and in considerable detail. It is first stated therein that the plaintiff, Ramdas Bhagat, is the sole surviving member of a joint family and is in possession of the entire property of that family. One of the members of the family, the plaintiff's ancestor Jawahir Bhagat, founded and endowed a thakurbari in the town of Gaya and installed idols for himself and the members of his family. He appointed five persons as managers of the endowed property and one Gayadin Tewari as pujari, but no deed of endowment was executed. Later on, in 1907, the plaintiff's uncles Tulsi Bhagat and Ramchandar Bhagat and Gayadin Tewari (here the plaint is wrong : Gayadin Tewari did not join in the execution) executed a registered deed of endowment confirming the persons already appointed by Jawahir as managers and Gayadin Tewari as pujari (priest). One of the managers, Balgobind Ram, later dedicated a house for the benefit of the thakurbari but not in such a way as to alter the nature or status of the trust, which continued as a private and family charity with the accretion of the property dedicated by Balgobind Ram. It is next alleged (and this is important) that some time ago Gayadin Tewari died and his son, defendant 1 of the suit, took up the management of the affairs. Next it is alleged that though there were several trustees yet the thakurbari was managed in consultation with and under the orders of Jawahir Bhagat, Behari Bhagat and Tulsi Bhagat and this arrangement continued up to the death of the last of them.

Later, when the plaintiff came of age, he went on performing worship in the thakurbari but defendant 1 and also defendants 2 and 3 (a second son and a grandson of Gayadin) kept him in the dark regarding the thakurbari management. Gradually, however he learnt of all the circumstances and in 1934 he came to know that all the trustees, except Balgobind Ram, had died more than 10 years before and that the property of the thakurbari was solely under the control and will of defendants 1 to 3 and they had been spending the entire income on their personal necessities treating the thakurbari as their own property and wasting the thakurbari properties; and Balgobind, the only surviving trustee, failed to oppose them being in collusion with them. The plaintiff, as heir of the founder and proprietor of the thakurbari, wanted it to be efficiently managed and that the work should be done according to the intention of the founder. With that intention he filed a petition to get his name recorded in place of Tulsi Bhagat in the papers of the Municipality, but on this defendants 1 to 3 became very much annoyed and induced defendants 4 to 7, who are connected with them and are their creatures, to file an objection petition in the mutation case claiming to be themselves trustees. The

plaintiff's petition was rejected and the names of defendants 4 to 7 along with that of Balgobind Ram, who was then living, were recorded as trustees. The plaintiff then dismissed defendants 2 to 3 from the post of pujari and appointed another pujari but the defendants to the suit interfered ; hence the necessity for the suit.

Next it is alleged that in the deed of trust no provision was made for the appointment of further trustees after the death of the five trustees mentioned in the deed, and Balgobind Ram, the surviving trustee, had no power to appoint other persons as new trustees in place of the deceased trustees, and such persons as defendants 4 to 7 have no right to manage the thakurbari, and only the plaintiff as the heir of the founder is entitled to manage it. Hence after dismissing defendants 1 to 3 from the post of pujari and defendants 4 to 7 from the post of trustees, the plaintiff is looking after the administration of the thakurbari. Defendants 4 to 7 neither discharge the duties of trustees nor are they fit to do so. Defendants 4 and 5 are big people and in ill-health and take no interest in the thakurbari and Nos. 6 and 7 are intimate friends of defendant 1. Hence they are neither fit to perform the duties of trustees nor do they perform them. For this reason on account of want of proper attention *on the part of the aforesaid trustees* (it is important to note this expression), there is absolutely no check on the embezzlement of the income of the thakurbari. Defendants 1 to 3 misspent the income on their own pleasure and paid no attention to the worship of the deities. They maintained no accounts and did not seek to augment the property of the thakurbari from the surplus income. They took part in all sorts of nautches and musical entertainments and other kinds of sports, spoiling the income of the thakurbari, and they kept undesirable persons in the thakurbari on account of which respectable persons and the ladies of the plaintiff's family and other ladies did not like to go there. Defendants 1 to 3 have also caused loss to the thakurbari by falsifying papers and by selling the ornaments and moveables of the deities.

It is then repeated that from these facts it is clear that neither defendants 4 to 7 are legally fit *to continue as trustees* (this expression is also to be noted) nor are defendants 1 to 3 fit to continue as pujaris. The plaintiff has full right to manage the properties personally. The plaintiff and his family have always been in possession and occupation of the thakurbari and in charge of the administration and the plaintiff as the heir of the founder is in possession and occupation and is the manager, and in this capacity, he has dismissed all the defendants from the posts of priest and nominal trustees. It is prayed that his action be upheld by the Court ; hence this suit is instituted. Next there is a prayer in the following terms :

> That the property and income of the thakurbari may not be wasted, a Receiver may be appointed by the Court who may look after the administration thereof.

Next, the cause of action is stated as arising on 1st August 1934, when the real affairs of the thakurbari were disclosed, and also on 4th April 1935, when the plaintiff's application for mutation and registration of his name in the Municipality was rejected, and on 19th Kartik 1343, when Balgobind Ram, the last trustee appointed by Jawahir Bhagat, died. The reliefs claimed are then set out. The Court is first asked to declare that defendants 4 to 7 have no right and authority to manage the thakurbari and that the allegation with regard to their being trustees is wrong and illegal and not binding upon the plaintiff, and also that defendants 1 to 3 by reason of mismanagement, misappropriation of income and incapacity are not fit to act as pujaris and are fit to be removed from the office of pujari and have already been dismissed. Secondly, the Court is asked to hold and declare that there being no provision for the management of the thakurbari after the demise of Balgobind, the plaintiff as the heir of the founder is competent to manage the thakurbari directly or through somebody else. Next occurs the following prayer, which I consider it necessary to set out verbatim :

> In spite of the fact that the plaintiff is in charge of the management and is carrying on the administration of the thakurbari as the heir of the founder of the thakurbari on the demise of the trustees named in the trust deed and due to the absence of any provision for the management of the aforesaid estate, still *some arrangement may be made with respect to that portion which may be considered to be 'unadministered' in the opinion of the Court* (italics mine) and with that end in view, a Receiver may be appointed to manage the affairs of the thakurbari until the disposal of this suit.

Subsequently, a prayer was added for a permanent injunction restraining the defendants from interfering with the management and possession of the plaintiff. The plaint, as frequently happens in India, is a

confused and badly drafted document. To some extent, in the interests of clarity and good English, I have paraphrased it, but where the wording is material to the determination of this appeal, I have quoted its own language.

The learned Munsif found that the trust was a public one, not private as claimed; that the plaintiff's story regarding his own management and possession and that of the previous members of his family was entirely false; that actually defendants 1 to 3 were working as pujaris and defendants 4 to 7 as trustees and that the allegations of misconduct, misappropriation, mismanagement and neglect were also false; that defendants 4 to 7 had been rightfully appointed trustees by Balgobind Ram and had also been elected by the public after Balgobind's death and that in any case they were trustees de son tort; that the suit was substantially one for the removal of the trustees or the trustees de son tort and of the pujaris, and as such, it was not maintainable under the provisions of S. 92, Civil P. C., and S. 14, Religious Endowments Act, 1863. He held further that the suit was bad for defect of parties inasmuch as it appeared from the proceedings book of the thakurbari that after the death of Balgobind Ram, his son Rameshar Prasad was elected a trustee in his place, and as a matter of fact, he also along with defendants 4 to 7 had been managing the trust property and working as a trustee. Therefore he was a necessary party under the provisions of O. 31, R. 2, Civil P. C., which prescribes that where there are several trustees, executors, or administrators, they shall all be made parties to a suit against one or more of them.

The lower Appellate Court endorsed all these findings with two exceptions. In his opinion the deed of endowment (Ex. 6) contained no provision for the appointment of new trustees upon the death of the original trustees. Defendants 4 to 7 therefore had not been validly appointed by Balgobind nor had they nor Balgobind's son been validly elected. All were therefore only trustees de son tort and the right of management did revert to the plaintiff as heir of the founder on the death of Balgobind, the last trustee. But it appeared from the deed that the wish of the founder was that a Board of Trustees should manage the affairs of the temple and its properties and also that no man of the founder's family should be on the Board of Trustees. Therefore the plaintiff had no right to take the management of the endowment into his own hands, and as heir of the founder, his sole right was to appoint a fresh Board of Trustees. Secondly, he held that only defendant 1 had been duly appointed pujari as the evidence showed, and that was also in accordance with the terms of the deed of trust which prescribed that Gayadin should remain as the karguzar for his lifetime and such one of his sons and heirs as might be considered fit to work as pujari should subsequently be appointed by the managers as such. Defendants 2 and 3 had no interest at all. He agreed however that the thakurbari was a public one, that the suit was essentially one for the removal of the trustees de son tort and the pujaris, and as such was not maintainable as it had not been brought under S. 92, Civil P. C., that it was also bad for non-joinder of Balgobind's son Rameshar who was one of the trustees de son tort; and also that none of the charges of misconduct, misappropriation, etc. has been substantiated and the plaintiff had not proved that defendant 1 was unfit to act as pujari. Moreover, under the deed of trust, so long as a suitable man was available in the family of Gayadin Tewari, no stranger could be appointed as pujari and the plaintiff had no right to dismiss defendant 1 from his office.

In appeal, the finding that the trust is a public one is not challenged. But it is contended that in spite of that fact S. 92, Civil P. C., has no application to the case since the suit is not founded upon breach of trust but is merely one between rival claimants, a case analogous to the case in 5 P L T 231[1] where it was held that S. 92 had no application. The plaintiff asked for the removal of defendants 4 to 7 not on account of any breach of trust but simply because they had not been validly appointed. It is said that it is a simple case of each side denying the title of the other. It is true that there are allegations of at least sins of omission on the part of defendants 4 to 7, but these allegations are mere surplusage and not the ground put forward for removal. Secondly, it is argued that the lower Appellate Court was wrong in holding that though the right of management reverted to the plaintiff still he was not entitled to manage personally but could only appoint a Board of Trustees. Thirdly, it is argued that the lower Appellate Court was wrong in holding that the plaintiff is not entitled

1. Deokinandan v. Brijnandan, (1924) 11 A I R Pat 502=76 I C 89=5 P L T 231.

to dismiss defendant 1 from the post of pujari. Once it is found that he is a mere servant, the right of dismissal follows independently of proof of misconduct. Lastly, it is urged that O. 31, Rule 2, applies only in the case of trustees and not in the case of trustees de son tort. Rameshar is not therefore a necessary party, and in any case, the suit should not fail for defect of parties and Rameshar should, if necessary, be added as a party.

I propose to consider first the question whether S. 92, Civil P. C., is applicable to this case, and it is for the purpose of determining this question that I have set out the allegations in the plaint in such detail, as in my opinion, the case really involves no principle of law and the decision depends entirely upon the facts set out in the plaint. I may say at once that I am clearly of opinion that a suit on the allegation contained in this plaint could lie, if lie at all, only under the provisions of S. 92, Civil P. C. Four conditions are necessary in order to invoke the operation of S. 92 : (1) the trust must be for public purposes of a charitable or religious nature, (2) the plaint must allege that there is a breach of such trust, or that the direction of the Court is necessary for the administration of the trust, (3) the suit must be not only in the interest of the plaintiff individually but in the interest of the public, or in the interest of the trust itself (for where the trust is a public one, the interest of the trust will be the interest of the public), and (4) the relief claimed in the suit must be one of the reliefs mentioned in the Section.

It is not disputed that in the present case the first condition is satisfied. There can, also, in my opinion, be no doubt that the second condition is satisfied. The plaint alleges breach of trust not once but many times. It is unnecessary to refer again in detail to all the allegations of misconduct on the part of the pujaris. Misconduct of the pujaris is made the misconduct also of the trustees since it is said that the pujaris were aided and abetted by the nominal trustees, and, as I have said, the trustees are further specifically charged with sins of omission, failure to supervise, and failure to check the mismanagement. It is true that it is sought to remove defendants 4 to 7 on the ground that they were not validly appointed. The plaintiff however was not content to rest his case on that basis alone. He had to go on to urge misconduct as an additional ground, and thereby, if in no other way, brought himself within the mischief of S. 92. I cannot agree with the argument that the allegations regarding breach of trust were mere surplusage. Reading the plaint as a whole, it is, on the contrary, clear that these allegations formed a substantial part, if not the most substantial part, of the plaintiff's claim for relief.

The matter is made plainer still if we consider the case of defendants 1 to 3, a point which was not touched upon in the arguments, but is, in my opinion, very important. The removal of defendant 1 at least is sought solely on the ground of misappropriation and misconduct. Now, though the Court may have found that defendant 1 was a mere servant, there can be no doubt that according to the allegations in the plaint, he also is a self-constituted trustee, that is to say a trustee de son tort. I need refer only to the allegation that on the death of Gayadin, defendant 1 took up the management of the affairs of the thakurbari; to the allegation in express terms that the property of the thakurbari was solely under the control and will of defendants 1 to 3, who had been spending the entire income on themselves and acting against the intentions of the founder of the thakurbari, Balgobind Ram being in collusion with them; to the allegation that it was defendants 1 to 3 who countered the plaintiff's move, when he applied for the mutation of his name, by setting up defendants 4 to 7, who were connected with them and were their creatures, to pose as trustees. These allegations may have been largely false, but when considering the application of S. 92, it is the allegations in the plaint alone that concerns us.

I would, moreover, go further than saying that the plaint alleges breach of trust. Though this point also was not made in argument, in my opinion, there is a clear statement in the plaint that the direction of the Court is necessary for the administration of the trust. I do not base this on the proposition, which may be doubtful, that a prayer for an injunction against the trustees de son tort is a prayer for a direction for administration. The matter is much clearer than that. There is an express statement in the plaint, which I have set out verbatim, that some portion of the estate may be considered to be unadministered owing to the absence of any provision in the deed for the management on the demise of the trustees, and a prayer is made that the Court may make some arrangement

with respect to that portion which may be considered to be unadministered in the opinion of the Court. In my view there could not be a clearer case of asking for the Court's direction for the administration of the trust, in part at least. The plaintiff even goes so far as to ask that a receiver pendente lite may be appointed.

The third condition, in my judgment, is fully satisfied. This is no case of rival claimants fighting to assert their own interests. Defendants 4 to 7 have no personal claim at all. They are respectable people elected as trustees and acting as such to the satisfaction of the entire public, as found by the Courts below. As for the plaintiff, it is apparent from the plaint that he does not purport to sue on his own behalf but in the interests of the trust, and that is, as I have said, in the case of a public trust, synonymous with the interests of the public. Repeatedly it is stated in the plaint that the wishes of the founder are not being carried out; that the trust is suffering; and that not only the plaintiff and his ladies but also respectable persons and other ladies of the town do not like to visit the thakurbari. No doubt the plaintiff asks that the management should be handed over to him, but that is not for his own gain but in the interests of the trust itself, which is as he says, being mismanaged. No doubt he also (somewhat inconsistently) states that he himself is in possession and is managing the property. But that was clearly put in merely in the attempt to avoid the necessity of praying for consequential relief in addition to a declaration. That allegation was hardly serious in view of the other recitals in the plaint and both the Courts below have found it false.

There remains the fourth condition, which must be satisfied. Is the relief claimed one of those mentioned in the Section? Here I agree with the views of the Courts below that the suit is substantially one for removing the trustees de son tort. I agree with Sir Sultan Ahmad, who has argued the case for the appellant, that where the relief sought is the removal of a trustee, the prayer for removal must be based upon one of the conditions set out in the first part of the Section, that is the breach of trust or the necessity for the Court's direction. In other words, one of those conditions must be not merely alleged but alleged as the basis for the suit and if it had been sought to remove the defendants solely because they were not validly appointed trustees, then the mere fact that breach of trust had been alleged independently would not necessarily bring the suit within the terms of S. 92. But here the fact is, as I have said, that even in the case of defendants 4 to 7 the removal is sought not only on the one ground but also on the other, and in the case of defendants 1 to 3 the ground for removal is based solely on the allegations of misconduct, which would amount to breach of trust once it is held, as I have said, that the plaint describes these defendants also as trustees de son tort.

It is, of course, clear that though the suit purports to be for a declaration and an injunction, it is essentially and substantially for the removal of the trustees de son tort. The allegation that the plaintiff had not only the right of management but was also the actual manager in possession is not, as I have said already, to be taken seriously. It is admitted over and over again in the plaint that the de facto management is in the hands of the defendants. The prayer for injunction, therefore, is actually one for removal. In considering the application of S. 92, the Court must look to the substance of the claim and not merely to its wording: A I R 1926 Mad 1029;[2] also A I R 1927 Mad 886.[3] The suit is for the removal of trustees de son tort and not for the removal of legal trustees; for the removal of persons who are trustees de facto but not de jure. But that does not matter. It is well settled that S. 92 applies to such cases. In 27 I C 389[4] it was laid down by the Court of the Judicial Commissioner of Oudh that a suit under S. 92, Civil P. C., is maintainable as against a de facto trustee or a trustee de son tort, for he is subject to the same liability while he is so acting as a trustee de jure. This case follows 35 Cal 789[5] a Calcutta case. The Allahabad High Court has also held in 40 I C 165[6] that S. 92, Civil P. C., applies to the case of persons who are trustees de son tort. The Bombay High Court took the same view in 23 Bom 659.[7] The Allahabad High Court again took the same view in 69

2. Innasimuthu Pillai v. A. J. Lutz, (1926) 13 A I R Mad 1029=97 I C 630.
3. Jambullinga Pathan v. Akilanda Asari, (1927) 14 A I R Mad 886=109 I C 862.
4. Muhammad Nasim v. Muhammad Ahmad, (1914) 1 A I R Oudh 408 = 27 I C 389 = 18 O C 38.
5. Budree Das Mukin v. Chooni Lal Johurry, (1906) 33 Cal 789=10 C W N 581.
6. Sidhan Lal v. Gouri Shankar, (1917) 4 A I R All 264=40 I C 165.
7. Jugalkishore v. Lakshman Das, (1899) 23 Bom 659=1 Bom L R 118.

I C 990[8] holding that a suit under S. 92 will lie against a trustee de son tort; in other words, against a person who, without title, chooses to take upon himself the character of a trustee; and again in 84 I C 631.[9] Similar also is the view of the Madras High Court in 78 I C 950.[10] Lastly, our own High Court in 151 I C 138[11] has held that if the defendant was a person who was not a trustee and purported to act as a trustee, he was a trustee de son tort and the removal of that person was the removal of a trustee within the meaning of S. 92, Civil P. C.

That the defendants in the present case are trustees de son tort and not mere trespassers cannot be doubted. They make no claim on their own behalf. They purport to be trustees. They claim not adversely to the trust but under it. They are, moreover, several times referred to as trustees in the plaint. I have no doubt in my mind that all the necessary conditions to invoke the application of S. 92, Civil P. C., are present in this case. That being so, the suit, as presented before the Munsif was not maintainable and the suit and appeal must fail on that ground. In this view, it is unnecessary to express any opinion on the other questions which have been raised. I would dismiss the appeal with costs.

Wort J.—I agree.

G.N./R.K. *Appeal dismissed.*

8. Ram Bilas v. Nitya Nand, (1922) 9 A I R All 542=69 I C 990=44 All 652=21 A L J 105.
9. Behari Lal v. Shiva Narain, (1924) 11 A I R All 884=84 I C 631=47 All 17=22 ALJ 866.
10. Malkajigunda v. Ramaswami Chettiar, (1925) 12 A I R Mad 212=78 I C 950.
11. Ghasi Gir v. Jamuna Prasad, (1934) 21 A I R Pat 321=151 I C 138.

A. I. R. 1940 Patna 430

HARRIES C. J. AND MANOHAR LALL J.

Chatargoon Sao and others —
Defendants — Appellants.

v.

Babu Ramlal and another —
Plaintiffs—Respondents.

Appeal No. 16 of 1937, Decided on 29th November 1939, from original decree of Sub-Judge, Palamau, D/- 15th July 1936.

Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 8—Court is not bound to re-open transaction but should do so in proper case—Interest at mercantile rate slightly in excess of rate permitted by Act charged — Transaction need not be re-opened.

The Court is not bound to re-open a transaction under S. 8 though of course, it should do so in a proper case. Even if it is established that interest at the mercantile rate slightly in excess of the rates permissible in the Bihar Money-lenders Act has been charged the Court would be reluctant to order the whole transaction to be re-opened. [P 431 C 2]

Rai Gurusaran Prasad and D. P. Sinha — *for Appellants.*

Baldeva Sahay and Rajkishore Prasad — *for Respondents.*

Harries C. J. — This is a defendants' appeal from a decree of the learned Subordinate Judge of Palamau decreeing the plaintiffs' claim in a mortgage suit. The plaintiffs brought the suit out of which this appeal arises for the enforcement of a mortgage dated 19th March 1932. The learned Subordinate Judge held that consideration had passed and that the mortgage had been duly executed according to law. He accordingly decreed the claim. The defendants were the members of a family which carried on a business in selling cloth, yarn etc. The plaintiffs had from time to time sold to the defendants cloth and yarn, and according to the plaintiffs an account was struck in March 1932 which showed that there was due from the defendants to the plaintiffs a sum of Rs. 6000 in respect of cloth and Rs. 2700 in respect of yarn etc. This statement of account was actually signed by defendant 2. On 19th March 1932, defendants 1, 2, 3 and Hussaini executed the mortgage deed now sued upon. Defendant 2 executed the deed on behalf of himself and as guardian of defendant 8, and Hussaini, now dead, executed the document on behalf of himself and as guardian of defendants 4 and 5. Defendants 6 and 7 apparently were born after this mortgage deed was executed. The deed was to secure the sum of Rs. 8700 which was the balance due upon the cloth and yarn transactions between the parties.

The bond was an instalment bond and interest was at the rate of six per cent. per annum. It was provided however that in case of default of two instalments interest should be payable at the rate of twelve annas per cent. per month compoundable yearly. Nothing was paid by the defendants in respect of the principal and interest due under this mortgage, and on 21st May 1935 the present suit was brought. In the lower Court the defendants denied that any sum was due from them to the plaintiffs at the date of the mortgage, and suggested that they had been coerced into executing the mortgage. The lower Court has rejected these pleas, and in my view rightly. Mr. Rai Gurusaran Prasad who appears on be-

half of the appellants has not challenged this part of the case. He has confined his argument to the question of interest.

On behalf of the appellants it is said that the amount stated to be due from the defendants to the plaintiffs on 19th March 1932, namely Rs. 8700 includes a good deal of interest. It is said that the plaintiffs charged compound interest at the rate of twelve annas per cent. per month upon all balances due to them. Accordingly, it is urged that Rs. 8700 which formed the principal sum in this mortgage must consist largely of sums due by way of interest.

The appellants claimed the benefit of S. 8, Bihar Money-Lenders (Regulation of Transactions) Act, 1939. That Section provides that in any suit brought by a money-lender before or after the commencement of the Act in respect of a loan advanced before the commencement of the Act or in any appeal or proceedings in revision arising out of such suit, the Court may exercise a number of powers. The Court may reopen a transaction, take an account between the parties and relieve the debtor of all liability in respect of any interest in excess of nine per cent. per annum simple in the case of a secured loan. It has further provided that notwithstanding any agreement purporting to close previous dealings and to create a new obligation, the Court may re-open any account already taken between them and relieve the debtor of all liability in respect of any interest in excess of nine per cent. simple per annum in the case of secured loan and twelve per cent. simple per annum in the case of unsecured loans.

It is urged that the evidence in this case makes it clear that when this balance of Rs. 8700 was agreed a part of the sum undoubtedly consisted of interest. The defendants could easily have established this fact by production of their books; but no books were produced. Reliance has been placed upon the plaintiffs' books and the evidence of one of the plaintiffs' witnesses. Relevant portions of the plaintiffs' books are printed at pp. 15, 16 and 17 of part 3 of the paper-book. The account opens with a balance due under previous transactions amounting to Rs. 5509-12-3. According to the appellants, this amount included interest; but how much interest the appellants are wholly unable to say. All that they can point to is the statement made by plaintiffs' witness Sheonandan Prasad (P. W. 4). In cross-examination he said:

> Rupees 5509-12-3 was brought forward from preceding year in the bahi of Nimak khata in 1987-88. Rs. 7677-5-9 was brought forward in 1987-88 from preceding year in Kapra khata shop. I can't say how much of these is principal and how much is interest.

Earlier the witness said:

> Bahis are changed on Katik Badi 15. Interest accrued at Katik Badi 15 forms principal and it carries future interest.

And earlier he had said that the plaintiffs had charged interest at twelve annas per cent. per annum from all customers and that interest ran on both sides of the account. It is clear that the account from 1930 onwards included little, if any, interest as the amounts shown as received by the plaintiffs are obviously amounts in respect of goods sold and delivered. If any interest is included in the sum of Rs. 5509-12-3, which was brought forward in the account printed at p. 15, part 3, of the paper-book, it would appear as if this interest was paid off very soon afterwards. It is to be observed that there is a proviso to S. 8, Bihar Money-lenders (Regulations of Transactions) Act, 1939, which provides that if anything has been paid or allowed in respect of any liability for interest in excess of nine per cent. simple per annum in the case of a secured loan and twelve per cent. simple per annum in the case of an unsecured loan, nothing in cl. (a) or (b) shall be deemed to require the creditor to repay any amount so paid or allowed in excess or to reduce the amount of the principal of the loan.

In my judgment the appellants in this case have wholly failed to establish that when the account was stated in March 1932 there was included in the amount due sums by way of interest in excess of the rate permitted by the Bihar Money-lenders Act. It was clearly for the appellants to show this, and they have failed to do so. The evidence relied upon is most meagre, and does not establish a state of facts which would require this Court to re-open the transaction. Further, the Court is not bound to re-open a transaction under S. 8, Bihar Money-lenders Act, though, of course, it should do so in a proper case. Even if the appellants had established that interest at the mercantile rate slightly in excess of the rates permissible in the Bihar Money-lenders Act had been charged, I would have been reluctant in this case to order the whole transaction to be reopened. However as I have stated, the plaintiffs here failed to show facts which bring the case within S. 8, cls. (a) and (b), and accordingly they have no right to have the trans-

action re-opened. No other point has been taken on behalf of the appellants and accordingly this appeal must fail. I would therefore dismiss the appeal with costs. Two months' time is allowed for payment of the sum under the mortgage.

Manohar Lall J.—I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 432

ROWLAND AND CHATTERJI JJ.

Harihar Gir—Appellant.

v.

Mt. Dulhin and others—Respondents.

Appeal No. 26 of 1939, Decided on 13th September 1939, from original order of Sub-Judge, Gaya, D/- 3rd December 1939.

Execution — Matters to be considered in deciding whether subsequent application for execution is application to continue previous application stated.

The first condition necessary to sustain the plea that the subsequent application should be treated as an application to continue the earlier execution is that the earlier execution case must not have been finally disposed of. If it was so disposed of, no question of continuing it can arise. If, on the other hand, there was an interruption in the earlier proceeding by reason of which the Court, being unable to grant the appropriate relief, struck off the case, it cannot be said to have been finally disposed of. It will then be considered to be still pending, and may, if proper case is otherwise made out, be revived and continued. Regard is to be had to substance rather than to the form of the application. The second application will not however be considered to be continuation of the former one if it is found to be different in its scope, or if the former execution is found to have been abandoned by the decree-holder or to have been dismissed through his default or laches : *Case law reviewed.*

[P 433 C 1; P 435 C 2]

Sir M. N. Mukherji, Sarjoo Prasad and R. J. Bahadur—*for Appellant.*

Mahabir Prasad, Syed Hasan and S. P. Srivastava—*for Respondents.*

Judgment. — This is an appeal by Mahanth Harihar Gir, one of the judgment-debtors, against an order rejecting his objections under S. 47, Civil P. C. Of the various objections taken by him, the only one pressed in this appeal is that the execution is barred under S. 48, Civil P. C., having been filed more than twelve years after the date of the decree. The decree under execution is a mortgage decree which was passed on 23rd December 1923, and the present execution was filed on 24th February 1936, under the following circumstances: The first execution was taken out in Execution Case No. 214 of 1926. In course of that execution, some of the judgment-debtors interested in items 1 to 5 of the mortgaged properties paid Rs. 4800 to the decree-holders on or about 12th April 1929, on the understanding that the other mortgaged properties, namely items 6 to 9 would be first put up to sale for realization of the balance of the decretal amount, and in case of deficiency, items 1 to 5 might be sold. On 12th April 1929, the decree-holders accordingly prayed for sale of items 6 to 9 and the prayer was allowed by the Court after hearing the parties concerned. On 15th April 1929, items 6 to 9 were sold and purchased by outsiders and the sale proceeds were sufficient to satisfy the decree.

On 11th May 1929, Jagat Prasad Singh, one of the judgment-debtors who was interested in the properties sold, deposited the decretal amount with compensation and prayed for setting aside the sale under O. 21, R. 89, Civil P. C. Almost immediately afterwards Jagat Prasad brought a Title Suit No. 21 of 1929, for a declaration that the mortgage decree and the auction sale were not valid and binding against him and for refund of the money that was deposited by him under O. 21, R. 89. By an order passed in that suit on or about 16th May 1929, the decree-holders were restrained from withdrawing the money deposited. Thus, the decree-holders could not withdraw the money which remained in deposit. The last order in the execution case was recorded on 23rd May 1929, to the effect that the case was dismissed on full satisfaction and the sale was set aside. The Title Suit No. 21 of 1929 was eventually decreed on 27th February 1933 and Jagat Prasad was allowed to obtain a refund of the money which he had deposited under O. 21, R. 89. Against this decision, the decree-holders, on 10th July 1933, preferred an appeal to this Court which was not decided until 27th August 1938. This Court substantially confirmed the decree of the trial Court. In the meantime, the present application to execute the decree by sale of the properties Nos. 1 to 5 was presented as already stated on 24th February 1936, and numbered as Execution Case No. 38 of 1936. It was resisted on various grounds; but we are only concerned here with the plea that it is barred by time.

The date, 24th February 1936, was nearly seven years after the dismissal of the execution case on 23rd May 1929, and the judgment-debtor's first objection was that the fresh execution was barred by Art. 182 of the Schedule to the Limitation Act. This

was negatived because the right to execute the decree was in suspension from 1929 until the disposal of Jagat Prasad's title suit. The right revived on 28th February 1933, with the result that for the purposes of Art. 182, the decree-holder was entitled to count a period of three years from 28th February 1933. Thus, the Subordinate Judge's decision regarding Article 182 was correct. That Article did not bar a fresh execution presented on 24th February 1936, and it is not contended before us that Article 182 stood in the decree-holder's way. This, however, will not entitle the decree-holder to present a fresh application beyond the period of twelve years from the date of decree laid down in S. 48.

The question, therefore, is whether this application presented on 24th February 1936, is a fresh application to execute the decree. We have referred to the application itself, and it is in the form prescribed for a fresh application to execute a decree. In para. 1 it mentions Execution Case No. 214 of 1926 as being a previous execution case and states that the applicants after giving set off of the amount realized "file this execution case jointly against all the judgment-debtors for the balance of the decretal amount." Particulars follow of the amount due calculated up to the date of the present application and then a list of the judgment-debtors. Then there is a prayer for substitution of parties and also for notices under O. 21, R. 22. It recites the history of Jagat Prasad's title suit and says in para. 16 :

> Because after the passing of the judgment dated 28th February 1933, in the said title suit, these applicants were required to take out the present execution by reason of the said judgment they file this application for execution in this Court.

There is no indication throughout the application that the decree-holders intended or desired it to be treated as one made in continuation of the proceedings already commenced. Nor did the decree-holders, up to the time of hearing their objections, ever petition the Court in writing to treat it as anything but a fresh application. If therefore we are to be guided by the form of the application and are to have regard to what the written word contains, it would seem prima facie to be a fresh application and as such barred by S. 48. This is how the appellant asks us to treat it. The respondents, however, contend that regard is to be had to substance rather than form and that although their application may have been otherwise framed, it is in substance an application to continue the earlier execution and ought to be treated as such.

The first condition necessary to sustain the plea that the present application should be treated as an application to continue the earlier execution is that the earlier execution case must not have been finally disposed of. If it was so disposed of, no question of continuing it can arise. If, on the other hand, there was an interruption in the earlier proceeding by reason of which the Court, being unable to grant the appropriate relief, struck off the case, it cannot be said to have been finally disposed of. It will then be considered to be still pending, and may, if proper case is otherwise made out, be revived and continued. From the state of facts given above, it is obvious that on account of the injunction that was passed in the Title Suit No. 21 of 1929 the executing Court was unable to pay out to the decree-holders the decretal amount which was deposited under O. 21, Rule 89, Civil P. C. Until the amount was available to the decree-holders the decree could not be said to have been satisfied. The order passed on 23rd May 1929, dismissing the execution case on full satisfaction in the face of the injunction was therefore meaningless. Though on the strength of this order it was contended, but unsuccessfully, in the lower Court that the decree was fully satisfied and no further execution could lie, that contention has been rightly abandoned by Sir Manmatha Nath Mukherji in this Court. The true effect of the said order dated 23rd May 1929, in our opinion, must be taken to be that the Court struck off the case, being unable to proceed with it on account of the injunction. In this view the execution case of 1926 may be considered to be still pending.

Now we have to consider the question whether the present application, though in form a fresh application under O. 21, R. 11 (2), Civil P. C., can be regarded as an application to continue the previous execution. For this purpose, it will be necessary to refer to the case law on the point. In 23 W R 183[1] the execution proceedings instituted by the decree-holder were interrupted by a claim case instituted by a third party and the claim being allowed, the execution case was struck off on 7th June 1870. The decree-holder then brought a suit to have it declared that the property in reality belonged to his judgment-debtor and was appli-

1. Booboo Pyaroo Tuhobildarinee v. Syed Nazir Hossain, (1875) 23 W R 183.

cable to the payment of his debts. The suit was decreed on 28th February 1873, and on 5th December 1873, the decree-holder made the application to execute his decree which was resisted on the ground that it was barred by limitation. The remedy sought was sale of the same property which the decree-holder had sought to sell in 1870. It was held that the order striking off execution proceedings in consequence of the result of the claim case was not final being subject to revision in a regular suit. The decree-holder having proved the result of the claim case to be erroneous and thus become entitled to sell the particular property, the Court held :

Whatever may be the form of the last application dated 5th December 1873, in substance, it was an application to the Court for the continuation of the former proceedings on the ground that the bar that was set up by reason of the adverse order under S. 246 had been removed by the decision in the subsequent regular suit.

Their Lordships further observed :

The view we have taken of these proceedings is not open to the observation that the time for executing the decree in such a case thus becomes practically unlimited. Though, in the present case, we hold that the striking off the execution case did not, under the circumstances, put an end to the proceedings, we do not say that if the judgment-creditor had been dilatory or negligent in pursuing his remedy that the result would have been the same. What we hold is that having diligently pursued his remedy to get the order under S. 246 set aside, it may fairly be held that the execution proceedings in this case have been continuous, and that he is proceeding now, not upon a fresh application, but upon his former application.

This decision was followed in the same Court in 4 Cal 415.[2] In this case, the first execution proceeded to sell an attached property, the sale proceeds being paid over to the decree-holder and the execution proceedings struck off on 28th July 1872. The judgment-debtor however obtained on 14th May 1873 an order setting aside the sale and for refund of the sale proceeds. On the decree-holder's application dated 22nd December 1874, to execute the decree, it was held that the application fell within the principle of the earlier decision. It was said:

It is true that the Court executing the decree disposed of the application of 10th July 1871, after the judgment-debtor's property was sold ; but the effect of the subsequent order dated 14th May 1873, by which the sale was set aside and the decree-holder directed to refund the money which he had withdrawn from the Court, was to nullify all the proceedings taken on the application of 10th July.

It would seem that in the latter application the decree-holder was asking the Court to sell the same property the sale of which had fallen through. The Hon'ble Judges thought that although in point of form the petition of 22nd December 1874 was an application to execute the decree, in reality it was simply an application to the Court to continue the proceedings already commenced. A similar view was taken by a Full Bench of the Allahabad High Court in 1 All 355,[3] which like the earlier of the Calcutta decisions was a case in which the decree-holder had had to bring a regular suit to reverse the decision in a claim case and had succeeded in that suit.

The above decisions were considered in the Allahabad High Court in 3 All 484[4] where the facts were somewhat different. The decree-holder had obtained two decrees on bonds executed in his favour by Syed Muhammad and his wife Khair-un-nissa, respectively. He put to sale properties left by Syed Muhammad and standing in the name of his widow Khair-un-nissa and appropriated the sale proceeds to the satisfaction of both his debts. Satisfaction was entered and the execution proceedings struck off on 10th September 1877 ; but other heirs of Syed Muhammad by suit against the decree-holder recovered from him such portions of the proceeds of the sale as had been appropriated towards the bond executed by Khair-un-nissa. The decree-holder then sought to execute the decree for the amount due on Khair-un-nissa's bond but the Court held that the circumstances did not come within the principle of the cases cited that if the decree-holder had the misfortune to buy something that his judgment-debtor had not to sell, he had only himself to blame for putting up an interest to sale that did not exist. Under such circumstances, it would seem that satisfaction was rightly entered up and the execution proceedings properly struck off. It was therefore held that the present application to execute the decree was a fresh application and was barred by the three years' rule.

In a Full Bench decision of the Allahabad High Court in 18 All 482,[5] S. 230, Civil P. C., 1882, corresponding to S. 48 of the present Code was considered. In this case the decree had been passed on 9th April 1880, and in execution on an application presented on 28th September 1885,

2. Issurree Dassee v. Abdool Khalak, (1879) 4 Cal 415=3 C L R 46.

3. Paras Ram v. Gardner, (1877) 1 All 355 (F B).
4. Khair-un-nissa v. Gauri Shankar, (1881) 3 All 484.
5. Rahim Ali Khan v. Fulchand, (1896) 18 All 482=1896 A W N 142 (F B).

attachment was duly made. There were protracted and contentious proceedings for determining the saleability of various items of the property. A sale which had been held was on 13th February 1892 set aside as regards part of the property sold and confirmed as to the remainder and the Court then passed an order directing that the execution proceeding be struck off as partially satisfied with leave to the decree-holder to take any further steps in execution hereafter. The decree-holder on 19th February 1894 petitioned to the Court to restore to the file the execution proceedings which had on 13th February 1892 been struck off and to grant the reliefs prayed for in the application of 28th September 1885. Knox J. in his judgment emphasized that the form of the application was not an application to execute afresh but to continue the former execution. In terms the application of 19th February 1894 was an application praying that Execution Case No. 413 of 1890 struck off on 13th February 1892, be restored to its original number and sale notification be formally issued in respect of the properties previously attached. Banerji J., after pointing out that in form it was not an application for execution as contemplated by S. 235 held further that it was not in substance an application for execution such as was contemplated by S. 230. In this decision both the form and the substance of the application were considered and from both points of view, the same conclusion had to be arrived at. A similar position arose in 27 All 334,[6] a case which came before the Judicial Committee of the Privy Council. Here the application by its terms asked that the execution previously instituted might be revived. Their Lordships held that the earlier execution proceedings

were never finally disposed of and that the application now under consideration was in substance as well as in form an application to revive and carry through a pending execution suspended by no act or default of the decree-holder and not an application to initiate a new one.

Up to this point while decisions in the Calcutta High Court clearly support the view that substance is to be regarded even where it conflicts with the form of the application, that position does not seem to have been definitely accepted in the Allahabad High Court and the question did not directly arise before the Judicial Committee of the Privy Council either in the decision last cited or in 14 W R 21[7] but the Allahabad High Court have definitely accepted this proposition in 32 I C 1005.[8] Here the facts were that the decree was passed on 11th July 1902 and the application for execution was made on 13th November 1914. It was in form a fresh application but the relief sought was a sale of certain property for which the decree-holder had already applied to sell on 12th June 1912. The sale could not at once be held because of a suit instituted by the judgment-debtor's son claiming a declaration that the property attached was not liable to sale in execution of this decree. The suit succeeded in the first Court but on appeal the decree-holder succeeded, and obtained an order from the Appellate Court on 28th August 1914. The appellate order discharged an injunction granted on 23rd January by which execution of the decree was suspended. The Judges who decided the case were both of opinion that the question whether the application before them was a new application or one in continuation of the former execution was a question of fact and not of law. It was to be determined on the facts of the particular case, and in this determination, substance and not form was to be regarded. The facts of the case were on all fours with those in 23 W R 183.[1] Walsh J. observed that if the decree-holder were held to be time barred, the result,

if a Court were driven to it, would be most unfortunate because it would be to turn what is intended as an instrument of justice into an instrument of injustice.

A similar view was taken by the majority of the Judges who decided 56 All 791.[9] In this state of the authorities, we must hold that regard is to be had to substance rather than to the form of the application. The second application will not, however, be considered to be a continuation of the former one if it is found to be different in its scope, or if the former execution is found to have been abandoned by the decree-holder or to have been dismissed through his default or laches: In 2 P L T 22[10] a mortgage decree had been obtained on 7th

6. Kamaruddin v. Jawahir Lal, (1905) 27 All 334 =32 I A 102=2 A L J 397=8 Sar 810 (P C).
7. Maharajahdhiraj Mahtab Chand Bahadur v. Bulram Singh, (1870) 13 M I A 479=14 W R 21=2 Suther 351=2 Sar 597=5 Beng L R 611 (P C).
8. Santlal v. Srinivas Das, (1916) 3 A I R All 24 =32 I C 1005.
9. Shiva Shankar Das v. Yusuf Hasan, (1934) 21 A I R All 481 = 148 I C 1017 = 56 All 791= 1934 A L J 202 (F B).
10. Kesho Prasad Singh v. Harbans Lal, (1920) 7 A I R Pat 570=53 I C 85=2 P L T 22.

September 1905 and an execution pending in 1914 was met with objections under S. 47, Civil P. C., which resulted in an order exempting from sale the properties in respect of which the objections had been presented, but directing the sale of three plots which were the subject of the mortgage. Thereafter the decree-holder not having taken steps in the execution, the case was dismissed for default. An application thereafter presented on 3rd September 1917 was held to be barred by time. It was said that the relief in the present application to sell the mortgaged properties was not the same as in the former application where the prayer was to sell the other properties as well. Therefore, the subsequent application was not identical in its scope and character with the former one. It was further said that a subsequent application for execution cannot be considered as a continuation of the former one if the former one had been dismissed through the fault or laches on the part of the decree-holder in the prosecution of the execution. A distinction is drawn between this case in which the earlier execution broke down because the decree-holder was seeking to sell the property which he was not entitled to sell and such cases as 37 Cal 796[11] where the setting aside of a sale was considered to restore the parties to the position which they would have occupied if the sale had not taken place and an application of the decree-holder for an order absolute for sale was proved to have been erroneously dismissed.

In 10 P L T 807[12] which is a decision of the Privy Council, the facts were that a zamindar who had sold his zamindari on 27th June 1893 instituted a suit for his own arrears of rent against the patnidars on 21st September 1893 and obtained a decree on 10th July 1896. An application for execution of the decree was made on 9th May 1908 on the footing that the decree was a rent decree creating a charge on the tenure. Subsequently, in a suit between the parties concerned, it having been held by their Lordships of the Judicial Committee in 1914 that the decree of 10th July 1896 was not a decree for rent creating a charge on the tenure but only a money decree, the decree-holders presented three successive applications for execution on 22nd January 1915, 19th March 1917 and 23rd November 1918 on the footing that the decree of 10th July 1896 was a money decree. These applications being infructuous, the decree-holders presented a fresh application on 2nd December 1922 for execution of the decree of 10th July 1896 as a rent decree creating a charge on the tenure. This application being presented more than 12 years after the date of the decree, the decree-holder contended that it should be treated as a continuation of the application for execution which had been filed on 9th May 1908. Their Lordships of the Judicial Committee agreeing with the decision of the lower Courts rejected this contention. Their Lordships observed as follows :

> Their Lordships have no doubt that the applications of 22nd January 1915, 19th March 1917 and 23rd November 1918, were essentially different in character from the application of 9th May 1908, and they are inclined to the view that the decree-holders had abandoned the application of 9th May 1908, which proceeded on the footing that their decree created a charge on the tenure, but in any event they are clearly of opinion that the combined effect of these previous applications marks such substantial departure from the original application of 9th May 1908, as to make it impossible to hold that the application of 2nd December 1922, was a continuation of the application of 9th May 1908.

In order to apply the principles deducible from these decisions to the case before us, it is necessary to examine the facts of the case before us. The application which the decree-holder says he is now still continuing was presented on 7th July 1926, (Ex. 1). Prayer was made for sale of nine properties, in five of which the present objector was interested, those being Nos. 1 to 5 of the schedule while other parties were interested in properties Nos. 6 to 9. In April 1929, the proceedings had reached the stage of being ripe for sale and properties Nos. 1 to 4 of the sale proclamation were actually put up and a bid was made on behalf of the decree-holder which, according to the purport of the order sheet dated 12th April 1929, would appear to have been sufficient to satisfy the entire decree. The sale, however, was not knocked down but kept on hammer. On 12th April 1929, the decree-holder acknowledged receipt of Rs. 4800 from the present objector and two other parties of judgment-debtors and prayed that the sale of properties Nos. 1 to 5 be postponed and that of properties Nos. 6 to 9 proceeded with for the balance of the decretal amount. This was opposed by Jagat Prasad, judgment-debtor 27, who contended

11. Madhab Mani Dasi v. Lambert, (1910) 37 Cal 796=6 I C 537 = 12 C L J 328 = 15 C W N 337.
12. Maharaj Bahadur Singh v. A. H. Forbes, (1929) 16 A I R P C 209 = 118 I C 268 = 10 P L T 807 (P C).

that the decree could have been satisfied by accepting the bid in respect of properties Nos. 1 to 5 of the sale list. The objection was, however, disallowed, the decree-holder's petition accepted, the auction of properties Nos. 1 to 5 was abandoned, and the decree-holder was allowed to put up properties Nos. 6 to 9 of the list. The petition of the decree-holder dated 12th April 1929 did not ask that properties Nos. 1 to 5 be completely exempted from sale but prayed

for the sale of properties Nos. 6, 7, 8 and 9 as mentioned in the sale list of the execution petition for realization of the balance of the decretal amount, and in case of deficiency, the sale of properties Nos. 1 to 5 of the said list.

To this prayer the present objector and others who had paid portions of the decretal amount assented. It would seem therefore that the relief claimed in the present application was a relief contemplated by the parties in the event of the decree not being satisfied by sale of properties Nos. 6 to 9. The present application is therefore within the scope of the former execution. It is also in substance an application to continue the previous execution because what the decree-holders now really ask for is that the sale of properties Nos. 6 to 9 having proved abortive, the sale of the other mortgaged properties may be proceeded with. It remains to consider whether the failure of the execution proceedings against properties Nos. 6 to 9 was due to any default on the part of the decree-holder. Jagat Prasad's challenge to the decree against him succeeded on the ground that the decree as against Jagat Prasad was a nullity having been passed against a minor without taking proper steps for his representation. We have not been shown the judgment in Title Suit No. 21 of 1929 but it is stated by the Subordinate Judge in the order now under appeal that :

In the Title Suit No. 21 of 1929, Jagat Prasad, prayed for a declaration that he is not liable to contribute any amount and that the sale of his property is null and void and without jurisdiction.

The Subordinate Judge says :

From all these judgments it is clear that the sale held in Execution Case No. 214 of 1926 was declared null and void and Jagat Prasad was ordered to withdraw the money deposited by him in the above execution case.

It is also stated that the suit was decreed against defendants 1 to 14, the decree-holders, but dismissed against the other defendants. It may be inferred that Jagat Prasad did not get as against the other judgment-debtors a declaration that he was not liable to contribute any amount. Can it then be said that the failure of the decree-holders to sell properties Nos. 6 to 9 and to exhaust their remedy against Jagat is a default or laches disentitling them to revive their former execution? The answer seems to be that such a default must be default or laches in executing the decree and not any defect in the decree itself. For the aforesaid reasons we hold that the application for execution presented on 24th February 1936, should be treated as a continuation of the previous application which was filed in Execution Case No. 214 of 1926. In that view the bar of S. 48, Civil P. C., does not apply. We accordingly dismiss the appeal but, in the circumstances, without costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 437

AGARWALA AND ROWLAND JJ.

Mrs. Zohada Begum Saheba —
Defendant — Petitioner.

v.

Messrs. Haji Dawood Ayed, Firm and others — Opposite Party.

Civil Revn. No. 42 of 1940, Decided on 5th February 1940, against order of Sub-Judge, Dhanbad, D/- 19th January 1940.

Civil P. C. (1908), O. 26, R. 4—Application by defendant for issue of commission for examination of her husband serving as Deputy Magistrate unable to obtain leave and more than 200 miles from Court — Application held should have been granted.

A defendant in a suit applied for the issue of commission for the examination of her husband as a witness on her behalf. At the time of the application the husband was serving as Deputy Magistrate more than 200 miles from the Court where the suit was pending. He was unable to obtain leave to proceed to the Court. The Court refused the application :

Held that the Court acted with material irregularity in the exercise of its jurisdiction in refusing the application. [P 438 C 1]

S. C. Mazumdar and S. C. Ghose — *for Petitioner.*

Syed Ali Khan and H. R. Kazimi — *for Opposite Party.*

Agarwala J.—This is an application by defendant 1 against an order of the Subordinate Judge of Dhanbad refusing to accede to her request to issue a commission for the examination of her husband as a witness on her behalf. The application was made in a suit in which defendant 1 is being sued for breach of contract. The ground on which the Court below has rejected the application is that the husband of defendant 1 will be an important witness

in the case and it is, therefore, desirable that the Court should have the advantage of watching his demeanour while deposing. The husband of defendant 1 is at present serving as a Deputy Magistrate in Orissa, more than 200 miles from the Court where the suit is pending in Dhanbad. O. 16, R. 19, therefore, is a bar to the Court obtaining the presence of the witness by summoning him. O. 26, R. 4 confers upon the Court a discretion to permit witnesses to be examined on commission. The only question therefore is whether the Court has acted with material irregularity in the exercise of its jurisdiction in refusing the application of defendant 1. In 21 M L J 889[1] a Division Bench held that "a party to a suit has a right to the issue of a commission to examine a witness beyond the prescribed distance."

This decision was followed by a single Judge of the same Court in 46 Mad 574.[2] On behalf of the opposite party, it was contended that defendant 1 has acted mala fide and that her conduct shows her intention of delaying the hearing of the suit. This contention is based on the fact that in October the husband of defendant 1 applied for leave, apparently with the object of proceeding to Dhanbad to be examined as a witness, and that although his application for leave was refused defendant 1 took no steps to apply for a commission until 16th January 1940. It appears however that in December negotiations for compromising the suit were in progress and that after those negotiations had fallen through the husband of defendant 1 wrote to the latter's pleader at Dhanbad on 3rd January 1940, again stating that he would be unable to obtain leave to leave the district and therefore instructing the pleader to apply for his examination on commission. It does not therefore appear that the conduct of defendant 1 displays any negligence in this matter. In view of this fact and of the importance of the examination of the husband of defendant 1 and of the fact that he is performing public duties in Orissa, we consider that the Court acted with material irregularity in refusing the application. I would therefore set aside the order of the Court below and direct the issue of a commission for the examination of the husband of defendant 1.

1. Vidya Purna v. Sitamma, (1911) 21 M L J 889 =12 I C 74.

2. Jagannatha Sastri v. Sarathambal Ammal, (1923) 10 AIR Mad 321=71 I C 530=46 Mad 574=44 M L J 202.

The parties will bear their own costs of this application.

Rowland J.—I agree.

D.S./R.K. *Order set aside.*

A. I. R. 1940 Patna 438

HARRIES C. J. AND MANOHAR LALL J.

Shiva Prasad Singh—Plaintiff — Appellant.

v.

Smt. Mandira Kumari Debi — *Defendant*—Respondent.

Appeal No. 48 of 1937, Decided on 19th January 1940, from original decree of Sub-Judge, Dhanbad, D/- 15th October 1936.

(a) Adverse Possession—Agreement to lease — Possession of person under agreement to lease is not adverse — He is merely tenant at will and can be ejected — His only defence against ejectment is claim for specific performance of contract to lease if same is not barred — But such claim shows that he was not trespasser and his possession was not adverse—Fact that proposed lessor stood by and permitted him to erect structures does not bar ejectment suit by reason of estoppel, acquiescence or waiver.

A person in possession under an agreement to lease is in a very different position from a person in possession under a lease which has been registered. He is a tenant at will or something of that nature pending the execution of a registered lease. He has no defence to a claim for ejectment other than a right to insist upon specific performance of the contract to lease. If he is sued for ejectment, he can apply for a stay of proceedings to enable him to institute a suit for specific performance if such is not barred by limitation. But he has no right whatsoever to apply for specific performance if he has repudiated the agreement to lease and asserted a title adverse to the proposed lessor. Where therefore he claims a right to maintain a suit for specific performance of the agreement to lease when the ejectment suit was instituted, then it must follow that up till that time he was not a mere trespasser and was not holding adversely to the proposed lessor but, on the contrary was holding the land under the agreement to lease and such would not give him any title under the Limitation Act, and the fact that the proposed lessor did not interfere but on the contrary stood by and permitted him to erect structures does not bar the suit for ejectment by reason of any doctrine of estoppel, acquiescence and waiver : *A I R 1931 P C 79, Rel. on; (1882) 21 Ch D 9; (1882) 8 A C 467; (1811) 18 Ves 328 and (1866) 1 H L 129, Expl. ; (1879) 4 A C 324; AIR 1929 Pat 117 and A I R 1933 Pat 288, Disting.*

[P 442 C 1, 2 P 443 C 1]

(b) Bengal Cess Act (9 of 1880), Ss. 4 and 41 (2)—Word "tenure-holder" — Meaning — Decree under S. 41 (2) against person does not establish that he is tenure-holder in strict sense.

The holder of tenure, for the purposes of the Cess Act, includes all persons holding any interest in land whether rent-paying or not with certain exceptions. All that the rent cess decrees under S. 41 (2) show is that the person against whom they were obtained held an interest in land which

made him liable for payment of cess, and they do not establish that it had been held that he was a tenure-holder in the strict sense of the word. Therefore, a mere finding that he was a tenure-holder for the purposes of the Cess Act does not amount to anything more than he held some interest in the land which made him liable for cess.

[P 443 C 2 ; P 444 C 1]

P. R. Das, N. N. Ray and Vishnudeva Narayan — *for Appellant.*

S. C. Mazumdar and Ramanugrah Narain Sinha — *for Respondent.*

Harries C. J.—This is a plaintiff's first appeal from a decree of the learned Subordinate Judge of Dhanbad decreeing his claim in part for possession of certain property. There is also a cross-objection of the respondent claiming that the suit should have been dismissed in its entirety. The plaintiff is the Raja of Jharia and the proprietor of what is known as the Jharia Estate. The claim was in respect of about 82 bighas of land. With regard to 38 bighas 13 kathas, the plaintiff claimed possession on the ground that he had terminated whatever interest the defendant had in the property. With regard to the remaining 43 bighas, the plaintiff alleged that the defendant was a mere trespasser and claimed to eject her upon the ground that the latter had no title whatsoever to the property.

The plaintiff's case can be shortly stated as follows: On 30th Aswin 1325 B. S. Thakur Prankrishna Singh, since deceased, husband of the defendant, applied to the Raja for settlement of certain homestead land in Jharia and Fatehpur. The lands were measured and the area was found to be 38 bighas 13 kathas. The Raja agreed to make a settlement of this land in favour of Thakur Prankrishna Singh at a rental of Rs. 5 per bigha and a salami of Rs. 1000. No written agreement was entered into between the parties; but it is clear that the Raja did agree to these terms as will be seen from a note signed by him for the information of his own office. This note is printed at page 4 of part 3 of the paper-book. It is alleged that the parties agreed that a lease should be executed and that Thakur Prankrishna Singh immediately took possession of the land and paid the salami of Rs. 1000. No lease however was ever executed; but the defendant's husband remained in possession of the land and paid no rent. In 1925 the Record of Rights was published and in the Record of Rights the defendant's husband was wrongly shown as a tenure-holder in respect of this property. The plaintiff gave notice to the defendant calling upon her to give up possession of the property, but as she refused to do so the present suit was brought. With regard to the 43 bighas of land, the plaintiff alleged that Thakur Prankrishna Singh had gradually encroached upon the plaintiff's land and had in course of time wrongfully taken possession of these 43 bighas; hence he claimed possession of this land also. In her written statement the defendant pleaded that the Raja had agreed to give a permanent lease of the whole 82 bighas of land and that salami of Rs. 1000 had been paid to the plaintiff and further that the plaintiff had been given certain other lands in exchange. The defendant admitted that no lease had been executed, and in para. 10 she stated that she was entitled to maintain a suit for specific performance of the agreement to lease. She further pleaded that the claim was barred by estoppel, acquiescence and waiver and that the suit was barred by the principle of res judicata. Limitation was not expressly pleaded; but the point was raised at the trial and an issue framed upon it.

The learned Subordinate Judge did not accept the defendant's case that there had been an agreement to lease the whole area of 82 bighas. He found that the agreement between the parties related only to 38 bighas 13 kathas and that with respect to the other land the defendant had encroached upon it. The learned Judge came to the conclusion that as there had been no registered lease of the 38 bighas odd the defendant's title became adverse to the plaintiff from the time her deceased husband took possession, and as the defendant and her husband had asserted title as tenure-holders adversely to the plaintiff for more than twelve years she had acquired a title to the 38 bighas odd and could not be ejected. With regard to the area of 43 bighas, the learned Judge came to the conclusion that the defendant had not been in adverse possession of 22 bighas odd of this land for more than twelve years. He however held that with regard to an area of 20 bighas odd, the defendant had been in possession adversely to the plaintiff for the statutory period and accordingly she had a title to it. In the result the plaintiff's claim was partly allowed and a decree for possession was given in respect of about 22 bighas only. The finding of the learned Subordinate Judge that the agreement to lease comprised only 38 bighas 13 kathas has not been challenged by the defendant. The documents make it clear

that the defendant's husband only applied for settlement of 38 bighas 13 kathas and that the salami of Rs. 1000 was paid in respect of the settlement of this land and this land only. The defendant's husband was undoubtedly recorded in the Record of Rights in 1925 as being a tenure-holder of 82 bighas of land, and in my view there can be no doubt that the defendant's husband encroached considerably on the plaintiff's land and thereby increased his holding from 38 bighas odd to roughly 82 bighas. The case has been argued upon the finding that 38 bighas odd only were the subject-matter of this agreement and that the defendant's title, if any, to the remaining 42 bighas odd is based upon adverse possession by encroachment for over twelve years.

On behalf of the appellants it has been contended, that the learned Judge was wrong in holding that the defendant had a good title to the area of 38 bighas, 13 kathas by adverse possession. It was urged that upon the facts of this case no question of adverse possession can possibly arise with respect to this area. It is said that the Raja agreed to lease this area to the defendant's husband and that in pursuance of the agreement the defendant's husband took immediate possession of the property and paid salami of Rs. 1000. According to the plaintiff, the defendant's husband and afterwards the defendant continued in possession of this land in pursuance of the agreement and as such their possession could never be regarded as adverse to the plaintiff. During such possession, the plaintiff contends that the defendant was entitled to call upon the Raja to grant a lease in proper form and that if he refused to do so, she or her husband could have brought a suit for specific performance. The learned Subordinate Judge has held that there was never any refusal on the part of the Raja to grant a lease until he gave notice to the defendant calling upon her to give up the property. Such a notice would, of course, amount to an intimation that the Raja refused to grant a lease. The plaintiff contends that even after this notice was given a suit for specific performance could have been brought within three years of the date of the notice : *see* Article 113, Limitation Act. On the other hand, the defendant has contended that there was a present demise of this property and as the demise was not by a properly executed and registered instrument it was void. Accordingly, the defendant contends that her husband entered under a void lease which gave him no title whatsoever and therefore time began to run against the plaintiff from the date upon which her husband took possession.

In my view there was no actual demise in this case and such was never alleged in the written statement. In para. 4, it is stated that the plaintiff agreed to give a lease in permanent nishkar right of the entire land in suit to the defendant's husband, and in para. 10 the defendant submits that she had a right to get specific performance of the oral contract referred to in paras. 2 and 3 of the plaint which was an oral contract to grant a lease. In short, in the written statement the defendant admitted that all that had happened was that an oral agreement had been made between the parties respecting this 38 bighas 13 kathas of land and that Thakur Prankrishna Singh had paid Rs. 1000 salami and had taken possession of the land in pursuance of that agreement. In my judgment there was no actual demise of the land but only an agreement to lease the same and Thakur Prankrishna Singh took possession not of land demised to him there and then but of land which the plaintiff agreed to lease to him by a registered lease to be executed thereafter.

The respondent relies on a number of cases to support his contention that possession of the defendant's husband was adverse from the moment he entered upon the land. The first case relied upon is (1879) 4 A C 324[1] the facts of which are as follows : The governors of Magdalen Hospital made in 1783 a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, &c. during the term, and to surrender the premises at its end; and, on the part of the governors, for quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July 1876, the governors brought an action to recover possession of the land thus leased. It was held that the lease was absolutely void within the provisions of the statute 13 Eliz., c. 10. That consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the statute of limitation. It was

1. Magdalen Hospital v. Alfred Knotts, (1879) 4 A C 324=48 L J Ch 579=40 L T 446 = 27 W R 602.

also held by Lord Selborne that if any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the statute of limitations could not have run. It will be observed that in this case the tenant entered under a lease which was void ab initio and held throughout under that void lease. The lease gave him no title of any kind to the property and he could have been ejected from the moment he had entered into possession. That being the case, the House of Lords held that time began to run against the landlords from the date upon which the tenant took possession. Throughout no rent was ever demanded or received. This case differs from the case before the Court because there was an actual demise which was void. In the present case there was no actual demise but merely an agreement to lease. The defendant's husband did not take possession in consequence of an instrument which gave him no title whatsoever, but he took possession in consequence of the agreement to lease and upon paying salami of Rs. 1000. He entered into possession with the consent of the landlord and he did not purport to hold the land under any instrument which gave him no title whatsoever to the property.

Reliance was also placed upon the case in 8 Pat 549.[2] In that case it was held that a gift of a portion of an estate in contravention of S. 12-A (1) (a), Chota Nagpur Encumbered Estates Act, 1876, is void ab initio and not merely from the death of the donor, and the possession of the donee is adverse to the proprietor of the estate from the date of the alienation. This case is very similar to the case in the House of Lords to which I have referred. The donee entered into possession as a result of a transaction which was void ab initio, and that being so, his possession was adverse from the date of the gift and time began to run in his favour from such date. Counsel for the respondent further relied upon 14 P L T 294.[3] In this case also, possession was taken under a void transaction and that being so time began to run against the owner from the date of the transaction. All these cases are, in my view, clearly distinguishable from the present case. As I have stated earlier, the transaction entered into between the parties in this case was a perfectly valid one. Possession was taken in pursuance of it, and it cannot be said that the defendant's husband took possession and asserted a title which was in any way adverse to the plaintiff. He took possession pending the execution of a registered lease and according to para. 10 of the written statement the nature of the possession of the defendant's husband and of the defendant remained the same until the suit was instituted. The defendant's husband never took possession of this property as a lessee or as a tenure-holder, and he was, in my view, a tenant-at-will or something of that nature pending the execution of a registered lease.

It has been contended however that the nature of the possession of the defendant's husband must have changed because in the year 1925 he was regarded as a tenure-holder of 82 bighas of land which included the area of 38 bighas 13 kathas which was the subject-matter of this agreement to lease. It is urged that the Record of Rights shows that the defendant's husband was claiming to be a tenure-holder and this adversely to the plaintiff. That being so, it is said that limitation began to run in his favour from the time when he put forward this claim. Even if this contention be accepted, it does not assist the defendant. There is no evidence that the defendant's husband openly asserted an adverse title until the publication of the record of rights and that was in the year 1925. If time began to run in 1925 in favour of the defendant which is by no means clear, then the suit is not barred by limitation. The view that I take that the possession of the defendant's husband at its inception was not adverse to the plaintiff is supported by the case in 58 Cal 1235.[4] It had long been held in India that the English rule in (1882) 21 Ch D 9[5] applied to India and that a person who had entered into possession under an agreement to lease was in equity in very much the same position as the actual lessee. It was held however in 58 Cal 1235[4] that a person who took possession under an agreement to lease was not in the same position as he would be under English law. The facts in 58 Cal 1235[4] can be shortly stated as follows : In 1913, the

2. Bageswari Charan Singh v. Jagarnath Kuari, (1929) 16 A I R Pat 117=115 I C 699=8 Pat 549.
3. Abdul Jabbar Khan v. Gulab Khan, (1933) 20 A I R Pat 288=144 I C 439=14 P L T 294.
4. Ariff v. Jadunath Majumdar, (1931) 18 A I R P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).
5. Walsh v. Lonsdale, (1882) 21 Ch D 9=52 L J Ch 2=46 L T 858=31 W R 109.

appellant, having verbally agreed with the respondent to grant him a permanent lease of a plot of land at Rs. 80 per month, let him into possession. Shortly afterwards, the respondent, with the knowledge and approval of the appellant, erected structures on the land at a cost of over Rs. 10,000. In December 1918, the appellant definitely refused to grant the respondent the agreed lease, and, in 1923, sued to eject him after a month's notice to quit. Under the Limitation Act, 1908, Sch. 1, Art. 113, the respondent's right to sue for specific performance of the verbal agreement was barred in December 1921.

It was held that there being no lease made by a registered document, as required by S. 107, T. P. Act, 1882, the appellant was entitled to eject the respondent, with liberty to him to apply to remove the structures; had the respondent's right to sue for specific performance not been barred, he could have claimed the execution of an instrument, which he could have registered, the appellant's suit being stayed in the meantime. It was further held that even if an English equitable doctrine should be applied in any case so as to modify the effect of an Indian Act, which may well be doubted, the English equitable doctrine of part performance, referred to in (1882) 8 A C 467,[6] affecting the provisions of an English statute as to the right to sue upon a contract, cannot be applied, so as to create, without writing, an interest, which S. 107, T. P. Act, enacts can be created only by a registered instrument.

This case clearly lays down that a person in possession under an agreement to lease is in a very different position from a person in possession under a lease which has been registered. He has no defence to a claim for ejectment other than a right to insist upon specific performance of the contract to lease. If he is sued for ejectment, he can apply for a stay of proceedings to enable him to institute a suit for specific performance if such is not barred by limitation. In 58 Cal 1235,[4] the defendant's right to sue for specific performance was barred in December 1921, because the appellant had definitely refused to grant such a lease in December 1918. Accordingly the respondent had no defence whatsoever to the suit and a decree for possession was passed. In the present case, the learned Judge has found and rightly found that the plaintiff had never intimated that he would not grant a lease until he gave notice to the defendant calling upon her to vacate the premises. Indeed, the defendant herself in para. 10 of the written statement submits that she had a right to maintain a suit for specific performance when the suit was instituted. The right to maintain a suit for specific performance was not barred when the present suit was instituted and that being so the defendant could have applied to the Court to stay proceedings in order to prosecute her suit for specific performance. If she could obtain stay of proceedings to institute a suit for specific performance, it clearly shows that she was not a mere trespasser and that her possession was not adverse to the plaintiff. A person who holds under an agreement to lease has no right whatsoever to apply for specific performance if he has repudiated the agreement to lease and asserted a title adverse to the proposed lessor. If the defendant, as is urged by her, had a right to maintain a suit for specific performance of the agreement to lease when this suit was instituted, then, it must follow that up till that time she was not holding adversely to the plaintiff but on the contrary was holding the land under the agreement to lease and such would not give her any title under the Limitation Act. Even assuming that by reason of an assertion of adverse title at the date of the publication of the Record of Rights in 1925, the defendant could not claim specific performance when this suit was instituted, yet as I have stated earlier she has no title by limitation by reason of the fact that twelve years had not expired from the date of the publication of the Record of Rights when this suit was instituted. In my judgment the learned Judge was wrong in holding that the suit with respect to 38 bighas 13 kathas of land was barred by limitation.

It was also urged by counsel that the plaintiff's suit with respect to this property was barred by reason of the doctrine of estoppel, acquiescence and waiver. After the defendant's husband took possession of the property, structures were erected upon it, and such must have been erected to the knowledge of the plaintiff or his agents. Accordingly, it was said that the plaintiff had stood by and allowed the defendant's husband to expend money on the property. Therefore his suit to eject the defendant was barred by estoppel and acquiescence. A precisely similar point arose in 58 Cal 1235[4]

6. Maddison v. Alderson, (1882) 8 A C 467 = 52 L J Q B 737=49 L T 303=31 W R 820 = 47 J P 821.

to which I have already referred. In that case very valuable structures had been erected, and it was contended that the suit was barred by the doctrine of equitable estoppel, laid down in (1811) 18 Ves 328,[7] as explained in (1866) 1 H L 129.[8] Dealing with this part of the case, Lord Russell, who delivered the judgment of the Board, observes at page 1243 :

> This is no case of money being expended by the respondent in any mistaken belief as to his legal rights, or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent. Observe the true facts. In 1913 the respondent obtained a verbal agreement for the grant of a perpetual lease, under which agreement he could have sued for and obtained and registered an instrument creating his title to enjoy the property in perpetuity. That agreement continued to be enforceable against the appellant until the month of December 1921. The structures were erected on the land many years before that date, and they were erected, not in any mistaken belief by the respondent of his rights in regard to the land, but in assertion of rights which he correctly believed to be his; not by reason of any encouragement or abstention on the part of the appellant, but by reason of the agreement which he was then entitled to enforce against the appellant.

These observations apply equally to the facts of the present case. The defendant's husband entered into possession under an agreement to lease and began to erect these structures not in any mistaken belief as to his rights but in assertion of rights which he correctly believed to be his. The plaintiff did not in any way mislead or encourage the defendant by not interfering because he could not have interfered as long as the defendant's husband had a right to sue for specific performance. In my judgment, the fact that the plaintiff did not interfere but on the contrary stood by and permitted the structures to be erected does not bar this suit by reason of any doctrine of estoppel, acquiescence and waiver. This Court is bound by the principles laid down in 58 Cal 1235,[4] and that being so, I am constrained to hold that there is no force in the contention that the plaintiff could not maintain his suit to recover this 38 bighas 13 kathas of land by reason of the doctrine of estoppel, acquiescence and waiver. It was also urged in this case that the plaintiff's suit was barred by the doctrine of res judicata. It appears that a plot of land of about 11 bighas was compulsorily acquired under the Land Acquisition Act and that the defendant's husband was held to be entitled to compensation as a tenure-holder. It has been contended by the defendant that in these proceedings it was found that the defendant's husband was a tenure-holder and accordingly that it is not now open to the plaintiff to allege to the contrary. It is to be observed however that the plot of land in question formed no part of the area of 38 bighas 13 kathas which was the subject-matter of the agreement to lease. That being so, any finding as to the nature of the possession of the defendant's husband with regard to the plot of 11 bighas can in no way operate as res judicata with regard to the suit in so far as it deals with the area of 38 bighas 13 kathas. The learned Subordinate Judge held that the suit with regard to this area was not barred by res judicata and in my view rightly.

It was also contended that the suit was barred by res judicata by reason of the fact that the plaintiff had obtained certain decrees for cess against the defendant's husband, and it is said that those decrees for cess were given on the basis that the defendant's husband was a tenure-holder of the property in question. By S. 41 (1), Cess Act, 1880, every holder of an estate has to pay to the Collector the entire amount of the local cess calculated on the annual value of the lands comprised in such an estate; and by sub-s. (2), every holder of a tenure shall yearly pay to the holder of the estate or tenure within which the land held by him is included, the entire amount of the local cess of the land comprised in his tenure. These cess decrees were obtained under S. 41 (2), Cess Act, and it is urged that they could not have been obtained unless it had been held that the defendant's husband was a tenure-holder. For the purposes of the Cess Act the term "tenure-holder" has a very wide meaning. The word "tenure" is defined in S. 4 as including every interest in land, whether rent-paying or not, save and except an estate as defined in the Act, and save and except the interest of a cultivating raiyat. In short, the holder of a tenure, for the purposes of the Cess Act, includes all persons holding any interest in land whether rent-paying or not with certain exceptions. All that these rent cess decrees show is that the defendant's husband held an interest in land which made him liable for payment of cess, and they do not establish that it had been held that he was a tenure-holder in the strict sense of the word. The defendant did hold

7. Gregory v. Mighell, (1811) 18 Ves 328=11 R R 207.
8. Ramsden v. Dyson, (1866) 1 H L 129=12 Jour (N S) 506=14 W R 926.

an interest in land which may or may not have rendered him liable to cess; but a mere finding that he was a tenure-holder for the purposes of the Cess Act does not amount to anything more than he held some interest in the land which made him liable for cess. In my view these cess decrees, which apparently were obtained without contest, cannot operate to bar the plaintiff's claim on principles of res judicata.

The plaintiff is therefore entitled to possession of the area of 38 bighas 13 kathas. He does not however claim the structures erected on the land by the defendant and her husband, and the latter should, in my view, be given an opportunity of removing them if they now exist as was ordered in 58 Cal 1235[4] previously cited. With regard to the remaining 43 bighas of land, Mr. P. R. Das on behalf of the appellant has conceded that his claim was bound to fail with regard to the plot of 11 bighas odd which was the subject-matter of the land acquisition proceedings. This land was not in the possession of the defendant at the date of the suit and therefore no claim in possession in respect of it could possibly succeed. With regard to the remaining 8 bighas odd of land, Mr. Das has contended that the learned Subordinate Judge should have ejected the defendant therefrom. The learned Subordinate Judge has found, and in my view rightly, that the defendant's husband and the defendant had been in possession of this plot for more than twelve years before the suit was brought. Mr. Das did not seriously contest this finding; but he has contended that as this land abutted on to the plot of 38 bighas 13 kathas which the defendant's husband was in possession under an agreement to lease, the possession of the defendant was in fact and in law possession on behalf of the landlord plaintiff. It is unnecessary to consider the appellant's contention upon this aspect of the case, because Mr. Das very properly did not press it and eventually did not ask the Court to reverse the finding of the learned Subordinate Judge with respect to this plot of 8 bighas odd.

In support of the cross-objection, Mr. Majumdar, counsel for the respondent, has urged that the learned Judge was wrong in holding that the plaintiff had established his claim to 22 bighas odd out of the 43 bighas odd upon which the defendant's husband had encroached. The learned Subordinate Judge held that there was no evidence that the defendant's husband was in possession of this 22 bighas odd before the date of the publication of the Record of Rights in 1925. In the Record of Rights the defendant is shown as being in possession of 82 bighas as tenure-holder and this 82 bighas comprised not only the 38 bighas 13 kathas which was the subject-matter of the agreement to lease but also 43 bighas odd which had been encroached upon. The learned Subordinate Judge has come to the conclusion that there was no satisfactory evidence that the defendant's husband had been in possession of these 22 odd bighas of land before 1925, and with this view I agree. With regard to the remaining land encroached upon, there was such evidence. The Court cannot assume from the fact that the defendant was shown in possession of the land in 1925 that he had been in adverse possession for any period of time previous to that year. The only evidence of adverse possession with respect to these 22 bighas of land was the entry in the Record of Rights and that showed adverse possession from the year 1925. Such would not give the defendant a title by adverse possession to this area of land, and that being so, the learned Subordinate Judge was right in giving the plaintiff a decree for possession of the same. The result therefore is that this appeal is allowed in part and the plaintiff is given a decree for possession with respect to the area of 38 bighas 13 kathas as well as the area for which a decree for possession had already been granted. The defendant is given three months' time from today to remove the structures if any constructed by her or her husband on the area of 38 bighas 13 kathas. The claim with respect to the remainder of the area of 82 bighas was rightly dismissed and the appeal with respect to that area fails. The cross-objection also fails and is dismissed with costs. The plaintiff will be entitled to proportionate costs in this Court and in the Court below.

Manohar Lall J. — I agree.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 444

ROWLAND AND CHATTERJI JJ.

Sampat Lal and others — *Plaintiffs* — Appellants.

v.

Kaluram Brijmohan and others — *Defendants* — Respondents.

Appeal No. 128 of 1939, Decided on 7th February 1940, from original order of Sub-Judge, Saran, D/. 5th May 1939.

Jurisdiction — *A*, residing and doing business at Saran, having transactions with *B*, residing and doing business at Bombay — *A* mortgaging certain property in Saran for money due to *B* — *B* bringing mortgage suit in Bombay and obtaining decree — *A* suing in Court at Saran for declaration that decree of Bombay Court is nullity and fraudulent — Court of Saran held had no jurisdiction to try case.

One *A* who was a resident of the district of Saran carrying on cloth business in the town of Chapra had transactions with *B*, who resided and ordinarily did business in Bombay. *A* executed a simple mortgage bond hypothecating some immovable properties in the district of Saran for the payment of debts due from him to *B*. *B* brought a mortgage suit at Bombay, obtained a preliminary decree ex parte and through his attorneys sent to *A* a notice intimating that the High Court at Bombay would be moved for certain reliefs in the matter of sale of the mortgaged properties. *A* filed a suit at Saran for a declaration that the decree obtained at Bombay was illegal, fraudulent and a nullity:

Held that the place where *A*'s cause of action arose was Bombay and the Subordinate Judge at Saran had no jurisdiction to try the case: *29 All 418 ; A I R 1914 All 93 and A I R 1924 Pat 831, Rel. on.* [P 446 C 1]

Sarjoo Prasad and Jaleshwar Prasad — *for Appellants.*

Dr. Sir Sultan Ahmad, Chowdhury Mathura Prasad and Ajit Kumar Mitter — *for Respondents.*

Rowland J.—The appellants are plaintiffs whose plaint was returned on 5th May 1939 for presentation to the proper Court on the ground that the Subordinate Judge of Saran in whose Court the suit had been instituted had no territorial jurisdiction to entertain it. The correctness of that order is the only point for consideration in the appeal. The facts leading up to the suit are that the plaintiffs along with the pro forma defendants are residents in the district of Saran carrying on cloth business in the town of Chapra and that they had transactions with the defendants first party who reside and ordinarily do business in Bombay. The plaintiffs and the defendants first party executed in 1935 a simple mortgage bond hypothecating some immovable properties in the district of Saran for the payment of debts due from them to the defendants first party. Thereafter the defendants first party brought a mortgage suit on the original side of the High Court at Bombay, obtained a preliminary decree ex parte and through their attorneys sent to the plaintiffs a notice which the latter received on 15th March 1939 intimating that the High Court at Bombay would be moved on 21st March 1939 for certain reliefs in the matter of sale of the mortgaged properties. The plaintiffs filed the present suit on 17th March 1939. The prayer is for a declaration that the decree obtained at Bombay is illegal, fraudulent and a nullity and is liable to be set aside and for an order to set aside the decree. There was also a prayer for interim injunction, but that has been disallowed by the Court below and is not pressed for in this appeal.

It is contended that the Bombay High Court had no territorial jurisdiction and therefore the decree obtained there is a nullity. The contention was based on the fact that the present plaintiffs, defendants of the mortgage suit, did not reside in Bombay, nor according to them did the cause of action wholly or in part arise in Bombay. The suit being on a mortgage should, it is said, have been instituted in the Court having territorial jurisdiction in the place where the mortgaged property is situated. These matters are not sufficient to give a cause of action for a suit instituted in Chapra unless some event taking place within that district is a part of the cause of action. As for the question whether the Bombay High Court had territorial jurisdiction, that is not a matter which can be canvassed here except in a suit which the Court has jurisdiction to entertain. Therefore the point for decision here is not whether the Bombay High Court had territorial jurisdiction over the previous suit, but whether the plaintiffs have set up a cause of action entitling them to sue in Chapra; and it is argued that they have such a cause of action arising out of two matters, first, that as stated in para. 5 of their plaint the plaintiffs received a notice on 15th March 1939 from the attorneys of the first party defendants; secondly, that the decree was obtained by fraudulent suppression of summons and this must be considered to be done in Chapra because the summons if it had been duly served ought to have been served in Chapra.

It seems to me that the receipt of notice on 15th March 1939 from the attorneys for the defendants is no part of the cause of action for the suit at all and cannot possibly change the venue of the trial. The cause of action set up for the suit was the fraudulent obtaining of the decree and this was a matter which was done in Bombay. As for the suppression of the process, the plaint gives no particulars as to how, when or where this was done. It was, we may suppose, the duty of the Bombay High Court to cause a notice to be sent for service on the plaintiffs in Chapra. By what contrivance this

duty was not fulfilled has not been at all disclosed in the plaint. Whether the fraud was committed in Bombay by not issuing any notice at all or whether the notice was made away with on the way to Chapra or whether it was suppressed through the process-serving staff in Saran district, all is in the air. It is impossible to say that the plaintiffs have in their plaint made any definite allegation which can constitute a cause of action arising in the Saran district. It may be pointed out that this is not a case in which execution has been taken out by attachment of any property or any similar overt act or issue of process within the district in which the suit is instituted. Whatever has been decided in cases of that kind may therefore be distinguished from the case before us. Here, I would follow the decisions in 29 All 418;[1] 36 All 564[2] and in this Court in 75 I C 469[3] and hold that the place where the plaintiffs' cause of action arose was Bombay and the Subordinate Judge was right in directing the plaint to be returned for presentation to the proper Court. The appellant should pay the costs of the contesting respondents.

Chatterji J.—I agree.

D.S./R.K. *Order accordingly*

1. Umrao Singh v. Hardeo, (1907) 29 All 418=4 A L J 392=1907 A W N 112.
2. Dau Dayal v. Munna Lal, (1914) 1 A I R All 93=24 I C 978=36 All 564=12 A L J 955.
3. Benares Bank Ltd. v. Surendra Narain Singh, (1924) 11 A I R Pat 831=75 I C 469.

A. I. R. 1940 Patna 446

MEREDITH J.

In the matter of Madan Kishore and another.

Criminal Ref. No. 48 of 1939, Decided on 31st January 1940, made by Additional Sessions Judge, Gaya.

(a) Penal Code (1860), S. 188—Order under S. 144, Criminal P. C., without affixing copy of it in public places — This irregularity would not make such order ultra vires so as to prevent conviction of person disobeying it.

Even if a copy or copies of the order under S. 144 were not affixed in public places for the information of the public, this irregularity in the method of promulgation of the order would not make it ultra vires, so as to prevent the conviction under S. 188 of any person who being proved to have had knowledge of the order, nevertheless disobeyed it. [P 447 C 2]

(b) Penal Code (1860), S. 188 — Question of knowledge must generally be matter of inference.

It is true that it is not enough in cases under S. 188 to prove that the order has been duly promulgated and that the accused must have knowledge of the order which he is charged with disobeying. The question of knowledge must generally be a matter of inference. [P 447 C 2; P 448 C 1]

(c) Penal Code (1860), S. 188 — Communal tension —Magistrate promulgating order under S. 144, Criminal P. C., forbidding assembly of five or more persons in public — Five persons appearing behind procession of deceased armed with lathis — Each of them, besides disobeying order, is potential danger to public.

For conviction under S. 188 there must clearly be something more than mere disobedience of the order. It must also be shown that obstruction, annoyance or injury, danger to human life, etc. etc. have been caused or might have been caused. [P 448 C 1]

Where as a result of considerable tension between the Hindus and the Mahomedans of the town, Magistrate has promulgated an order under S. 144, Criminal P. C., forbidding the assembly of five or more persons in any public place, street, or thoroughfare and forbidding the carrying by any person within those limits of any lathi or weapon of offence it can hardly be argued that when five persons appear behind a procession of deceased armed with lathis each one of them was not besides disobeying the order also a potential menace to peace and a danger to the public. [P 446 C 2; P 447 C 1; P 448 C 1]

(d) Criminal P. C. (1898), S. 144 (3)—Order prohibiting public from assembling in streets within limits of Union Committee of certain town held sufficiently described particular place.

Following a communal tension the Magistrate of the town of Nawadah promulgated an order under S. 144 (3) forbidding public to assemble in public streets and to carry lathis within the limits of Nawadah Union Committee:

Held that the limits of Union Committee if clearly and specifically defined could be considered as describing a particular place: *A I R 1931 Bom 513 and A I R 1931 Bom 325, Dissent.; A I R 1937 Lah 80, Approved.* [P 448 C 2]

Sarjoo Prasad —

In support of Reference.

Assistant Government Advocate —

Against Reference.

Order.—This is a reference under S. 438, Criminal P. C., by the learned Additional Sessions Judge of Gaya recommending that the conviction and sentence passed against two persons, under S. 188, I. P. C., should be set aside. These two persons, Madan Kishore and Badri Lal, were convicted under S. 188, I. P. C., and sentenced to pay fines of Rs. 25 each or in default to undergo simple imprisonment for one month each in the following circumstances: On 10th July 1939 there was a stabbing case in the town of Nawadah as a result of which there was considerable tension between the Hindus and the Mahomedans of the town. The Sub-Divisional Magistrate of Nawadah thereupon promulgated an order under S. 144, Criminal P. C., forbidding the assembly of five or more persons in any public place, street, or thoroughfare within

the limits of the Nawadah Union Committee and forbidding the carrying by any person within those limits of any lathi or weapon of offence. This order was promulgated the same day at about 7.45 P. M. by beat of drum and was to remain in force for one week.

On the following morning, 11th July, the dead body of the person who had been stabbed was carried in procession under police protection for the purpose of cremation. Some distance behind this procession these two persons Madan Kishore and Badri Lal were seen going with three other persons all five being armed with lathis. The police challenged them and attempted to arrest them. The other three slipped away, and the two persons, already mentioned, were arrested. They were subsequently charged under S. 188, tried and convicted as already described, upon a complaint in writing made by the Sub-Divisional Magistrate. At the trial the accused pleaded, first that they were not aware of the order because they had been away at Rajgir when it was promulgated; secondly they denied that they had carried lathis and thirdly, they challenged the validity of the order. Four points have been mentioned in the letter of reference, in regard to which the learned Judge considers that the Magistrate was wrong; and these four points have been taken by Mr. Sarjoo Prasad who appears in support of the reference. The first is that the order under S. 144 was not properly published having regard to the provisions of S. 134, sub-s. (2), Criminal P. C., which as appears from para. 2 of S. 144 applies to orders under that Section as well as to orders under S. 133. S. 134 (2) provides that :

> If such order cannot be so served (the reference is to personal service), it shall be notified by proclamation published in such manner as the Local Government may by rule direct and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

In the present case it does not appear that a copy or copies of the order were affixed in public places for the information of the public. It is argued for the Crown that the reference to such sticking up of copies in S. 134 (2) is meant to apply only to cases where the order is directed against individuals and not against the public generally. This argument is based on the fact that the last words of the clause are "to such person" which it is argued can relate only to cases where the information is to be conveyed to a particular person as opposed to the public frequenting a particular place. There may be some doubt upon this point, and I do not consider it is necessary to decide the question because Mr. Sarjoo Prasad concedes that even if there has been this irregularity in the method of promulgation of the order, that in itself would not make it ultra vires, so as to prevent the conviction of any person who, being proved to have had knowledge of the order, nevertheless disobeyed it. Mr. Sarjoo Prasad has taken this point, he says, chiefly as bearing upon his second point—the question of knowledge; and indeed it is clear that whether necessary or not, affixing copies in conspicuous places would be a desirable means of conveying an order of this nature to the notice of the public who may not all be present in the place when the order is promulgated by beat of drum.

The second point then is, that it is not proved that these two persons actually had any knowledge of the promulgation of the order. Several rulings have been cited in which it has been laid down that it is not enough in such cases to prove that the order has been duly promulgated. There must also be positive evidence that the accused had knowledge of the order which he is charged with disobeying. These cases are 63 I C 865,[1] A I R 1927 Cal 28[2] and A I R 1927 Cal 306.[3] There can be no doubt about the correctness of this proposition and it is not challenged. But it is urged that in the present case there is a finding of knowledge and it is based on definite materials. The accused persons led some evidence to show that they were in Rajgir, but the Magistrate did not accept it and has criticized both the witnesses examined on the point. It is clear that he intended to find, even if he did not express himself very clearly, that at the time of promulgation the accused must have been in the town, and he comments on the evidence of the Sub-Inspector, Nawadah, as to how he promulgated the order. This witness stated that he himself promulgated it by beat of drum in all the streets and lanes of the town. The Magistrate remarks that the police in promulgating the notice had moved about the streets of the town in

1. Emperor v. Abdullah, (1921) 63 I C 865=22 Cr L J 705.
2. Ramdas v. Emperor, (1927) 14 AIR Cal 28=99 I C 36=54 Cal 152=28 Cr L J 4=44 C LJ 250.
3. Sheikh Abdul v. Emperor, (1927) 14 A I R Cal 306=100 I C 830=28 Cr L J 350 = 45 C L J 202=31 C W N 340.

a car which had to move slowly and to halt at places. It is pointed out that evidence of knowledge can rarely be direct evidence; in most cases knowledge can only be proved by circumstantial evidence. The question of knowledge must generally be a matter of inference. As I have said, the Magistrate has not expressed himself very clearly; but I think there can be no doubt that he did mean to make this inference of knowledge from the circumstances, and the circumstances were such that he was entitled to make the inference. The second point, like the first, therefore fails. The third point is based on the wording of S. 188, I. P. C., which lays down that :

> Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order, with certain property in his possession or under his management disobeys such direction shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment, etc., etc. and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment etc., etc.

As the Section is worded, it is pointed out there must clearly be something more than mere disobedience of the order. It must also be shown that obstruction, annoyance or injury, danger to human life etc., etc. have been caused or might have been caused, and, it is said, that there is no such finding in the present case. Here again, however, there is a finding, though it might have been more precise. The Magistrate observed that the disobedience on the part of the accused was certainly risky. By this, in my view, he clearly meant risky not to the accused themselves but to the public peace, and the circumstances were such as to justify this finding. There was a clear state of communal tension. One man had been stabbed to death, a curfew order had been considered necessary, and it had been found necessary to forbid the carrying of lathis. Many instances come to mind where communal riots have arisen from very small initial causes. In circumstances like these, it can hardly be argued that when five persons appear behind a procession of the kind described, armed with lathis, each one of them was not besides disobeying the order also a potential menace to peace and a danger to the public. In these circumstances the third point in my view also fails. The last contention is based on the wording of S. 144, sub-s. (3), Criminal P. C., which runs as follows :

> An order under this Section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

Here we are dealing with an order to the public generally; and it is argued that "within the limits of the Nawadah Union Committee" does not sufficiently describe a particular place within the meaning of S. 144 (3). In support of this proposition two Bombay rulings have been cited : A I R 1931 Bom 513,[4] where it was laid down that an order prohibiting the public generally and certain persons named therein from taking part in a procession within the whole of certain municipal limits and all public places within such limits, does not conform to the requirements of S. 144 (3) and is beyond the powers of a Magistrate; and secondly, A I R 1931 Bom 325,[5] where a similar view was taken. To adopt this view would, I consider, unduly narrow and restrict the operation of S. 144 in a way not contemplated by the Legislature when framing the Section. I see no reason why the limits of the Union Committee, if clearly and specifically defined, should not be considered as describing a particular place. The view adopted in those two Bombay rulings was not followed in a later Bombay case, AIR 1935 Bom 33,[6] where it was held that an order directed to the public when frequenting public or private streets in a particular city is sufficiently definite as to place to comply with the requirements of S. 144. A Lahore case, 17 Lah 515,[7] goes very much further. There it was held that the whole district of Lahore might be considered "a particular place" within the meaning of S. 144 (3), Criminal P. C.

Their Lordships further observed that the argument advanced was in their opinion, based on a mistaken interpretation of sub-s. (3) of S. 144. This sub-section, they considered, has nothing to do with the nature of the order, but is merely one of the four sub-sections which refer to the manner of promulgation and to the duration of an

4. Motilal Gangadhar v. Emperor, (1931) 18 AIR Bom 513=1931 Cr C 945 = 134 I C 1237=33 Cr L J 75=33 Bom L R 1178.
5. D. V. Belvi v. Emperor, (1931) 18 A I R Bom 325=1931 Cr C 581=134 I C 344=32 Cr L J 1144=33 Bom L R 673.
6. Sorab Shavaksha v. Emperor, (1935) 22 A I R Bom 33=1935 Cr C 68=154 I C 637=36 Cr L J 547=36 Bom L R 1129.
7. Abdul Karim v. Emperor, (1937) 24 A I R Lah 80=167 I C 284=38 Cr L J 354=17 Lah 515 =38 P L R 964.

order under sub-s. 1. My own views coincide with those of their Lordships of the Lahore High Court, as expressed in that case. In my opinion there is nothing in any of the four points made in the letter of reference and argued before me, which would justify interference with this conviction. The reference is therefore discharged and the convictions will stand.

D.S./R.K. *Reference discharged.*

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* A. I. R. 1940 Patna 449

FAZL ALI AND MEREDITH JJ.

Choudhury Bibhuti Narayan Singh and others — Defendants — Appellants.

v.

Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur — Plaintiff — Respondent.

Appeals Nos. 786 of 1937 and 217 and 355 of 1938, Decided on 26th September 1939, from decision of Addl. Sub-Judge, Arrah, D/- 23rd July 1937.

(a) Limitation Act (1908), S. 23—Distinction must be made between continuance of legal injury and continuance of its injurious effects — No distinction however can be made between injury to public, quasi-public and private rights for purposes of S. 23.

Upon its terms S. 23 can only apply where the wrong is really a continuing one, and this cannot be the case where the encroachment is by an act such as the building of a wall, which is over and done with once completed. A distinction must be made between the continuance of a legal injury and the continuance of its injurious effects. There is however nothing in S. 23 upon which to base a distinction between public, quasi-public and private rights. Whether the wrong is continuing or not must depend upon the nature of the wrong itself and not upon the nature of the right which is infringed : *6 Cal 394 (P C), Expl.; Case law discussed.* [P452 C 2]

*** (b) Limitation Act (1908), S. 23—Continuing wrong — Where it amounts to dispossession plaintiff cannot recover possession after defendant has become owner by adverse possession — Where it does not amount to dispossession there is no right of action after wrong has ripened into easement.**

Where the wrong amounts to dispossession of the plaintiff, then, although it may be a continuing wrong, the plaintiff cannot recover possession after 12 years, because under S. 28 he himself has got no right left which he can enforce. Where the plaintiff is Government or is representing Government, this period will be sixty years under Art. 149. Where the plaintiff is a local authority suing in regard to a public road, the period will be thirty years under Art. 146-A of the Act. Where the obstruction does not amount to dispossession of the plaintiff, either because it is not on the plaintiff's land, or because the plaintiff himself has only a right of easement, as in the case of rights of way of villagers originating in custom, then in such cases, even though the wrong be a continuing one, there would be no right of action after twenty years (or sixty years in the case of Government) where the defendant's wrong has itself ripened into an easement, and this right of the defendant is one subsisting within two years next before the date of the suit : *Case law reviewed.* [P 455 C 1]

(c) Civil P. C. (1908), O. 1, R. 8—Encroachment on village pathways — Non-resident landlord of village can sue for declaration and injunction on behalf of villagers under O. 1, Rule 8.

Where there are any special rights in the village pathways existing in the villagers, as distinct from the public generally, the landlord of the village may well be said to share the special interest, even though he be not a resident of the village and therefore in case of encroachment on those pathways the landlord can sue for declaration and injunction on behalf of the villagers under O. 1, R. 8. [P 455 C 2; P 456 C 1]

(d) Highway—Highway and village pathway — Distinction explained.

Where the privilege to use a road is enjoyed only by one particular Section of the community or by inhabitants of two or three villages, and not by others, the road is not a public road. Such ways are not regarded as public ways but private ways, and they generally have their origin in custom. Such a customary way can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication. But the evidence in support of the public claim must be cogent : *A I R 1930 Cal 286, Rel. on; Case law referred.* [P 460 C 1]

(e) Civil P. C. (1908), S. 91 and O. 1, R. 8—S. 91 confers new right of suit — "Public nuisance" in S. 91 includes obstruction to village pathways — Suit for removal of obstruction to village pathway can be brought under S. 91 without proving special damage — S. 91 does not overrule O. 1, R. 8 and take away right of suit under O. 1, R. 8 even in case of public nuisance.

Section 91 takes away no existing right. It does confer a new right, and in express terms, namely, the right with the consent of the Advocate-General to sue for the removal of a public nuisance without proof of special damage. That is a right which could not exist independently of that Section. The definition of "public nuisance" is wide enough to cover cases of obstruction to village pathways, though they may not be public highways in the full sense. It is possible therefore to bring a special suit under S. 91 with the consent of the Advocate-General for obstruction of a village pathway, and in the absence of any special damage. It is, however not necessary to resort to the provisions of S. 91 if there is any independent right of suit, for S. 91 takes away no independent right of suit which may exist, and it does not overrule the provisions of O. 1, R. 8 and take away any right of suit under O. 1, R. 8 even when it is a case of public nuisance : *A I R 1925 Cal 1233 and A I R 1934 All 941, Rel. on.* [P 462 C 1; P 465 C 1, 2]

(f) Civil P. C. (1908), S. 91—Doctrine of special damage—Nature—It applies to India—It is limited to cases regarding public rights in full sense and invasion of special right — It does not apply to quasi-public rights such as village roads and where plaintiff sues either for himself as

member of limited class of persons having common special rights or on behalf of that class under O. 1, R. 8.

The doctrine of special damage is based on the principle of English common law that there can be no private action for a public wrong. To give a right of suit the wrong must be in some way special or peculiar to the person who sues, and it is based on the sound rule that no man should be harassed by a multiplicity of suits in respect of a single wrong. It has been adopted by the Courts in India as a matter of equity and good conscience and must govern their procedure in the absence of any specific provision of law giving a special right of suit in derogation of the general principle. It is however a doctrine which has got two very definite limitations : first, it applies only to cases regarding public rights in the full sense. Secondly, an invasion of special right will provide a cause of action without special proof of damage, for, in such a case the law will presume damage. That the doctrine of special damage subject to these limitations applies also in India is clear from the wording of S. 91. [P 463 C 2; P 464 C 1, 2]

It is by reason of these limitations that it does not apply to cases of quasi-public rights, such as village roads, and where the plaintiff sues either for himself as a member of the limited class of persons having special rights in common, or on behalf of that limited class in a representative suit under O. 1, R. 8, for infringement of those rights : *Case law discussed.* [P 464 C 2]

(g) Civil P. C. (1908), O. 1, R. 8 — Object — O. 1, R. 8 is enabling provision and provides no new right of suit—It enables some of class having special interest to represent rest of class — Individuals cannot sue on behalf of general public under O. 1, R. 8.

Order 1, Rule 8 is not intended to allow individuals to sue on behalf of the general public, but to enable some of a class, having special interests, to represent the rest of the class. It is merely an enabling provision. It provides no new right of suit, but merely a right of representation where a right of suit already exists, and that right of suit is provided by the invasion of the special rights of the limited class represented : *9 Mad 463 and A I R 1933 P C 183, Rel. on.* [P 464 C 2; P 465 C 1]

(h) Civil P. C. (1908), S. 91—Special restrictions of S. 91 can be evaded by proof of special damage or by proof of invasion of special rights of limited class.

There are clearly two modes of escape from the special restrictions of S. 91 : (1) by proof of special damage and (2) by proof of the invasion of the special rights of a limited class which will give an independent right of action : *(1869) 4 Ex 43, Rel. on.* [P 465 C 2]

*** (i) Civil P. C. (1908), O. 1, R. 8 and S. 91—Suit for removal of obstruction to village pathway — Plaintiff not using S. 91 or proving special damage—He must show that he sues not on behalf of general public but on behalf of limited and defined class with which he has common interest — Path must be shown to be quasi-public.**

In the case of suits relating to obstructions to village ways, if the plaintiff does not utilize the special provisions of S. 91, or prove special damage, but purports to sue under O. 1, R. 8, he must plead and show (1) that he sues not on behalf of the public generally, but on behalf of a limited and clearly defined class with which he has a common interest and a common right of suit, (2) he must plead and show that the pathway in question is not a public highway in the full sense, in which all members of the public who happen to go to the place have equal interest, he must show that it is a way or path of the quasi-public type in which the class he represents has got special rights as distinct from those of the public generally : *Case law reviewed.* [P 465 C 2; P 466 C 1]

L. K. Jha and G. P. Shahi (in 786), N. N. Sinha and Harinandan Singh (in 217) and Harinandan Singh (in 355) — *for Appellants.*

Harnarain Prasad (in 786), M. N. Pal and P. Jha (in 217) and Syed Ali Khan (in 355) — *for Respondents.*

Meredith J. — It has been deemed advisable to take these three appeals together, as similar questions arise for decision in each. They are questions of considerable importance, and in regard to which there is not only no authoritative decision of the Patna High Court but the case-law in India appears to be in a state of confusion. All three appeals are by defendants and arise out of suits for removal of encroachments on village roads.

No. 786 is an appeal from a decision of the Additional Subordinate Judge of Arrah, dated 23rd July 1937, confirming a decision of the Munsif, First Court, Arrah, dated 26th September 1935. The respondent, the Maharaja Bahadur of Hathwa, sued the appellants for recovery of possession over certain parcels of land situated in mauza Kurmurhi, after a declaration that the defendants had no right to cultivate those lands, and praying for a permanent injunction restraining the defendants from encroaching upon the lands in question. The plaintiff sued as 16 annas proprietor of mauza Kurmurhi, and the suit was in respect of portions of plots Nos. 1600, 1422 and 708. All these plots were recorded in the gair mazrua am khata, 1600 being entered as daggar, 1422 as rasta and 708 as karha (water channel). It was alleged that the defendants, in Asarh 1340 F. had unlawfully amalgamated certain portions of these plots with their own lands, and had brought them under cultivation. Subsequently to the filing of the plaint, the plaintiff asked for permission of the Court to sue in a representative capacity under the provisions of O. 1, R. 8, Civil P. C., and the Court, having granted permission, issued notice, as required by that rule, by publication in the Provincial Official Gazette. The plaintiff's

case in this regard was that by obstruction of the daggar, rasta and karha much mischief had been done to the plaintiff and to the public at large. He sought to sue not only in his capacity as landlord, but also as representing the public.

The appellants, in defending the suit, claimed that it was not maintainable by the plaintiff, and that the claim was also barred by limitation, as they had been in cultivating possession of the disputed lands for much more than twelve years. Other pleas were also taken, which are not now material. The first Court held that the lands in question had been formerly daggar, rasta and karha but the defendants had been in cultivating possession of them for more than twelve years before the suit. The plaintiff's claim as landlord must therefore fail. It held however that as the plaintiff had sued in a dual capacity, he was entitled to maintain the suit under O. 1, R. 8 in a representative capacity, and as the encroachment amounted to the obstruction of public paths and ways, the plaintiff, as a member of the public, had a right to have the encroachments removed irrespective of the length of user by the defendants, because the encroachments were continuing nuisances, and S. 23, Limitation Act, was applicable. He purported to base his finding on the decision in A I R 1934 Pat 34[1] and accordingly decreed the suit.

In appeal the Subordinate Judge upheld these findings. He also held that the plaintiff was entitled to sue under O. 1, R. 8 and that as the encroachments amounted to obstruction of public pathways, S. 23, Limitation Act, was applicable, and the suit was not barred by limitation. It was argued before him that on his findings the obstruction amounted to a public nuisance and consequently the plaintiff could not sue, except in accordance with the provisions of S. 91, Civil P. C., after obtaining the consent of the Advocate-General. The learned Subordinate Judge however thought that this was not necessary in view of the provisions of cl. (2) of S. 91, as the plaintiff had an independent right of suit in view of his dual capacity as landlord of the village, he having filed the suit, because the encroachments interfered with his rights as landlord as well as with those of the entire public. So far as the first right was concerned, all that was necessary was compliance with the provisions of O. 1, R. 8, and that had been done. He held that the fact that the plaintiff was not a resident of the village, did not prevent him from maintaining the suit on behalf of the public of the village. In this second appeal we are no longer concerned with the karha plot 708, as the appeal is confined to the lands forming part of plots 1600 and 1422, which were both roads. The same two points, and those two only, are again raised in second appeal, namely that the suit was not maintainable by the Maharaja as framed, and that the claim was in any case barred by limitation.

Second Appeal No. 217 of 1938 is from a decision of the learned Additional District Judge of Shahabad, dated 23rd December 1937, confirming a decision of the Munsif, Second Court, Arrah, dated 2nd September 1936. The suit was for removal of an alleged encroachment on a village lane, said to have been made by the defendants on 10th February 1935 by erecting compound walls thereby narrowing the lane and causing inconvenience to the public. Here again the plaintiff asked that the suit should be treated as one under O. 1, R. 8, Civil P. C. This was allowed, and notice was issued by publication in the Provincial Gazette. The contesting defendant claimed that the land belonged to him, had been in his possession for a long time, and the compound walls had been in their present position for more than twelve years. It was denied there had been any encroachment on the lane or any inconvenience caused to the public.

The first Court held that the defendants had encroached upon the village lane to the extent of 6 dhurs and 8½ dhurkis, and the disputed walls had been constructed on 10th February 1935, as alleged by the plaintiffs. It held that the lane in question was a "village public lane" and carts used to pass through it. It was settled law that in a village lane, as distinguished from a public highway, special damage need not be proved. Moreover, the suit was properly framed under O. 1, R. 8, Civil P. C. The suit was not barred by limitation on the findings and moreover the encroachment upon a public lane was a continuing wrong. On appeal by defendant 1 the Additional District Judge upheld these findings, although with regard to the question of special damage he expressed himself somewhat differently as follows:

> The suit having been brought by the plaintiffs under O. 1, R. 8, Civil P. C., as residents of village Gidha, and the encroachment upon the public lane

1. Bhagwan Dutt v. Asharfi Lal, (1934) 21 A I R Pat 34=146 I C 408.

being necessarily a cause of inconvenience to all villagers, there is special damage to the plaintiffs, and so they are entitled to bring the suit.

Second Appeal No. 355 of 1938 is an almost precisely similar case. It is an appeal by defendants 1 to 4 from a decision of the Additional District Judge of Shahabad, dated 25th November 1937, affirming a decision of the Munsif of Arrah, dated 30th September 1936. This also was a suit under O. 1, R. 8, Civil P. C., brought by the plaintiffs, as representing the public, for removal of an alleged encroachment on a portion of plot No. 2085 in Mauza Khadaon Bujrug, which was said to be a public thoroughfare. A permanent injunction was asked for restraining the defendants from encroaching upon the thoroughfare. The defendants contended inter alia that there was no encroachment, that the plaintiffs had no locus standi to bring the suit without the permission of the Advocate-General under S. 91, Civil P. C., and that the suit was barred by limitation. The house of the defendants being old and built of mud fell down. They therefore demolished it and reconstructed a brick house on the old site confining themselves to the limits of the old house. The finding was that plot No. 2085 was a public rasta, and the defendants had encroached upon that rasta. Reliance was once more placed on A I R 1934 Pat 34[1] for a finding that the encroachment was a continuing wrong, and so no question of limitation arose. In appeal the Subordinate Judge also held that there had been an encroachment on the gair mazrua am pathway, plot No. 2085, and observed that no other point had been pressed in the appeal which was therefore dismissed with costs.

The points that arise in these cases are (1) the exact nature, scope and application of S. 91 and O. 1, R. 8, Civil P. C.; (2) the application of the doctrine of special damage to India; (3) the nature and scope of representative suits regarding obstructions to highways, village ways and pathways; and (4) the law of limitation applicable to such suits. I propose to consider first the question of limitation. A I R 1934 Pat 34[1] is a single Judge case, and no Division Bench case of the Patna High Court, in which the question has been considered, has been cited at the Bar. In the case cited, Kulwant Sahay J. held that no length of user can justify an encroachment into a public way, as such encroachment is a continuing wrong, and, as S. 23, Limitation Act, is applicable, no question of limitation arises. He noticed the decision of the Madras High Court in 19 Mad 154,[2] where it was held that the defendant, who had encroached upon a public highway adjoining his house, had acquired a right by adverse possession, and the plaintiff's action was barred by limitation. But he pointed out that the Calcutta High Court, in 29 I C 385,[3] had held that wrongful interference with a right of way constitutes a nuisance and is a continuing wrong under S. 23, Limitation Act, and in that decision the Calcutta High Court was following the decision of the Privy Council in 6 Cal 394=7 I A 240.[4]

The argument put forward on behalf of the appellants is, first, that a distinction must be made between encroachments upon public highways and upon village pathways. In the first case, we are dealing with full public rights which have their origin in dedication, or upon the principle of a lost grant. In the second case, the right is of a semi public nature, commonly having its origin in custom and being of the nature of an easement. It is said that this difference was not considered by Kulwant Sahay J. and must give rise to a distinction, for where an easement can be acquired, it can also be extinguished. Secondly S. 23, Limitation Act, is clear in its terms. It runs as follows :

> In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Upon its terms it can only apply where the wrong is really a continuing one, and this cannot be the case where the encroachment is by an act such as the building of a wall, which is over and done with once completed. A distinction must be made between the continuance of a legal injury and the continuance of its injurious effects. There is nothing in S. 23 upon which a distinction can be made between the case of encroachment upon private land and upon public land, and if in the one case limitation will run, there is no reason why it should not also run in the case of a precisely similar act committed upon public land, there being, in short, nothing in S. 23 upon which to base a distinction between public and private rights. Whether the wrong is continuing or not must depend upon the

2. Municipal Commissioners v. Sarangapani Mudaliar, (1896) 19 Mad 154.
3. Nazimullah v. Wazidulla, (1916) 3 A I R Cal 733=29 I C 385=21 C L J 640.
4. Rajrup Koer v. Abdul Hossein, (1881) 6 Cal 394=7 I A 240=7 C L R 529=4 Sar 199 (PC).

nature of the wrong itself and not upon the nature of the land over which it is committed. It must be conceded that there is considerable force in this argument. The distinction sought to be made has in fact received judicial recognition from the Calcutta High Court itself in 20 C W N 481[5] where it was observed :

> Where the wrongful act produces a state of affairs every moment's continuance of which is a new tort a fresh action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury.

In 49 I C 93,[6] where a portion of a street vested in the Calcutta Municipal Corporation, and a platform had been built by the plaintiffs about half a century before the suit as an integral part of their building, it was held that the right of the Municipal Corporation to that portion of the street, which was occupied by the wall of the platform, was barred by the provisions of Art. 146-A to Sch. 1, Limitation Act. The erection of the platform was not a continuing wrong, and limitation was not saved by the provisions of S. 23, Limitation Act, as the injury was complete on the erection of the platform. It is to be noted that the decision in that case was based on the finding that the Municipal Corporation had been dispossessed ; as the land, upon which the wall of the platform stood, had formerly belonged to the Municipality as the owner thereof, the injury was found to be complete on the erection of a wall, and so there was no continuing injury within the meaning of the statute. The effect might continue, but that could not extend the time of limitation.

In 156 I C 390,[7] a case of 1935, it was held that where the plaintiff had a right to use certain land as a passage, and sheds had been erected obstructing his passage way, there was a continuing wrong, and S. 23, Limitation Act, was applicable in the case of a suit for removal of the sheds. It should be noted that in this case there was no question of any public way. Section 23 was found applicable despite the fact that it was a private way, the passage way being jointly owned by the parties. The learned Judges referred to the Privy Council decision in 7 I A 240[4] and the decision in 29 I C 385[3] the very cases which were relied upon by Kulwant Sahay J. in the case in A I R 1934 Pat 34.[1] They distinguished the case in 49 I C 93[6] on the ground that the real reason of the decision appears to have been that the platform having been in existence for fifty years, the Municipality had lost their right to the land on which it stood, and there was therefore no continuing wrong.

This decision is a little difficult to follow, since if the Municipality could lose its rights in the land, apparently so could the plaintiff his rights in the common passage way. No doubt where a right is completely extinguished there is no question of any wrong continuing. The matter was considered by the Lahore High Court in 1935 in 162 I C 303.[8] A house had been built by the defendants so as to interfere with the plaintiff's right of light and air, and this was held to be a continuing wrong, as every day the building obstructed the flow of light and air. Reliance was once more placed upon the Privy Council decision in 7 I A 240[4] and upon 29 I C 385.[3] In a Madras case, 69 M L J 42,[9] where the plaintiffs had a right to a flow of water as an easement, and the defendants obstructed the channel preventing the plaintiffs from irrigating their lands, it was held that whether the principle of continuing wrong could be applied to obstruction of a right of way or not, there could be no doubt that it did apply to cases of interference, with a water course, and once more reliance was placed upon 7 I A 240.[4] The learned Judge observed :

> It has no doubt been sometimes stated generally that whenever a permanent state of things has been brought about there is no scope for the application of S. 23, Limitation Act.

He pointed out that this theory could not apply where, (as in that case) even if a permanent state of things had been brought about, it had been done on the defendant's own land, so that there was no scope for the applicability of the doctrine of title by adverse possession. It should be observed that here also there was no question of any public right but only of an interference with the right of the plaintiffs. 1 C W N 96[10] is another case where it was held that an obstruction of the plaintiffs' private

5. Brojendra Kishore v. Sarojini Roy, (1916) 3 A I R Cal 751=31 I C 242 = 22 C L J 283 = 20 C W N 481.
6. Ashutosh Sadhukhan v. Corporation of Calcutta, (1919) 6 A I R Cal 807=49 I C 93 = 28 C L J 494.
7. Sarat Chandra Mukherjee v. Nerode Chandra Mukherji, (1935) 22 AIR Cal 405=156 IC 390.
8. Moti Ram v. Hansraj, (1936) 23 A I R Lah 334 =162 I C 303.
9. Muthalagappa Chettiar v. Navaneetheswara, (1935) 22 A I R Mad 668 = 158 I C 987 = 69 M L J 42.
10. Sreemati Soojan Bibi v. Shamed Ali, (1897) 1 C W N 96.

right of way was a continuing wrong and S. 23 was applicable. This case simply followed 6 Bom 20,[11] which in turn was based on the Privy Council case, 7 I A 240.[4] The other case so frequently referred to in the decisions, 20 I C 385,[3] was also based upon 7 I A 240.[4] It was not in respect of a public road. The plaintiffs merely alleged interference with their right of way, which was the only means of access to their land. In this case it was expressly held that, what their Lordships of the Privy Council had laid down with regard to obstruction of a watercourse, must apply to an obstruction to a right of way, and that wrongful interference with a right of way equally constituted a continuing nuisance.

Thus, all these cases really base themselves on the authority of the Privy Council in 7 I A 240.[4] But it has never been stated clearly anywhere, even in 29 I C 385,[3] on what basis of principle the obstruction of a right of way is held to be a continuing wrong, and how what was laid down with reference to the flow of water must also apply to a right of way. At best these cases all seem to have proceeded merely upon the principle of analogy. Unfortunately, if the Privy Council decision be closely studied it is seen that there is no strict analogy; for, in 7 I A 240[4] there was manifestly and patently a continuing wrong. In that case the plaintiff was found to have a right to take water flowing through a channel on the defendant's land. The defendant had interfered with that right by making a number of dams and cuts in the channel, and diversions from it. The plaintiff succeeded in the Courts below with regard to all of these interferences, except two channels cut in the side of the water course to draw off water: some hollow palm trees were placed to draw off water to the defendant's land. It was only in respect of these two interferences that the case came before their Lordships of the Privy Council. Neither of them was obstruction strictly speaking and by both of them the defendants were continuously drawing off, from day to day, the plaintiff's water, so that in fact, whenever the defendant drew off water through these diversions, he was in fact stealing plaintiff's water and committing a fresh wrong. It was in such circumstances merely that their Lordships observed that the obstructions, which interfered with the flow of water to the plaintiff's mahal, were in the nature of continuing nuisances as to which the cause of action was renewed de die in diem, so long as the obstructions causing such interferences were allowed to continue, and indeed, they said, S. 23 of the Statute contained express provision to that effect. The case was therefore actually not analogous with the case of obstruction to a right of way, and it was moreover a case where what the defendant had done was done on his own land, so that there was no question of his acquiring any title by adverse possession. It is not at all clear therefore on what legal basis the decisions with regard to rights of way have proceeded. They may be right or they may be wrong, but they are not supported by the Privy Council decision upon which they all profess to rely.

It seems to me therefore that in determining whether the doctrine, which as I have noticed, has not been universally adopted, (as for instance in the decision in 49 I C 93,[6]) is right or wrong, it is necessary to go back to the Limitation Act itself and endeavour to find some logical principle upon which the matter can be determined. One thing is clear: whatever that principle may be, it has nothing to do with the question whether the right interfered with is public, quasi public or private. There is nothing in S. 23 which would justify any such distinction, and, as I have noticed, many of the cases, where S. 23 has been held applicable, are cases of private right. Is there then any justification for holding that if I trespass upon and cultivate a man's land, I can acquire title by adverse possession, but for some reason if I trespass upon land over which another man has a right of way it is a continuous wrong so long as the trespass continues? Certain points occur to the mind at once. Trespass or obstruction may in some cases be continuing wrongs and in some cases they may not be. Under Art. 37, Sch. I, Limitation Act, three years' limitation from the date of obstruction is provided for suits for compensation for obstructing a way or watercourse. Similarly, under Art. 39, Sch. I, three years' limitation is provided for suits for compensation for trespass upon immovable property. Manifestly it is here contemplated that obstruction and trespass are not continuing wrongs. Presumably these Articles contemplate single acts of obstruction or trespass which are not continued.

If however the trespass or obstruction is continued by the wrong-doer in the sense that it is not abandoned—where for instance

11. Punja Kuvarl v. Bai Kovar, (1881) 6 Bom 20.

the trespasser goes on asserting acts of possession over the land by cultivation, or the obstructionist continues inhabiting the house built or using the water diverted, and so on—then clearly the case is quite different: the wrong continues, and S. 23, Limitation Act, gives rise continuously to fresh periods of limitation. Is there then a perpetual right of suit under S. 23? The answer is clearly, no, when the trespass or obstruction by lapse of time themselves give rise to rights under Part IV of the Act which would thereby put an end to the wrong. For, if the wrong ceases to be a wrong it cannot be said any longer to continue. Such rights may arise by way of easement under S. 26 (1) in twenty years, or against Government under S. 26 (2) in sixty years. Or they may arise in the case of trespass after twelve years under S. 28 read with Arts. 142 and 144, or after sixty years in the case of Government under Art. 149. After the expiry of these periods the defendant himself has acquired a right of easement, or the plaintiff's right to possession has become extinguished under Sec. 28, and there is no further right of action for possession or for removal of the obstruction despite the provisions of S. 23.

The position now becomes quite clear. Where the wrong amounts to dispossession of the plaintiff, then, although it may be a continuing wrong, the plaintiff cannot recover possession after twelve years, because under S. 28, Limitation Act, he himself has got no right left which he can enforce. Where the plaintiff is Government or is representing Government, as in the case of the Advocate-General suing in respect of public land in the full sense, this period will be sixty years under Art. 149, Limitation Act. Where the plaintiff is a local authority suing in regard to a public road, the period will be thirty years under Art. 146-A, Limitation Act. Where the obstruction does not amount to dispossession of the plaintiff, either because it is not on the plaintiff's land, or because the plaintiff himself has only a right of easement, as in the case of rights of way of villagers originating in custom, then in such cases, even though the wrong be a continuing one, there would be no right of action after twenty years (or sixty years in the case of Government) where the defendant's wrong has itself ripened into an easement, and this right of the defendant is one subsisting within two years next before the date of the suit.

It will be observed that all this is quite in accord with the doctrine that obstruction of a public or village path is a continuing wrong just so long as the wrong-doer is associated with the obstruction, but it is so only unless and until the wrong-doer has himself acquired a right which renders his action no longer a wrong. Though this is so, there will clearly be no right of suit where the continuing wrong has ceased to be a wrong. After that happens, there can be no right of suit, except perhaps for compensation for the last injury suffered while the act was still wrongful, if brought within three years of that injury, under S. 24, Limitation Act, read with Art. 37 or Art. 39. It is impossible on the materials before us to come to any finding as to whether upon these principles the plaintiff's rights are barred by limitation in the present cases, because the matter has not been considered in this aspect by the Courts below and the necessary findings of fact are not there. No remand is however necessary, because, as I shall presently show, all the suits must fail and the appeals succeed upon the other grounds with which I am about to deal.

I now turn to these other points. It has been pointed out in Second Appeal No. 786 of 1937 that the learned Subordinate Judge was guilty of confusion of thought in applying the provisions of cl. (2) of S. 91, Civil P. C., because of the plaintiff's dual capacity as landlord, for though he might have sued also as landlord, that claim was clearly barred by the twelve years' rule of limitation. Therefore the suit could succeed, if it succeeded at all, only in virtue of the plaintiff's claim in his representative capacity whatever that might be. It is next argued on the pleadings that the plaintiff had sued as representative of the public generally, and not as representative of the villagers alone, and as having some exclusive common interest with the villagers within the meaning of O. 1, R. 8, Civil P. C. The references in the plaint were to the rights of the public generally and not to any particular rights of the villagers, as distinct from the rights of the public at large. Further it is argued that even had the plaintiff sued as representative of the villagers, he had no common interest with them in the subject-matter of the suit as necessitated by O. 1, R. 8, and the suit must fail on that ground. With this last contention I cannot agree, because it seems to me that, if there are any special rights in these village pathways existing in the

villagers, as distinct from the public generally, the landlord of the village may well be said to share this special interest, even though he be not a resident of the village, for as owner of the village he will share the villagers' interests in the public lands of the village.

Upon the view that the plaintiff in this case sued as a member of the public, and not as a member of a limited class or community, it is said that S. 91 (1) is clearly applicable, and the suit can only lie in accordance with its provisions and with the consent of the Advocate-General. Having regard to the definition of 'public nuisance' in the Penal Code, which is applicable under the terms of the General Clauses Act, the obstructions being to public paths, are public nuisances irrespective of the fact whether these paths are used by the public generally or only by people in the locality. The plaintiff as a landlord has no subsisting right of suit, since limitation must defeat that claim. On the other hand, if he sues as a member of the public for the removal of a public nuisance, S. 91 provides a bar, and O. 1, R. 8 gives no separate right of suit in itself. There being no separate right of suit, cl. (2) of S. 91 cannot help the plaintiff. O. 1, R. 8 gives no right of suit, but only a right of representation where there is already a right of suit, and in any case O. 1, R. 8 cannot override S. 91. Cl. (2) of S. 91 might give the plaintiff a right of suit if he had pleaded and proved special damage, but he has neither pleaded it nor sought to prove it. The findings of the lower Courts with regard to damage are clearly expressed as being damage to the rights of the public at large. On the pleadings and findings the paths in question must be held to be available to anyone wanting to use them, no matter what his residence.

For the respondent it is argued, on the point of maintainability, that S. 91, Civil P. C., has no application in the case of a village path, as opposed to a public highway, and a large number of rulings has been cited in support of this contention. It is said therefore that a suit under O. 1, R. 8 is maintainable. It is further argued that in any case the plaintiff has sued as representing the villagers, not the public generally, and the villagers have special rights in these paths as distinct from the rights of the general public. The doctrine of special damage does not apply in India, and in these circumstances it is unnecessary for the plaintiff to prove special damage. The arguments in the other two appeals have followed similar lines. The questions raised are obviously of considerable importance, and it becomes necessary to examine very carefully the exact significance and application of S. 91 and O. 1, R. 8, Civil P. C. S. 91 reads as follows :

> In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction, or for such other reliefs as may be appropriate to the circumstances of the case.
>
> Nothing in this Section shall be deemed to limit or otherwise affect any right of suit which may exist independent of its provisions.

The provisions of O. 1, R. 8 are :

> Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued or may defend, in such suit, on behalf of or for the benefit of all persons so interested.
>
> But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.
>
> Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

The application of the doctrine of special damage to India seems to have been first considered in a Bombay case, 2 Bom 457,[12] where the whole subject was exhaustively discussed. This case was one where the plaintiffs, who were Musulmans, sued to establish their right to carry tabuts in procession along a certain road to the sea, and alleged that the defendants (also Musulmans) obstructed them in doing so. The plaint however did not allege any personal loss or damage to the plaintiffs, arising from the obstruction. It was held that the plaintiffs could not maintain a civil suit in respect of such obstruction unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of religious or sentimental gratification arising from carrying tabuts along a public road was not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action.

This case was followed by the Madras High Court in 1886 in 9 Mad 463[13] where the nature of S. 30, Civil P. C., which then contained the provisions now embodied in

12. Satku v. Ibrahim Aga, (1877) 2 Bom 457.
13. Adamson v. Arumugam, (1886) 9 Mad 463.

O. 1, R. 8, was also examined. It was a case similar in many respects to those with which we are now concerned. The plaintiffs as representatives of the villages of Podiamputhur sued the defendant to obtain a declaration that certain land enclosed by him was public property, to recover possession thereof, and to remove an obstruction placed on a certain road. It was treated as an action for the removal of an obstruction from a public highway. The plaintiff proved no special damage. The learned Chief Justice of the Madras High Court observed that the English law upon the subject was that no action can be maintained by an individual against another for obstruction to a highway without proof of special damage and that rule was founded on adequate reasons of public policy and had been generally adopted in the Indian Courts. "The rule that a man who may have committed some public injury shall not be harassed by innumerable actions by persons who have not sustained any damage embodies equitable doctrine," he said,

and should be enforced in India as a rule of equity and good conscience. As there was no proof of special damage the plaintiffs must fail.

Section 30, Civil P. C., could not help them. That Section was designed rather to allow one or more persons to represent a class having special interests than to allow such persons to sue on behalf of the general public, to which the notices prescribed by that procedure would be inapplicable. It was observed that the High Courts at Calcutta and Allahabad had come to the same conclusion and he referred with particular approval to the examination of the matter in 2 Bom 457.[12]

These principles were more or less uniformly followed until 1924 when a somewhat similar case came before the Privy Council in 47 All 151.[14] This was a case where the Shia Muhammadans of a certain town brought a suit for a declaration of their right to take procession bearing religious emblems along a public street immediately behind a Sunni Mahomedan mosque and make pauses from time to time for religious observances. Their Lordships of the Privy Council observed that the case raised for authoritative decision the question as to the right of religious processions to proceed along the roads in India practising their religious observances. With regard to this question they observed that the decided authorities in India were conflicting. They remarked that there was an obvious discrepancy between Bombay and Madras, and Calcutta upheld Madras. They noticed the leading Bombay case, 2 Bom 457.[12] They observed that the judgment in that case proceeded entirely on English authorities which laid down the difference between proceedings by indictment and by civil action. In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction, they observed, peculiar to English law and ought not to be applied in India. In the Madras cases on the other hand, in none of them was the idea entertained of special damage other than the obstruction of procession being needed. They noticed that in 24 Cal 524[15] the Calcutta High Court had taken the Madras view. Their Lordships were of opinion that the views of the Madras High Court were right and those of the Bombay judgment were wrong and they thought that the plaintiffs were entitled to the declaration asked for.

It is to be noted that the cases considered by their Lordships were all suits for declaration of the right to take religious processions along roads; they were not for removal of public nuisances. And their Lordships in speaking of the idea of special damage were careful to say that no proof of special damage was needed "other than the obstruction of the procession." Nevertheless, this decision gave rise to a train of cases in which it was held that no proof of special damage of any sort was necessary, or even that the doctrine of special damage was not at all applicable to India. As a matter of fact, before this Privy Council case, although the Calcutta High Court might have followed Madras with regard to the rights of religious processions, the Bombay view that in the case of obstruction to a public road a suit was not maintainable without proof of special damage had been adopted. Thus, in 1919 in 25 C W N 95,[16] Newbould J. and Panton J., of the Calcutta High Court held that an action for obstructing a public road was not maintainable, unless the plaintiff proved some injury or damage peculiar to himself and different from damage that would be suffered by other people who used

14. Manzur Hasan v. Muhammad Zaman, (1925) 12 A I R P C 36=86 I C 236=52 I A 61=47 All 151 (P C).

15. Muhammad Abdul Hafiz v. Latif Husain, (1897) 24 Cal 524.

16. Batiram Kolita v. Sibram Das, (1921) 8 A I R Cal 271=61 I C 405=25 C W N 95.

the road. Special damage, they observed, did not mean serious damage, but meant a damage of a special nature, that is, damage affecting the plaintiff individually or damage peculiar to himself, his trade or calling. And their Lordships, besides referring to 2 Bom 457,[12] also cited another Calcutta case, 5 C W N 285,[17] in which the same view had been adopted.

Moreover, in Bombay the distinction had been drawn between suits for the removal of public nuisances and suits such as that in 34 Bom 571,[18] for declaration of a right to take a religious procession along a road. For example, in 87 I C 934[19] the distinction was clearly drawn, and it was held that the plaintiff could not sustain a suit for an injunction directing the defendant to remove an obstruction from a road in the absence of evidence to show that as a consequence of the encroachment he was unable to use the road; nor could he seek assistance of the Court merely because he wanted to walk over that portion of the road occupied by the obstruction, unless he proved special damage.

Another important point which it is necessary to notice is that in the Calcutta High Court a distinction had been drawn at a very early stage between the case of public roads, in which every member of the public has a right of way, and village roads in which the inhabitants of the particular village have special interests, and a distinction had been drawn in the two classes of cases in applying the doctrine of special damage and in considering the application of S. 91 and O. 1, R. 8, Civil P. C. This distinction was first drawn in 1888 by Wilson J., in the Full Bench case, 15 Cal 460.[20] Wilson J. observed that by the common law of England there were three distinct classes of rights of way and other similar rights:

> First, there are private rights in the strict sense of the terms vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freeman of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects; and the source of these is ordinarily dedication.

He said it was important to remember that these three classes of rights exist in India just as in England. The first and third classes, strictly private rights and public rights, were of frequent occurrence but the second class of rights belonging to a portion of the public, were also to be found in India and were expressly recognized by the Legislature in S. 42, Ill. (a) and S. 54, Ill. (p), Specific Relief Act. "It is specially important," he said,

> that this class of rights should be clearly understood and borne in mind in a country like India, where interests of the most essential importance depend so largely upon custom. And I am not sure that the existence of this class of rights has not sometimes been overlooked. I think there is reason to suspect that, in some cases, ways and other claims of a like nature have been treated as public rights when perhaps they might have been both more correctly and more conveniently regarded as village ways and village rights; more correctly, because I think there is reason to suppose that such village roads as distinguished from public roads are of very common occurrence; more conveniently, because, as I shall show later, there may be more easy civil remedies for treating questions of village roads than questions relating to public roads.

He went on to say that in the case of rights of the second class, i. e., the quasi-public rights, there were some additional remedies open. Where, for example, such a right was claimed, it would seem that a member of the class entitled might, by taking the proper steps under S. 30, Civil P. C., obtain permission to sue, on behalf of himself and the other members of the class, any one who disturbed or sought to disturb the right of way. Following this, in 1912, it was held by the Calcutta High Court in 17 C W N 73[21] that, where the suit relates not to a public highway but to a village road, a suit is maintainable under S. 30, Civil P. C., even in the absence of proof of special damage. This case is a very instructive one. It was a suit brought by the plaintiff on behalf of the inhabitants of a village to establish their right to use a certain path obstructed by the defendants. The lower Appellate Court found that the land was part of the public road and had been obstructed by defendants. It also found that the plaintiff had suffered no special damage. When the case came before the Calcutta High Court, Coxe J. held that on these findings the suit must be dismissed. He observed :

17. Mahomed Alam v. Dilbar Khan, (1901) 5 C W N 285.
18. Baslingappa v. Dharmappa, (1910) 34 Bom 581=7 I C 663=12 Bom L R 586.
19. Mani Lal v. Ishvarbhai, (1925) 12 A I R Bom 367=87 I C 934=27 Bom L R 421.
20. Chuni Lal v. Ramkishen Sahu, (1888) 15 Cal 460 (F B).
21. Kali Charan v. Ram Kumar, (1913) 17 C W N 73=18 I C 67.

As pointed out by Woodroffe J. in 33 Cal 905,[22] "under the substantive law no action can be maintained by a private individual in respect of an infringement of the right of the general public, unless he has suffered special damage . . . . . In a case therefore of infringement of a right of the general public no suit can be brought under S. 30 or at all unless on proof of special damage."

The case came up in Letters Patent Appeal and Jenkins C. J. in the Letters Patent Appeal observed :

Had the judgment of Wilson J. in 15 Cal 460[20] been brought to his notice, he would have been able to give effect to what evidently was his view as to the justice of the case. But that case apparently was not cited to him, nor did the argument bring to his notice the distinction between a public highway and a road over which a section of the public, as for instance, the inhabitants of a particular locality, might have a right of way. To my mind it is clear . . . . . that the ultimate decision was . . . . that the particular pathway was a village road. That conclusion completely meets the difficulties raised by the defendants and the result is that, in my opinion, the judgment and decree of Coxe J. must be set aside.

The important point to notice here is that the doctrine of special damage was in no way disapproved in its application to India, but having regard to the distinction between public rights and quasi-public rights it was implied that it was applicable only to the former and not to the latter. Two years later, in 1914, in 22 I C 916[23] Coxe and Chatterjee JJ. once more affirmed that no suit would lie for the removal of an obstruction to a public road except upon proof of special damage to the plaintiff. It was a suit by eleven persons on behalf of the public for a declaration that a certain way was a public or common way for the egress and ingress of the people of a mahalla. It purported to be under O. 1, Rule 8, Civil P. C. Their Lordships referred to Wilson's decision in 15 Cal 460[20] and observed that if the right was one of the second class, that is quasi-public class, no special damage need be proved : but if it were one of the third class, that is to say, public in the full sense, the suit must be dismissed in the absence of proof of special damage. In 1918 Fletcher J. and Sir Syed Shamsul Huda of the Calcutta High Court held in 46 I C 970[24] that the public at large are not affected by the obstruction of a pathway which only the inhabitants of a particular village have the right to use, so that a suit for a declaration of the rights of the inhabitants of a village to the use of a pathway is not governed by S. 91, Civil P. C.

In the same year in 23 C W N 91[25] the same two Judges once more laid down that obstruction of a village pathway, in which plaintiff had got a right with other villagers by reason of a grant implied from long user, does not require proof of special damage to give the plaintiff a cause of action. At the same time they approved by implication the doctrine that in the case of a public way, in the full sense, proof of special damage would be necessary, and observed that proof by the plaintiff that he and his servants had been compelled to go by a longer route and thereby incurred additional expense was sufficient proof of special damage. In another Calcutta case, in 1921, namely 26 C W N 587,[26] Panton J. in a case, where the plaintiff had sued for a declaration that a village path was a public way and sought relief for himself and his fellow villagers and the permission of the Court had been taken under O. 1, R. 8, Civil P. C., held that the question of whether the plaintiff suffered special damage or not did not arise, because a suit for a declaration that a pathway is a village pathway can succeed without proof of special damage. Such a suit was one to which O. 1, R. 8, Civil P. C., was appropriate and the Court's permission having been obtained under that rule recourse to the Advocate-General was not necessary.

In 1929 there was a useful discussion of the position with regard to village ways and public ways by Mukerji J. in 33 C W N 915.[27] The learned Judge pointed out that a pathway, which lies over private land and which is used by the villagers and perhaps by the inhabitants of some other villages also, but with regard to which there is no evidence of such universal user as to raise an inference of dedication to the public in general, is not a public way such as is contemplated by S. 283, I. P. C. Ways permitted to be used by a section of the public are private ways, generally having their origin in custom, but such ways can be converted into ordinary highways after user by the public sufficient to raise a presumption of dedication to the public in general. Evidence in support of public claim

22. Monmotha Nath v. Harish Chandra Das, (1906) 33 Cal 905=10 C W N 867.
23. Heyat Bakhsh v. Lachminia, (1915) 2 A I R Cal 276=22 I C 916.
24. Nagendra Nath v. Banwari Lal, (1918) 5 A I R Cal 212=46 I C 970.
25. Harihar Das v. Chandra Kumar Guha, (1919) 6 A I R Cal 123=49 I C 79=23 C W N 91.
26. Harish Chandra v. Pran Nath, (1921) 8 A I R Cal 405=69 I C 910=26 C W N 587.
27. Pran Nath v. Emperor, (1930) 17 A I R Cal 286=1930 Cr C 366=125 I C 600=31 Cr L J 859=57 Cal 526=33 C W N 915.

must be cogent; but the fact that a pathway does not join a public thoroughfare at either end does not militate against its public character. The material question is whether the public in general use the way as a pathway, or only the inhabitants of the village and of some of the other neighbouring villages. Where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages, and not by others, the road is not a public road, 25 W R 233[28] and 9 All 434.[29] "Where there is the intention to allow not the public generally, but merely visitors to or traders with the people of the village," or where ways are "allowed to be used by villagers to go to a church or a market or the common fields of a village," such ways are not regarded as public ways but private ways, and they generally have their origin in custom (1903) 2 Ch 344.[30] Such a customary way can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication, (1909) 1 Ch 12.[31] But the evidence in support of the public claim must be cogent (1865) 1 Eq 204.[32]

The Calcutta cases so far dealt with all take a clear, logical and consistent view of the law. It will be noticed that the doctrine, that proof of special damage is necessary in suits relating to public rights and public wrongs in the full sense, is nowhere dissented from, nor is it anywhere held that the doctrine of special damage does not apply to India. The view taken in these cases is merely that it is a doctrine which does not apply to suits on behalf of limited sections of the public for infringement of their special rights, as for example, suits for removal of obstructions and other nuisances from village pathways, which are only quasi-public and in which the public as a whole have not the same interest as the people of the locality.

There are however some Calcutta cases where this distinction does not appear to have been fully appreciated and, as I mentioned previously, the Privy Council ruling in 47 All 151[14] was wrongly made the basis for a proposition that an individual member of the public has the right to maintain a suit for removal of obstruction on a public highway, if his right of passage through it is obstructed, without proving special damage, and that the principle of English law which requires proof of special damage in such cases is not applicable to India. Such a case is 60 Cal 1003[33] where Jack J. observed :

> That no proof of special damage is necessary appears to be established on the authority of the case in 47 All 151[14] in which their Lordships of the Privy Council overruled the contrary view held in 2 Bom 457.[12]

This ruling does not support the general proposition that a plaintiff merely as a member of the public, can maintain a suit for removal of obstruction from a public highway without proving special damage. I have dealt fully with the Privy Council case and pointed out the distinction which their Lordships drew between a suit for the declaration of the rights of a special sect or community, and a suit for the removal of a public nuisance; and I have also noted that the expression used by their Lordships was "no special damage other than the obstruction of the procession." Moreover, Jack J. really proceeded on a finding that there was special damage. The suit was for the removal of an alleged encroachment made by the defendant on a passage leading to the plaintiff's house and the decision was based on an express finding to the effect that the plaintiff had suffered special damage. It is to be noted too that the other Judge in the case, Mallik J., though he agreed with Jack J. in the order made in the case, observed :

> The finding was that the passage was a public pathway and that the obstruction resulted in plaintiff's inability to carry large articles into her house. Regard being had to the peculiar situation of her house, this inability to carry large articles into her house was 'special damage'—damage beyond what is suffered by her in common with other persons affected by the nuisance, viz., inconvenience in passing along the pathway.

The respondents rely strongly on another Calcutta case, 62 Cal 692.[34] Nasim Ali J. who decided that case, observed incidentally in holding that the plaintiff was not entitled to any relief :

> The plaintiff in the present suit, being one of the members of the public, is equally affected by the obstruction with the other members of the public.

28. Sham Soondar v. Monee Ram, (1876) 25 W R 233.
29. Fattehyeb Khan v. Mahmood Yusuf, (1887) 9 All 434=1887 A W N 82.
30. Brocklebank v. Thompson, (1903) 2 Ch 344 = 72 L J Ch 626 = 89 L T 209=19 T L R 285.
31. Farquhar v. Newbury Rural District, (1909) 1 Ch 12=78 L J Ch 170=100 L T 17 = 73 J P 1=7 L G R 364=25 T L R 39.
32. Vestry of Bermondsey v. Brown, (1865) 1 Eq 204 = 11 Jur (N S) 1031 = 13 L T 574 = 14 W R 213.
33. Mandakinee Debee v. Basanta Kumaree Debee, (1933) 20 A I R Cal 884=147 I C 811=60 Cal 1003.
34. Beer Bikramkishore Manikya v. Chairman Comilla Municipality, (1935) 62 Cal 692 = 61 C L J 182=39 C W N 590.

He has suffered no special damage. His claim is not in respect of a wrong to him individually. He is one of the numerous persons affected by the obstruction and therefore having the same interest in the matter. Consequently, the proper course for him was to bring a representative suit in conformity with the provisions of O. 1, R. 8, Civil P. C. *See* 25 C W N 95[16] and 56 Mad 657.[35]

This was a single-Judge case, and this obiter dictum of the learned Judge was certainly not in conformity with the view generally taken by the Calcutta High Court. Moreover, the two cases referred to as authority do not support any such proposition. 56 Mad 657[35] was a Privy Council case in which their Lordships were considering merely the question whether in a representative suit instituted under O. 1, R. 8, Civil P. C., the decision in a former suit, not under O. 1, R. 8, would or would not operate as res judicata. The suit had been instituted under O. 1, R. 8, by certain persons as representatives of the veniyas or oilmongers of Tiruchendur for a declaration of their right to worship in the inner shrine of a Hindu temple at Tiruchendur; that is to say the suit was not on behalf of the public in respect of a public right, but on behalf of a limited section of people. Their Lordships held that the previous suit, not having been properly constituted under O. 1, R. 8, would not operate as res judicata. They never anywhere in the course of their judgment made any observation, even as obiter, which could lend support to the proposition put forward by Nasim Ali J. in 62 Cal 692.[34] On the other hand, their Lordships did say that it has been deemed essential that in a representative action the class of persons, on behalf of whom relief was sought, should be clearly defined : the requirement being that the judgment in such an action (properly constituted under O. 1, R. 8) is binding on all the members of the class represented, it is essential that the range of the estoppel be defined somewhere on the face of the proceedings.

In the other case referred to, 25 C W N 95,[16] there was also nothing to support the proposition of Nasim Ali J. I have already discussed this case and pointed out that on the contrary it was therein held that an action for obstructing a public road is not maintainable, unless the plaintiff proved some injury or damage peculiar to himself and different from the damage that would be suffered by other people who used the road. Indeed in that case the learned Judges held that the mere fact that the plaintiff in common with others would have to go a long way round was not special damage to the plaintiff sufficient to give a right to sue and different from the damage that would be suffered by other people who had hitherto used this road. The object of the rule requiring special damage was to prevent the defendants being harassed by separate suits from every individual member of the public whose right of way had been obstructed. Another ruling relied upon for the respondents is A I R 1926 Cal 1159.[36] That also was a single Judge case and all that was laid down was that obstruction of a village pathway which is not a public pathway in which the plaintiffs have a right along with other villagers does not require proof of special damage to give rise to a cause of action. The learned Judge in that case did not discuss the question at length, but merely followed 23 C W N 91[25] and 26 C W N 587[26] which I have already discussed.

There is one Allahabad case which needs consideration, namely A I R 1934 All 941.[37] In that case Sulaiman C. J. held that if there is a right to take out a procession along a particular route and the defendants' action causes an obstruction with the result that the processionists are compelled to change the route or are prevented from following the usual route, that amounts to special damage. This ruling is really consistent with the majority view in the Calcutta High Court, though the matter is somewhat differently expressed. According to both views the suit for obstruction of a religious procession can succeed without proof of special damage other than the obstruction of the procession. It seems to me that it matters little whether it is said that such a suit succeeds because it is one to which the doctrine of special damage does not apply or because special damage, if necessary, may be inferred from the obstruction of the procession itself. The former mode of expression is perhaps more in accord with the general view which regards the expression "special damage" as a legal phrase connoting only damage peculiar to the plaintiff himself. It is of course merely a question of definition whether the expression "special damage" shall have that limited meaning or may be used in the wider

35. Kumaravelu Chettiar v. Ramaswami Ayyar, (1933) 20 A I R P C 183=143 I C 665=60 I A 278=56 Mad 657 (P C).

36. Suresh Chandra v. Jaminikanta, (1926) 13 A I R Cal 1159=96 I C 711.

37. Mahomed Hasan v. Amba Prasad, (1934) 21 A I R All 941=151 I C 263.

sense of damage to the special interests of a whole class or section who may be represented by the plaintiff in a representative suit and as such not strictly speaking peculiar to the plaintiff himself, but peculiar only to the class along with which the plaintiff has a common interest. The narrower connotation is perhaps more in accord with English usage and therefore to be preferred.

There is another point which may be noticed in connexion with this ruling. Sulaiman C. J. laid down certain propositions with regard to S. 91, Civil P. C. He said :

> Section 91, sub-s. (1) authorizes two or more persons to sue with the previous consent of the Advocate-General in respect of a public nuisance, but it does not compel them to do so nor is there anying in S. 91 which confers a new right. If a right exists independently of that Section that right is not taken away. Obviously therefore S. 91 confers no new right and it does not take away any pre-existing right.

Having regard to the terms of cl. (2), it is indeed clear that S. 91 takes away no existing right but I most respectfully dissent from the proposition that it confers no new right. It does confer a new right, and in express terms, namely the right with the consent of the Advocate-General to sue for the removal of a public nuisance without proof of special damage. That was a right which could not exist independently of that Section. The proposition that it takes away no right really needs no ruling to support it having regard to the clear wording of cl. (2). But it may be noted that it has been laid down in A I R 1925 Cal 1233[38] that S. 91 does not control or restrict the provisions of O. 1, R. 8, Civil P. C., and therefore does not take away any right of plaintiffs to sue which may exist independently of its provisions.

In a few Patna cases the question of the application of the doctrine of special damage to suits regarding obstructions to pathways and roads has been considered, though not exhaustively. In 18 P L T 459[39] Wort J., sitting singly, commented on 60 Cal 1003[33] as follows :

> Two learned Judges of the Calcutta High Court are reported to have held that individual member of the public has the right to maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proving special damage. If the learned Judges intended to hold that a single member of the public might bring an action, without the consent of the Advocate-General and without proving special damage, in respect of a public nuisance, I most respectfully disagree with them. A very long line of decisions in India has established the proposition that the law with regard to this matter in India is the same as in England ; and, indeed in my judgment, it would be quite impossible to hold a contrary view having regard to the provisions of S. 91, Civil P. C., which, by necessary implication, state that to be the position . . . . Had the facts of that case been brought to the notice of the learned Judges of the Calcutta High Court, they would have seen . . . . that this Court has not laid down any proposition which is not in conformity with the law as laid down by a large number of decisions of the Indian High Courts, and it would have been observed that the decision of their Lordships of the Judicial Committee of the Privy Council in 47 All 151[14] did not (as is suggested) reverse the decisions of the Indian High Courts to the effect that an action with regard to a public nuisance, to be maintained, must establish special damage, or be brought under the provisions of S. 91, Civil P. C. There Lord Dunedin, delivering the judgment of their Lordships of the Privy Council, and referring to a number of cases, accepted the Madras view as against the Bombay view on a very limited question relating to the conduct of religious processions through the streets and over the public highway, and it is with regard to that matter and that matter alone that their Lordships' decision was directed in 47 All 151.[14] If the matter ever comes up for decision before their Lordships of the Privy Council, I have no doubt that it will be pointed out that their decision was limited to the narrower and not to the wider question whether an action with regard to a public nuisance could be maintained without the proof of special damage . . . . . In my judgment the law in India is precisely the same in this regard as it is in England and it does not depend on the technical question of whether in the circumstances of the case an indictment could be maintained. Technical objections of that kind do not obtain in India. But the main principle upon which this question is to be discussed and upon which the whole matter rests is that where all members of the public have suffered inconvenience or damage, an action by an individual will not lie excepting as indicated by S. 91, Civil P. C. The law in England in this respect has never been altered, but with regard to the case in hand the principle laid down in the well-known case in (1869) 4 Ex 43[40] applies. There is no doubt with regard to the facts of this case in spite of the loose pleadings and it is quite clear that the plaintiff is one of the limited members who enjoys the use of a certain well. The user of that well has been obstructed by the action of the defendants, and the short question is whether an action in those circumstances would lie at the instance of the plaintiff alone. O. 1, R. 8, Civil P. C., has nothing to do with the matter at all. O. 1, R. 8, as has been pointed out by a number of decisions, is an enabling Section which entitles one party to represent many who have a common cause of action ; but it does not force one to represent many if his action is maintainable without the joinder of other persons.

His Lordship went on to deal with the case in (1869) 4 Ex 43[40] at some length and

38. Peary Lal v. Surendra Nath, (1925) 12 A I R Cal 1233=88 I C 505.

39. Ramghulam Khatik v. Ramkhelawan Ram, (1937) 24 AIR Pat 481=167 I C 798=16 Pat 190=18 P L T. 459.

40. Harrop v. Hirst, (1869) 4 Ex 43=38 L J Ex 1 =19 L T 426=17 W R 164.

to point out that on the authority of that case the doctrine of special damage even in England does not apply where the plaintiff is one of a limited number whose special right has been infringed, and therefore in a case of that nature the plaintiff can succeed without proof of special damage. But that in no way conflicts with the general principle, for

> the law considers that the right of the commoner is injured .... and therefore allows him to bring an action for it to prevent a wrong-doer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury.

I have quoted from this decision of Wort J. at some length, because, if I may say so with respect, it appears to me to state the true position correctly and clearly; and it is to be observed that it is entirely consistent with the doctrine laid down in so many rulings of the Calcutta High Court, that while it is necessary to prove special damage in cases where the plaintiff sues merely as a member of the public in respect of a public right in the full sense, it is not necessary to prove it in the case of quasi-public rights, where the plaintiff sues as a member of the limited class whose special rights have been infringed. In a later case 20 P L T 414[41] Wort J. again sitting singly, stated the same principles. He again referred to (1869) 4 Ex 43[40] and observed that, though under the general rule the consent of the Advocate-General was required in a suit with regard to a public right, an action brought by a particular class of persons as regards their right of way over a plot of land, which they alleged to be a village pathway, was an exception, and such an action was maintainable without proof of special damage. There appears to be only one Division Bench case of the Patna High Court at all bearing on the question, namely 18 P L T 737.[42] According to the placitum of that ruling their Lordships laid down that

> a person in the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action and that irrespective of whether he has proved special damage or not. The principle is that a person of an immediate community or Section of the public who is deprived of the amenity provided for that particular Section may be deemed to have suffered loss without proof of such loss.

41. Ramdahin Pande v Parmeshwar Singh, (1940) 27 A I R Pat 160=188 I C 249=20 P L T 414.
42. Pahlad Maharaj v. Gauri Dutt, (1937) 24 A I R Pat 620=171 I C 933=18 P L T 737.

The placitum however is misleading. What Courtney-Terrell C. J. in delivering the judgment, did say was somewhat different. It was a case in which the plaintiff and the defendant lived on opposite sides of a narrow road through a village, and the defendant had built on to the thoroughfare a structure containing a platform and a privy constituting a nuisance not only to persons passing through the thoroughfare but particularly to the plaintiff who lived on the opposite side of the road. His Lordship observed that the simple point was that the person living on the opposite side of the road, that is to say the plaintiff, suffered special damage. The Court of first instance seemed to be under the impression that the plaintiff had to prove special damage in the matter of financial loss: that was of course wrong. The finding was that the plaintiff living on the opposite side of the road had suffered particular inconvenience and in such circumstances the right to bring a suit on the part of the plaintiff was indisputable. His Lordship went on to observe:

> It is perfectly true that in the case of public thoroughfares generally a mere stranger to a district cannot on the ground that he is a member of the general public bring a suit for the removal of an obstruction unless he can prove some particular damage; if for example smoke is emitted in undue quantity in the streets of Calcutta, it will hardly lie in the power of an inhabitant of Patna to say that whereas he is a member of the public and pays occasional visits to Calcutta he is interested as of right to bring a suit for the removal of the nuisance.

He wound up by saying that

> the plaintiff was in a peculiar position to suffer loss and must be deemed to have suffered the loss from the inconvenience and nuisance committed by the defendant.

Thus, this ruling offers no support for the proposition that an individual member of the public, suing either by himself or as representing the public generally, can have a right of suit without proof of special damage. What it does lay down is that in some cases the necessary special damage can be inferred from the circumstances. In my view there is no real doubt as to what the law is. The doctrine of special damage is based on the principle of English common law that there can be no private action for a public wrong. To give a right of suit the wrong must be in some way special or peculiar to the person who sues, and it is based on the sound rule that no man should be harassed by a multiplicity of suits in respect of a single wrong. English law has never departed from that principle, and it

has been adopted by the Courts in India as a matter of equity and good conscience and must govern their procedure in the absence of any specific provision of law giving a special right of suit in derogation of the general principle. That the doctrine of special damage is sound law in England cannot be doubted. It was clearly affirmed in the House of Lords in (1875) 7 H L 243.[43] In this case Lord Penzance expressed himself as follows:

> But being a public right, it is said that the only remedy at law is by indictment. This is a well-known rule, but governed and limited by an equally well known exception . . . . . It is well, therefore, to look back to the other cases in which this exception was first established to ascertain the exact terms in which it is expressed. In *Iveson* v. *Moore*[44] the language of the Judges in the Exchequer Chamber affirming the exception and establishing the right of action was that 'the plaintiff did necessarily suffer an especial damage more than the rest of the King's subjects.' In *Ashby* v. *White*[45] the language was 'still if any person have sustained a particular damage beyond that of his fellow citizens' &c. The Judges do not say a damage of a different kind or description from that suffered by other subjects, but 'more than' or 'beyond' their fellowcitizens. The question then, is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer especial damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do . . . . . And if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one.

It is, however, a doctrine which has got two very definite limitations, and in English law it has been rigidly narrowed in these two ways: first, it applies only to cases regarding public rights in the full sense. This followed in English law from the fact that it was only in such cases that there must be an indictment, and the doctrine was held applicable only to cases where the procedure was by indictment and not by civil action. This was stated very clearly by Channell B., in (1869) 4 Ex 43,[40] who said:

> It is conceded that where an indictment may be maintained there is no remedy by action without proof of individual damage. But the same principle does not apply where the injury complained of is not one affecting the public generally, but only a particular class or Section of persons.

Secondly, an invasion of special rights will provide a cause of action without special proof of damage, for in such a case the law will presume damage. This principle also has been recognized by the House of Lords in (1904) A C 301.[46] Lord Lindley there observed:

> This has been long well settled. In the note to *Mellor* v. *Spateman*[47] it is said: 'Wherever any act injures another's right, and would be evidence in future in favour of the wrong doer, an action may be maintained for an invasion of the right without proof of any specific injury.' This principle has been repeatedly recognized and acted upon in cases involving water rights.

There is no reason why the doctrine of special damage, subject to these limitations, should not apply also in India, and it is clear from the wording of S. 91, Civil P. C., that the Legislature itself contemplates that it should. For there would be no point otherwise in providing a special right of suit in the absence of special damage, and the use of these words constitutes an implied recognition of the existence of the rule. It is clear also from the general trend of the rulings, which I have examined, that the doctrine has been applied subject to the two limitations I have mentioned. It is by reason of these limitations that it has been held not to apply to cases of quasi-public rights, such as village roads, and where the plaintiff sues either for himself as a member of the limited class of persons having special rights in common, or on behalf of that limited class in a representative suit under O. 1, R. 8, Civil P. C., for infringement of those rights. So much for the doctrine of special damage in its application to India.

Now with regard to O. 1, R. 8. As I have noticed it was clearly laid down in the old case already referred to, 9 Mad 463,[13] as long ago as 1886, that S. 30, Civil P. C., (O. 1, R. 8) was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class, having special interests, to represent the rest of the class. No case has been cited at the Bar in which the ruling has been considered and dissented from, and in my view it correctly states the position on that point. This view has received implied recognition from the Privy Council itself in 56 Mad 657.[35] There their Lordships observed:

> It has been deemed essential that in a representative action the class of persons on behalf of whom relief is sought should be clearly defined . . . . The gist of the requirement is that as the judgment in such an action is binding on all the members of the class represented, it is of the essence that the

43. Metropolitan Board of Works v. Owen McCarthy, (1875) 7 H L 243=43 L J C P 385=31 L T 182=23 W R 115.
44. 1 Ld. Raym 486.
45. 1 Sm L C (Edn. 10) 231=14 Howell St Tr 695.
46. McCartney v. Londonderry and Loughswilly Railway Co. Ltd., (1904) A C 301=73 L J P C 73=91 L T 105=53 W R 385.
47. 1 Wm. Saund 346*a*.

range of the estoppel be defined somewhere on the face of the proceedings.

The reason for this is plain. In a case under O. 1, R. 8, notice is issued to all the persons represented, and the decision will bind all the persons represented. Unless, therefore, the area of representation (as one might put it) is clearly defined, it would be impossible to determine afterwards the exact extent to which the decision is res judicata. And all sorts of difficulty may arise. For example, if the plaintiff sues merely as a member of the public, and not as a member of a limited and defined class, what will happen if the defendant secures a verdict that he has a right to maintain the obstruction? This decision will be res judicata against all those having a common interest with the plaintiff and represented by him. Who then, it might be asked, would be barred from bringing a fresh suit if the area of representation is not well defined? And an even worse difficulty would arise in the case of a compromise. It could hardly be said that a compromise in such a case would be binding upon the whole world. But here again, unless the area of representation is defined in the proceedings, it would be impossible to ascertain who was and was not bound by the compromise. It is, I think, for this reason that their Lordships laid down in 56 Mad 657[35] that it was essential that the range of the estoppel should be defined somewhere on the face of the proceedings.

Order 1, R. 8, Civil P. C., is merely an enabling provision. It provides no new right of suit, but merely a right of representation where a right of suit already exists, and that right of suit is provided by the invasion of the special rights of the limited class represented. I now turn to S. 91, Civil P. C. The Section, unlike O. 1, R. 8, does give a new right of suit, namely, a right to sue for the removal of a public nuisance, even where there is no special damage and no invasion of any special right. It gives that special right in the case of a public nuisance; and it is to be noted that the definition of 'public nuisance' in S. 268, I. P. C., which is made applicable to the Civil Procedure Code under S. 3 (44), General Clauses Act, is wide enough to cover cases of obstruction to village pathways, though they may not be public highways in the full sense. For that definition is:

> A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or nuisance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or nuisance to persons who may have occasion to use any public road.

It is possible therefore to bring a special suit under S. 91 with the consent of the Advocate-General for obstruction of a village pathway, and in the absence of any special damage. It is, however, not necessary to resort to the provisions of S. 91 if there is any independent right of suit, for having regard to the provisions of cl. (2), S. 91 takes away no independent right of suit which may exist, and it does not overrule the provisions of O. 1, R. 8 and take away any right of suit under O. 1, R. 8 even when it is a case of public nuisance: A I R 1925 Cal 1233[38] and A I R 1934 All 941.[37] There are clearly two modes of escape from the special restrictions of S. 91: (1) by proof of special damage and (2) by proof of the invasion of the special rights of a limited class which will give an independent right of action on the principle in (1869) 4 Ex 43.[40] This right, as I have noticed, is a right of suit independent of both the provisions of S. 91 and O. 1, R. 8, Civil P. C. It is not O. 1, R. 8 that gives that right of suit, and O. 1, R. 8 enables no individual to sue on behalf of the public at large for a public wrong where he would otherwise have no right of suit. It does give a right to sue in a representative capacity upon an existing right of suit, and that is a right to represent any particular defined section of the public with whom the plaintiff has a special common interest, but not to represent the public generally as a whole. It does not contemplate the issue of notice to the whole world or that the whole world should be bound by the decision in a suit under its provisions.

It follows from all this that in the case of suits such as those with which we are concerned in these appeals, relating to obstructions to village ways, if the plaintiff does not utilize the special provisions of S. 91, or prove special damage, but purports to sue under O. 1, R. 8, he must plead and show (1) that he sues not on behalf of the public generally, but on behalf of a limited and clearly defined class with which he has a common interest and a common right of suit; (2) he must plead and show that the pathway in question is not a public highway in the full sense, in which all members of the public who happen to go to the place have equal interest; he must show that it is a way or path of the

quasi-public type recognized long ago by Wilson J. in 15 Cal 460,[20] in which the class he represents has got special rights as distinct from those of the public generally.

It is now necessary to apply these principles to the cases before us. We have carefully examined the pleadings in all three cases, and it must be held that in none of them has either of these conditions been satisfied. Thus, in Second Appeal No. 786 of 1937 the plaint sets out that the lands contain daggar, pathway and karha for the use of the public. By their obstruction the plaintiff and other members of the public have been put to great loss and each member of the public has been put to inconvenience. The plaintiff brings the suit as sixteen annas malik, and on behalf of the public. In his petition under O. 1, R. 8, the plaintiff asks that he may be permitted to bring the suit under O. 1, R. 8 as a member of the public and asks for the issue of a notice or advertisement. The only notice that was issued was by publication in the Official Provincial Gazette in the following terms:

> Whereas the plaintiff has instituted the above suit against the defendants mentioned above on his own behalf as well as on behalf of the public to remove encroachments on survey plot Nos. 1600, 708, 1422 in village Kurmurhi, thana Piro, thana No. 199, pargana Piro, district Shahabad, it is notified hereby that whoever desires to join as a plaintiff in the said suit should appear on or before 27th day of March 1935 and signify to this Court whether he consents to be so added as a plaintiff.

There was no special notice of any kind to the villagers, though there could have been no difficulty in issuing notice in the village by beat of drum or by hanging up, or by special notice on the village headman or some principal villagers. Thus, in this case, there is not only no question of any definition of a limited class represented, but there is not even a claim that the plaintiff represents the villagers or any limited class having a common interest with himself. There was no special notice on the villagers; and with regard to the second point it was not pleaded, and no evidence was led, to show that the villagers had any special rights in these pathways in any way distinct from the rights of the general public. Exactly the same remarks apply to Second Appeal No. 217 of 1938. The plaintiffs do not say that they reside near the scene of the obstruction or that they suffer any particular inconvenience beyond that suffered by the general public. The obstruction is stated in the plaint to be upon a public lane which has been in existence from time immemorial, and the obstruction is said to have caused great difficulty and inconvenience to the public in using the lane, and finally it is stated that as the lane is a public one and the obstruction has caused inconvenience to the public, the plaintiffs have sued in a representative capacity for the benefit of the public. In the relief portion the lane is spoken of as a thoroughfare. Here again the only notice issued was by publication in the Provincial Gazette.

In Second Appeal No. 355 of 1938 the pleadings are the same. The land encroached upon is said to be a public thoroughfare and recorded as such in the survey. The encroachment has caused difficulty to carts passing through it and, as all the members of the public are interested in the pathway, the plaintiffs ask to be permitted to sue under O. 1, R. 8 on behalf of the members of the public. Here again it is not stated in which portion of the village the plaintiffs reside or that they are in any way particularly or peculiarly affected by the encroachment beyond other members of the public, nor is it said that it is a way in which the villagers have got any special rights. Once more the only notice was by publication in the Official Gazette.

In such circumstances it can only be held that none of the suits satisfy either of the two requirements which I have indicated as being essentially necessary for such suits. In Second Appeal No. 355 of 1938 Mr. Syed Ali Khan for the respondents, realizing the difficulty in which the plaintiffs had been placed by the fact that they have not claimed to sue on behalf of any limited and defined section of the public, has asked that we should ignore the fact that the suit was framed under O. 1, R. 8 and assume that the plaintiffs had sued in their individual capacity, and that then on the authority in 18 P L T 737[42] we should presume from the circumstances that there has been special damage to the plaintiffs individually. But apart from the fact that the pleadings clearly show that the plaintiffs are not suing in their individual capacity in this case, no circumstances have been stated either in the pleadings or in the evidence on which any such assumption could be made. As I have said, we are not even told in what portion of the village the plaintiffs reside; whether their houses are situated near the obstruction or even anywhere on the road obstructed. Nor has it been claimed that they have any special necessity to use

that road other than as members of the general public. Manifestly this is not a case where there can be any presumption of special damage or infringement of a special right.

All three appeals must succeed. In Second Appeal No. 786 of 1937 the plaintiff sued primarily as landlord, and it was only on realizing his difficulties owing to limitation that the expedient was adopted of asking to sue under O. 1, R. 8, Civil P. C., as representing the public. I consider therefore that this appeal should be allowed with costs throughout, the suit being dismissed in part with proportionate costs, as one of the plots has not been made the subject of appeal. In the other two cases the plaintiffs do appear to have sued in the public interest and not on their own behalf, and I would therefore allow these two appeals without costs.

Fazl Ali J — I agree.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 467

FULL BENCH

HARRIES C. J., AGARWALA AND MANOHAR LALL JJ.

Sunder Mall and others — *Plaintiffs* — Appellants.

v.

Lachhmi Tewari and others — *Defendants* — Respondents.

Letters Patent Appeal No. 22 of 1938, Decided on 7th May 1940, from decision of Wort J., D/- 23rd November 1938.

(a) Bengal Tenancy Act (8 of 1885), S. 22 (2) as amended in 1907 — Amendment does not apply to purchase made before 1907.

The amendments made in S. 22 (2) by the Amending Act of 1907 do not apply to a purchase made before that date. [P 467 C 2; P 468 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 22 (2) before amendment in 1907 — Purchase by one co-owner of occupancy right — Only occupancy right ceases to exist and not all tenancy rights.

The effect of the purchase by one of the co-owners of land of an occupancy right is not that the tenancy rights cease to exist altogether but only the occupancy right which is an incident of the holding: *24 Cal 143 and 32 Cal 386 (FB), Foll.* [P 468 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 22 (2) before amendment of 1907 — Co-proprietor purchasing occupancy right is not tenant under other co-proprietors.

A co-proprietor purchasing an occupancy right in land is not a tenant under the other co-proprietors of the land. Nor can he be viewed as occupying the status of a tenant under himself and his co-proprietors, for that involves the purchaser being a tenant under himself and the other co-proprietors as landlords. [P 469 C 2]

(d) Bengal Tenancy Act (8 of 1885), S. 22 (2) before amendment of 1907 — Co-owner purchasing occupancy right is not entitled to retain possession after land purchased by him is allotted to other co-sharer by partition.

There is nothing in sub-s. (2) to suggest that a co-owner who purchases an occupancy right is entitled to retain possession after the land which he has purchased has been allotted to the patti of any other co-sharer by partition: *A I R 1926 Pat 263, held no longer good law.* [P 471 C 1, 2]

S. M. Mullick, K. N. Lal and Prem Lall — *for Appellants.*

S. N. Dutta — *for Respondents.*

Agarwala J.—This appeal arises out of a suit to recover possession of plot 196 measuring 7 bighas, 2 khatas in khata No. 60 of tauzi No. 24363. This plot was originally recorded as kasht of Bhikari at a rental of Rs. 6 per annum and appertained to tauzi No. 9441. In 1897 Narsingh Tewari, ancestor of the defendants, purchased it from Bhikari and took possession. At the time Narsingh was a co-sharer landlord of the tauzi. Subsequently, there was a partition of the tauzi and plot 196 was allotted to the new tauzi No. 24363 which was the patti of another co-sharer malik Sarjug Singh. At the partition it was treated as bakasht and valued at Rs. 5 per bigha per annum. The co-sharers were put into possession of their new pattis under S. 94, Bengal Estates Partition Act, on 14th May 1923. The plaintiffs purchased Sarjug's patti in June 1924. They alleged that they obtained delivery of possession, but were dispossessed by the defendants a month later. It has been found however that they never obtained actual possession of the plot in dispute. The present suit was instituted on 7th March 1935. The plaintiffs' claim was resisted by the defendants on the ground that they are entitled to hold possession of it by reason of the provisions of S. 22 (2), Bihar Tenancy Act. Although the land was treated as bakasht in the partition and valued at Rs. 35 per annum instead of at Rs. 6 per annum which was the rent payable by Bhikhari, the plaintiffs contended that S. 119, Estates Partition Act, barred the defendants from contending that the land was their tenancy land as this would amount to contesting the partition. In the Courts below and before the Judge of this Court before whom this case was first argued, the matter was dealt with as if the present S. 22 (2) applied. It is clear however that the amendments made in S. 22 (2) by the Amending Act of 1907 do not apply

to a purchase made before that date and therefore do not apply in the present appeal to plot 196 which was purchased by Narsingh in 1897. Before its amendment in 1907, S. 22, Tenancy Act, stood as follows:

(1) When the immediate landlord of an occupancy holding is a proprietor or permanent tenure-holder, and the entire interests of the landlord and the raiyat in the holding become united in the same person by transfer, succession or otherwise, the occupancy rights shall cease to exist; but nothing in this sub-section shall prejudically affect the rights of any third person.

(2) If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person.

In 1907 the Section was amended and now stands as follows:

(1) When the immediate landlord of an occupancy holding is a proprietor or permanent tenure-holder and the entire interests of the landlord and the raiyat in the holding become united in the same person by transfer, succession or otherwise, such person shall have no right to hold the land as a tenant, but shall hold it as a proprietor or permanent tenure-holder (as the case may be); but nothing in this sub-section shall prejudicially affect the rights of any third person.

(2) If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may from time to time be payable to them; and, if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat, as the case may be, in respect of the land.

A question arose under the Section before its amendment as to what it was that was acquired by a co-owner who purchased the occupancy right in land and what it was that was extinguished by the Section. Subs. (2) speaks only of the transfer of the occupancy right in land and of the extinction of that right. The term occupancy right is not defined, but on a plain reading of the Section what was extinguished was the very thing that was transferred. In the case of an occupancy raiyat, the statute has superimposed on the ordinary right of a tenant to quiet possession certain statutory incidents aimed mainly at protecting him from ejectment and unreasonable enhancement of rent. These statutory incidents are inseparable from the occupation of the land and therefore are not transferable apart from the land. The term 'occupancy right' in sub s. (2) therefore prima facie, includes the whole of that fascicula or bundle of rights and statutory incidents appertaining to the tenancy of an occupancy raiyat; and the sub section, before its amendment, unequivocally enacted their extinction in the case of a purchase by a co-proprietor. What would appear to have been left therefore was the land relieved of all tenancy rights and free from the statutory incidents appertaining to the tenancy of an occupancy raiyat. In 24 Cal 143[1] however, a Special Bench of the Calcutta High Court consisting of five Judges held that the effect of the purchase by one of the co-owners of land of an occupancy right is not that the tenancy rights cease to exist altogether but only "the occupancy right which is an incident of the holding." That case came before the Special Bench on a reference by Petheram C. J., and Rampini J., in an appeal under the Letters Patent from the decision of Beverley J. In the Special Bench a short judgment agreeing with Beverley J. was delivered by Macpherson J., with whose judgment the remaining Judges agreed. Macpherson J. observed:

It is not said, and the sub-section cannot be understood to mean, that the holding shall cease to exist, but that the occupancy right, which is an incident to the holding, will cease to exist.

With very great respect to the learned Judge, I am unable to understand how an incident of a tenancy can be transferred apart from the holding which is the subject-matter of the tenancy. Beverley J. in the original appeal, had observed that

it was unreasonable to suppose that the Legislature intended that the purchase of an occupancy holding by one co-sharer should enure to the benefit of the other co-sharers who had paid nothing for it.

Their Lordships of the Privy Council in 51 Cal 631[2] however said:

Even if the Midnapur Company purchased any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished.

This dictum of their Lordships is in direct conflict with the opinion of Beverley J. whose view was the foundation of the decision of the Special Bench. The question again arose in 32 Cal 386.[3] This appeal first came before a Bench consisting of Rampini and Mitra JJ. the former of whom had been one of the referring Judges in the earlier case. They referred the matter to a Full Bench, stating that they disagreed with the decision in 24 Cal 143[1] and gave four

1. Jawadul Huq v. Ram Das Saha, (1897) 24 Cal 143=1 C W N 166.
2. Midnapore Zamindary Co. Ltd. v. Naresh Narayan Roy, (1924) 11 A I R P C 144 = 80 I C 827=51 I A 293=51 Cal 631 (P C).
3. Ram Mohan Pal v. Sheikh Kachu, (1905) 32 Cal 386=1 C L J 1=9 C W N 249 (F B).

reasons for their disagreement with that decision, namely (i) that to hold otherwise is to introduce a new class of tenants, not contemplated by the Act (*see* S. 4); (ii) that to lay down the principle is to frustrate the object of the introduction into the Act of S. 22, which was to discourage the purchase by landlords of their tenants' rights so as to prevent their encroaching upon the raiyati land of the province and converting it into nij jote land; (iii) the words in S. 22 (2) 'shall cease to exist' occur also in S. 22 (1); and so, if, in the circumstances referred to, the tenancy is not to cease to exist, but to continue divested only of the occupancy right, then under S. 22 (1) a landlord may purchase an occupancy right and become his own tenant, which would seem to be opposed to the fundamental principles which underlie the law of landlord and tenant in all countries; and (iv) that if the Legislature had intended to lay down any such rule as has been laid down in the above cited rulings, it would surely have conveyed its meaning not by implication, but by means of clear and unambiguous language.

The Full Bench consisted of the Chief Justice and five other Judges, one of whom was Rampini J. With the exception of the latter, the learned Judges were of opinion that the former case had been correctly decided. In 51 Cal 631[2] the Midnapur Co. had not in fact purchased any occupancy holding, so it may be said that the dictum of their Lordships referred to above was obiter. In any case the view taken by the Special Bench in Calcutta in 1897 has prevailed for so long both in Bengal and in this province that to take a different view now would inevitably result in upsetting a great many titles based on the view that the construction of S. 22 (2) then taken was correct. On the principle of stare decisis therefore that view should not now be abandoned. That however does not conclude the matter before us. In neither of the Calcutta cases had there been a partition between the co-maliks after the purchase by one of them of the occupancy right of a tenant; and the question that falls to be considered now is whether the right which a co-proprietor acquires by his purchase of an occupancy right in land is destroyed by a subsequent partition among the co-maliks. For the purpose of deciding that question it is necessary to enquire into the nature of the right acquired by the purchasing co-proprietor. In 24 Cal 143[1] the Special Bench held that the status of the purchaser was that of a tenant under the other co-proprietors of the land. That again is a view which in my opinion it is difficult to sustain. If *A*, *B* and *C* are co-proprietors of an estate, I do not understand how one of them who is in possession of a part of the estate can be viewed as a tenant under the other two, for the land belongs to all the three co-proprietors and not merely to the other two. Nor in my opinion can he be viewed as occupying the status of a tenant under himself and his co-proprietors, for that involves the purchaser being a tenant under himself and the other co-proprietors as landlords. The law does not recognize a person as a tenant of himself. The amendments of 1907 have made it quite clear that the Legislature never intended that after "the right of occupancy" had been purchased by a proprietor and extinguished by sub-s. (1) of S. 22, the purchaser should be regarded as a tenant by substituting for the words "the occupancy right shall cease to exist" in sub-s. (1) the words "such persons shall have no right to hold the land as a tenant." Precisely the same language was used in the original sub-s. (2) and should not be construed differently.

It is true that the amended sub-s. (2) does not as in the case of sub-s. (1), provide that the purchaser "shall have no right to hold the land as a tenant" but, in my view, the amendment of that sub-section should not be construed so as to defeat the object of the Legislature which was to prevent landlords from encroaching upon the raiyati land of the province. The amendment should be construed in the light of the fact that in 1891 the Privy Council had considered the rights of co-sharers inter se when one of them cultivates a part of the land belonging to all of them in 18 Cal 10[4] and had observed that it would be inconsistent with the rule of justice, equity and good conscience to allow any of the other co-sharers (the plaintiffs in that suit) to appropriate the fruits of the labour or capital of the defendant co-owner who had cultivated the land. By enacting in 1907 that the purchasing co-owner of an occupancy right shall be entitled "to hold the land" subject to the payment to his co-proprietors "of their shares of the rent which may be from time to time payable to them" the Legislature gave effect to the rule of equity, justice and good conscience referred to by their Lordships and should

4. Watson & Co. v. Ramchund Dutt, (1891) 18 Cal 10=17 I A 110=5 Sar 535 (P C).

not be taken to have intended to go any further than that.

This case also decided that where one of the co-sharer proprietors is in cultivating possession of a portion of the estate belonging to himself and the other co-sharers, such possession does not amount to ouster of the latter and therefore they are not entitled to a decree for joint possession with the former but to a decree for a sum of money as compensation in respect of exclusive use and benefit by the defendant of the lands which he cultivates, the amount of compensation being in proportion to the share of the plaintiffs in the land. It will be noticed that their Lordships did not award the plaintiffs' rent which would have been the appropriate remedy, if the defendant was a tenant, but compensation for exclusive use and occupation. The object of the amendment of sub-s. (2) would appear to give effect to this decision in the case of a purchase of an occupancy right by a co-proprietor and at the same time to prescribe the amount of the compensation payable, namely that proportion of the rent which would have been received by the other co-owners from the tenant if there had been no transfer of the occupancy right. The reference to 'rent' in the present sub-s. (2), should, in my view, be read in this sense and not as descriptive of the nature of the payment to be made by the purchasing co-owner to his cosharers. It is pertinent to observe that in amending S. 22 (2) in its application to Bengal and East Bengal the Legislature has now made its intention clear by providing expressly that the purchasing co-proprietors or tenure-holder shall hold the land as proprietor or tenure-holder and shall pay a fair and equitable sum for use and occupation : *see* the discussion by Fazl Ali J. in 16 Pat 500[5] at p. 512.

In 51 Cal 631[2] their Lordships again pointed out that where a cosharer or a co-proprietor cultivates any part of the lands which is not being cultivated by another of his cosharers, he is liable to pay compensation to them in respect of the exclusive use of the land and if they are not satisfied, their proper remedy is to obtain a partition of the lands. They pointed out that no co-sharer can, as against his cosharers, obtain any rights of permanent occupancy, in the lands held in common. It will be noticed their Lordships again negatived the idea of any tenancy existing between the parties by the use of the word 'compensation' instead of 'rent' and they denied the possibility of one cosharer obtaining a right of permanent occupancy as against another cosharer. They further held that the period for which the compensation is thus payable is until partition has been effected and possession of the lands falling on partition to the plaintiff has been delivered to the plaintiff.

There is nothing in sub-s. (2) to suggest that a co-owner who purchases an occupancy right is entitled to retain possession after the land which he has purchased has been allotted to the patti of any other co-sharer by partition. Indeed, the decision in 51 Cal 631[2] negatives the plaintiffs' right of permanent occupancy by the purchasing co-owner. It has been contended that this view should not be adopted as it would lead to an injustice. It is pointed out that if a cosharer has purchased an occupancy right for a substantial sum of money and is not entitled to retain possession after partition he loses the money which he spent in purchasing the right. It may be presumed that where a co-owner purchases an occupancy right he takes into consideration, in deciding what price to pay for it, (a) the risk that his cosharers may apply for partition, (b) the compensation payable to his cosharers until partition and (c) the salami which he may expect to receive if he settles the land with another tenant.

It is now necessary to refer to certain decisions of this Court. In 7 P L T 170[6] it was held that the right of a purchasing co-proprietor was not extinguished by a subsequent partition. It is not clear from the report of that case whether the purchase by the cosharer was before or after the amendment of 1907 and the decision proceeds on the basis that the present sub-s. (2) of S. 22 confers a privilege on the purchasing cosharer which is in derogation of the common law right of the other cosharers. No such privilege was conferred on a purchasing co-proprietor by the original sub-s. (2) of S. 22 which merely provided that the right purchased should cease to exist. A similar view was however taken in 2 P L T 163.[7] Again it is not clear whether the purchase was before or after 1907. The decision is a single Judge decision and is based on the supposed injustice suffered by

5. Miss G. B. Solano v. Umeshwari Kuer, (1937) 24 A I R Pat 506=171 I C 306=16 Pat 500=18 P L T 700.

6. Jhapsi Sao v. Mt. Bibi Aliman, (1926) 13 A I R Pat 263=93 I C 1001=5 Pat 281=7 P L T 170.

7. Babu Ram Prasad v. Gopal Chand, (1921) 8 A I R Pat 341=58 I C 955=2 P L T 163.

the purchasing co-proprietor if his right to possession is lost by subsequent partition. The answer to that view has already been noticed above. In 3 P L T 13[8] the decision of Adami J. that the rights of the purchasing co-proprietor terminate on partition was reversed on appeal under the Letters Patent. The report does not indicate when the purchase took place and no reference is made to the language of S. 22 (2) as it stood before the amendment. The case in 3 P L T 22[9] was a case in which the purchase took place prior to 1907. The decision is based on the Special and Full Bench decisions of the Calcutta High Court already referred to in which the question now being considered did not arise. In 1 Pat 600=3 P L T 419[10] Dawson-Miller C. J. observed :

> In all cases where you have a Collectorate partition between co-proprietors, if the lands were merely the bakasht lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords themselves at the time of the batwara, none of them has the right to dispute the possession of those into whose takhta the particular lands in question fall. The only exceptions seem to me to be those which are created by law either under the Bengal Tenancy Act, or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired.

It is probable that the learned Chief Justice by reference to rights created under the Bengal Tenancy Act was referring to the right referred to in S. 22 (2). But the case before him was a case to which that Section admittedly did not apply and his observation is therefore merely in the nature of obiter dictum. In 7 P L T 87,[11] a Division Bench of this Court held that the status of a co-proprietor purchasing an occupancy right is a peculiar status which attaches to the cosharer so long as he remains a cosharer, and if he ceases to be a cosharer and his proprietary right is lost he has no right to retain possession of land which passes on to the person who acquires the proprietary interest. In that case the proprietary right had been sold. The case therefore is not exactly in point. In my view there is nothing to justify the contention that a purchasing cosharer is entitled to retain possession against another to whom the land has been allotted on partition. In this view of the matter it is unnecessary to decide the further question which was raised by the plaintiffs-appellant that S. 119, Estates Partition Act, debars the defendants-respondents from raising the question which we have to decide in this case. The learned Judge from whose decision this appeal under the Letters Patent has been preferred was of opinion that the plaintiffs-appellants were not entitled to succeed, but as he was bound by the decision in 7 P L T 170,[6] he had no alternative but to dismiss the plaintiffs' appeal and suit. As I have already mentioned, the purchase in 7 P L T 170[6] was not shown to have been made before the amendment of 1907, and in my opinion it can no longer be held to be a good law in view of the decision of the Judicial Committee of the Privy Council in 51 Cal 631.[2] I would allow the plaintiffs' appeal and decree the suit with costs throughout.

Harries C. J.—I agree.

Manohar Lall J.—I agree.

D.S./R.K. *Appeal allowed.*

8. Nandkishore Singh v. Mathura Sahu, (1922) 9 A I R Pat 193=65 I C 586=3 P L T 13.
9. Basudeo Narain v. Radha Kisan, (1922) 9 A I R Pat 62=65 I C 281=3 P L T 22.
10. Qyamuddin Khan v. Ramyad Singh, (1922) 9 A I R Pat 354=67 I C 530=1 Pat 600=3 P L T 419.
11. Lala Bambhadur Lal v. Mt. Gungra Kuer, (1925) 12 A I R Pat 547=89 I C 232=7 P L T 87.

A. I. R. 1940 Patna 471

AGARWALA J.

Bhikhali Tewary and others —

Petitioners.

v.

Achaibar Kuer and others —

Opposite Party.

Criminal Revn. No. 64 of 1940, Decided on 5th March 1940.

Criminal P. C. (1898), Ss. 144 and 145 — Bona fide disputes regarding possession—Proper method of dealing is under S. 145 and not under S. 144.

In the case of bona fide disputes with regard to possession of land the proper method of dealing with the dispute is by a proceeding under S. 145 and not by a proceeding under S. 144. [P 472 C 1]

Dr. Sir Sultan Ahmed and M. Rahman — *for Petitioners.*

Syed Safdar Imam—*for Opposite Party.*

Order. — This is an application by the second party against an order of 30th November 1939, making absolute against them an order under S. 144, Criminal P. C., in respect of plots 2 and 3 of village Gaighat. The first party are tenants of village Gaighat and are in possession of plots 11, 12 and 13 immediately south and contiguous to plots 2 and 3. The second party are tenants of village Nainijore which is south of Gaighat. The proceeding commenced on a police report which stated that the second party

were in possession. The disputed plots had recently emerged from the Ganges and it is the case of the first party that there has been a re-formation in situ of land which belongs to them. The second party, on the other hand, relied on an amaldustak granted to them by the proprietor of the land about two months before the date of the police report. The learned Magistrate who initiated the proceedings came to the conclusion that the land was an accretion to the land of the first party and, accordingly decided against the second party. In his order he stated that the second party claimed the land as an accretion to their village Nainijore. The second party moved the District Magistrate who has pointed out that the village of Nainijore is south of Gaighat and nowhere it is contiguous to the disputed plots.

In revision it is contended that the second party are interested in village Rudrapur which is adjacent to plot No. 3, one of the disputed plots, and that this circumstance has not been considered by the Courts below. Now, the second party had an opportunity of showing cause against the original order before the Magistrate and also an opportunity of attacking the Magistrate's order before the District Magistrate. On neither occasion did they claim these lands by reason of any interest that they may have had in Rudrapur and there is nothing in the record which enables me to hold that they in fact have any interest in Rudrapur. The learned District Magistrate observed in his judgment that the Subdivisional Magistrate did not trust the police report. If the Subdivisional Magistrate has ever said that he distrusted the police report certainly it does not appear from his judgment. That judgment contains no reference to the police report at all. However, the finding given by the Courts below that the villagers of Nainijore have no claim to this plot is supported by circumstances and I see no reason to interfere in revision with an order which has already expired. Should there be any further dispute with regard to the possession of these lands the Subdivisional Magistrate will bear in mind the rulings of this Court that in the case of bona fide disputes with regard to possession of land the proper method of dealing with the dispute is by a proceeding under S. 145, Criminal P. C., and not by a proceeding under S. 144. The rule is discharged.

D.S./R.K. *Rule discharged.*

A. I. R. 1940 Patna 472

HARRIES C. J. AND FAZL ALI J.

Babu Satyendra Narain and others — *Decree-holders* — Petitioners.

v.

Wahiduddin Khan and others—*Judgment-debtors* — Opposite Party.

Civil Revn. Petn. No. 71 of 1939, Decided on 8th December 1939, from order of Munsif, Second Court, Monghyr, D/- 12th December 1938.

Civil P. C. (1908), O. 21, R. 16—Beneficiary cannot execute decree on ground that decree-holder was his benamidar.

A person who is neither a decree-holder within the meaning of S. 2 (3), Civil P. C., nor a transferee from a decree-holder by assignment in writing or by operation of law cannot apply for the execution of the decree. The executing Court must, as a rule, take the decree as it finds it and can only execute it if application is made by the decree-holder himself or by some person who is entitled under the Code to execute in the same manner as the decree-holder. There is no provision in the Code which allows a person to come forward and say that the decree-holder is a mere nonentity and that he (the applicant) is in substance and in fact the holder of the decree: *A I R 1927 Pat 170; A I R 1939 Pat 411; A I R 1938 Pat 457 and A I R 1925 Mad 701, Rel. on.* [P 473 C 1]

Janak Kishore — *for Petitioners.*

M. K. Mukharji and P. N. Sanyal — *for Opposite Party.*

Harries C. J. — This is a petition by decree-holders for revision of an order passed by the learned Munsif of Monghyr dismissing their application for execution. It appears that one Raja Prasad obtained a decree against the opposite parties. According to the petitioners, Raja Prasad was a benamidar for them and that the decree was really held by them. Raja Prasad died and so did the father of the present petitioners. After the death of these two persons, application was made by the petitioners when they attained majority to execute the decree held in the name of Raja Prasad, the deceased. The learned Munsif came to the conclusion that the petitioners were not entitled in law to execute this decree, and dismissed the application. It has been argued by Mr. Janak Kishore on behalf of the petitioners that the latter are entitled to execute the decree because they are in fact the decree-holders. The term "decree-holder" is defined in S. 2 (3), Civil P. C. According to that sub-section, "decree-holder" means any person in whose favour a decree had been passed or an order capable of execution has been made. Undoubtedly in this case the decree was passed in

favour of Raja Prasad, and he was, until his death, undoubtedly the decree-holder. On his death his rights, whatever they were, devolved upon his heirs or personal representative. Even if Raja Prasad was merely a benamidar for the petitioners, the petitioners cannot be regarded as decree-holders within the meaning of that term as used in the Civil Procedure Code. O. 21, R. 10, Civil P. C., deals with execution by the holder of a decree. The decree-holder must

> apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

This rule is confined to holders of a decree, and in my view, there is no difference between the holder of a decree and a decree-holder. The holder of a decree under O. 21, R. 10 must be a person in whose favour a decree has been passed. O. 21, R. 16, Civil P. C., also deals with the persons who may execute a decree. It provides that

> where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree .... in the same manner and subject to the same conditions as if the application were made by such decree-holder.

These are the only two rules dealing with who may execute a decree. Quite clearly the present petitioners do not come within either of the rules. They are not decree-holders within the meaning of that term. Neither are they transferees by assignment in writing or by operation of law. That being so, I cannot see how they can apply for execution of this decree. The executing Court must, as a rule, take the decree as it finds it and can only execute it, if application is made by the decree-holder himself or by some person who is entitled under the Code to execute in the same manner as the decree-holder. There is no provision in the Code which allows a person to come forward and say that the decree-holder is a mere nonentity and that he (the applicant) is in substance and in fact the holder of the decree.

Mr. Janak Kishore has relied upon a number of Calcutta cases and they undoubtedly support his contention. However, it is clear the High Court at Calcutta has not been consistent and that there are decisions of that Court which go to show that only the decree-holder or a person coming within O. 21, R. 16, Civil P. C., can execute a decree. In my view, however, it is unnecessary to consider these Calcutta cases, because we are bound by decisions of this Court. The earliest decision is the case in 8 P L T 163.[1] In that case *A* obtained a decree against *X* and subsequently *A* executed a deed of release in favour of *B*, admitting therein that *B* was the beneficiary in the suit, *A* being his mere benamidar. In execution proceedings *B* made an application under O. 21, R. 16, Civil P. C., to which no objection was raised by *X*, but on the decree having been transferred to another Court for execution, *X* made an objection that the decree obtained by *A* could not be executed by *B*, without a decree of assignment of the decree. It was held that O. 21, R. 16 required an assignment in writing or by operation of law and that release was not sufficient to give the real owner a right to execute the decree. It was further held that a real owner as such could not execute a decree obtained by the benamidar. This case is a strong authority against the contention of the present petitioners. The same view was taken by another Bench of this Court in 17 Pat 223.[2] In that case Wort J. reviewed the authorities and came to the conclusion that a person, who claimed to be the true owner, could not apply to execute a decree which had been obtained by an alleged benamidar unless there had been an assignment of the decree in writing or by operation of law. Varma J. agreed with the view expressed by Wort J. The matter was again considered in the recent case in 18 Pat 318.[3] In that case, it was held that the person appearing on the face of the decree as the decree-holder was entitled to execute the decree, unless some other person could show that he had taken the decree-holder's place by an assignment of the decree or by operation of law, that is by death or succession or in some similar manner. It was further held that in execution proceedings it was not open to the judgment-debtor to assert that the real holder of the decree was any person other than the person named as decree-holder in the decree unless there had been a valid assignment or devolution by process of law. The view of this

1. Ramsewak Lal v. Satrudhan Deo Sahai, (1927) 14 A I R Pat 170=101 I C 619=8 P L T 163.
2. Mohammad Anas v. Bhupendra Prasad, (1938) 25 A I R Pat 457=177 I C 992 = 17 Pat 223 = 19 P L T 901.
3. Ran Bahadur Singh v. Awadbehari Prasad Singh, (1939) 26 A I R Pat 411=181 I C 184 = 18 Pat 318=21 P L T 138.

Court is similar to that taken by the Madras High Court in 48 Mad 553.[4] In my view, this Bench is clearly bound by the cases of this Court, to which I have made reference, and accordingly it must be held that the petitioners in this case had no right to execute the decree. For the reasons given, I hold that this petition fails and would discharge the rule. In the circumstances of this case, I would make no order as to costs.

Fazl Ali J. — I entirely agree.

G.N./R.K. *Rule discharged.*

4. Palaniappa Chetti v. Subramania Chettiar, (1925) 12 A I R Mad 701 = 88 I C 409 = 48 Mad 553=48 M L J 419.

A. I. R. 1940 Patna 474

AGARWALA J.

Union Committee, Dalsinghsarai — Appellant.

v.

Sahay Sah and others — Respondents.

Appeal No. 218 of 1939, Decided on 9th February 1940, from appellate decree of Addl. Sub-Judge, Darbhangha, D/- 22nd December 1938.

Bihar and Orissa Local Self-Government Act (3 of 1885), S. 118-C (3) (d) — Owner of buildings is not taxable in respect of each building.

Clause (d) as it stands, does not refer to buildings, tanks, wells or water-courses but to persons, and in unequivocal language limits the assessment on any one person to Rs. 5 per mensem. Hence, an owner or occupier of buildings is not taxable in respect of each of the buildings which he owns or occupies and only one tax is assessable on each individual. [P 474 C 2]

Hareshwar Prasad Sinha—*for Appellant.*

S. N. Bose, K. N. Lal and K. P. Varma—*for Respondents.*

Judgment.—This is a suit by the karta and members of a joint Hindu family for a declaration that an assessment made on them on 9th June 1935, by the Union Committee of Dalsinghsarai under S. 118-C, Bihar and Orissa Local Self-Government Act, amounting to Rs. 255 was ultra vires the Union Committee and for recovery of the tax paid plus Rs. 10 by way of interest. The Courts below have agreed in decreeing the suit. This appeal is by the Union Committee of Dalsinghsarai challenging the decision of the Courts below.

The question that arises is whether an owner or occupier of buildings within the Union is taxable in respect of each of the buildings which he owns or occupies or whether only one tax is assessable on each individual. S. 118-C of the Act empowers the Union Committee to impose on the owners of buildings, tanks, wells or water-courses, or the occupiers of buildings, within the Union, or in any village therein, such assessment as may be required approximately to meet any deficiency in the financial resources of the Union. Cl. (d) of sub-s. 3 however limits the amount to be assessed on any person to Rs. 5 per mensem. The assessee in this case was a joint family and this family carried on business in five different buildings within the boundaries of the Union. Both before and after 1935, the assessment on the family had been limited to Rs. 5 per mensem. In 1935, however, the Union assessed the family in respect of each of these buildings with the result that the family has had to pay more than Rs. 5 per mensem. It is not disputed, of course, that a joint Hindu family 'is a person' within the meaning of cl. (d) of sub-s. 3. The learned advocate for the Union Committee in this Court has maintained the argument addressed to the Courts below that the Committee is entitled to levy tax in respect of each building owned or occupied by persons within the Union. Acceptance of that contention will be to ignore altogether the provisions of cl. (d) or sub-s. 3. Had the Legislature intended that any one person within the ambit of the Union Committee should be liable to pay more than Rs. 5 per mensem, cl. (d) would have read very differently and probably would have been worded as follows: "The amount to be assessed in respect of any building, tank, well or water-course shall not exceed Rs. 5 per mensem." Cl. (d) however as it stands, does not refer to buildings, tanks, wells or water-courses but to persons and in unequivocal language limits the assessment on any one person to Rs. 5 per mensem. I therefore agree with the Courts below that the assessment in the present case, in so far as it offends against the provisions of cl. (d), was ultra vires the Union Committee, and would therefore reduce the assessment to Rs. 5 per mensem.

With regard to the claim for recovery of the amount already paid, the learned advocate for the respondents concedes that the decree of the Court must be modified to this extent, that his clients are not entitled to the refund of the whole of Rs. 255 paid but only to so much of it as it is in excess of what was within the power of the Union Committee to levy, namely Rs. 60 per annum. He concedes therefore that the appel-

lant is entitled to retain Rs. 60 out of Rs. 255 paid. The result is that the decree of the Court below will be modified to this extent, that it will be declared that the assessment on the plaintiffs in excess of Rs. 5 per mensem is ultra vires and the plaintiffs are entitled to recover Rs. 195 out of the money which they claimed. With this modification the appeal is dismissed. The parties will bear their own costs in this Court.

D.S./R.K. *Decree modified.*

A. I. R. 1940 Patna 475

VARMA J.

Raghunandan Lohar — Plaintiff — Petitioner.

v.

Bachu Singh and others — Defendants —Opposite Party.

Civil Revn. No. 337 of 1939, Decided on 11th January 1940, from order of Munsif, First Court, Arrah, D/- 15th March 1939.

(a) Practice—Procedure — Dismissal for default — Day fixed for hearing having been declared holiday, case taken up next day but not disposed of—Case again taken up next day and dismissed for default—Court held acted too hastily and should have granted sufficient time.

The day fixed for hearing an application under O. 33, R. 1, Civil P. C., was declared a holiday and the case was taken up the next day but was not disposed of. The Court fixed the next day for hearing and on being informed by the applicant's counsel that he had no instructions from his client dismissed the application for default:

Held that the day fixed for hearing having been declared a holiday the Court should have given sufficient time to the parties and that in the particular case the parties were hustled to a great extent and therefore the dismissal was not justified. [P 476 C 1]

(b) Civil P. C. (1908), Ss. 151 and 115—Revision lies from order under S. 151.

Even against an order passed under S. 151 the High Court can exercise its revisional jurisdiction: *A I R 1918 Pat 100, Foll.* [P 476 C 1]

Hareshwar Prasad Sinha and R. S. Sinha — *for Petitioner.*

G. Sharma and Braja Kishore Prasad Sinha — *for Opposite Party.*

Order.—This is an application on behalf of one Raghunandan Lohar whose petition for restoring his application under O. 33, R. 1, Civil P. C., has been rejected by the lower Court. A few facts may be mentioned here.

The petitioner filed a suit and along with that suit he put in a petition to be allowed to sue in forma pauperis. An enquiry was made by the Government through a Deputy Magistrate, who reported that the petitioner was a pauper and had no means to pay the court-fee, but the Court below rejected the application on certain grounds. Against that order of the Court the petitioner came up in revision before this Court, which was Civil Revision No. 412 of 1938, and the case was sent back on remand to the Munsif to dispose of the matter on merits. The record of the case was received by the Munsif on 11th November 1938, and he fixed 26th November 1938, as the date of hearing. The 26th November 1938 was a Saturday and it was declared to be a holiday. The case was taken up on 28th November 1938, and at the request of the pleader, who appeared in the original case, the case was adjourned and again taken up on 29th November 1938. On 29th November the pleader, who was formerly engaged by the petitioner, said that he had no instructions, and the petition for leave to sue as a pauper was dismissed for default. Thereupon the petitioner filed another petition for restoration of that application, so that it could be disposed of on its merits. That has also been dismissed after examining witnesses in the case.

The whole point is whether the Court below was right in dismissing the case on 29th November 1938. The chief point urged before me is that the Court below has acted hastily in the disposal of this matter. If the case was not taken up on the date fixed on account of its being declared a holiday, the Court should have given a reasonable time for the petitioner to appear before the Court. It may be the practice in the Courts below that if a date fixed happens to be a holiday the case is taken up on the next working day, but the Court not having disposed of the matter on 28th November should have given a reasonable time for the petitioner to appear before it. From the order sheet it appears that the pleader appeared on 28th November and wanted the case to be taken up on the 29th to give him time to communicate with his client. Babu Sheochand was the pleader engaged by the petitioner, and his signature appears in the margin on the order sheet against the order that was passed on 28th November 1938 and his signature bears the date, 29th November 1938, and it was on that date that the case was disposed of. On this point alone I am inclined to think that the petitioner did not get a reasonable time to prosecute his case before the lower Court. If the pleaders take upon themselves the responsibility of conducting cases, of course

there is no difficulty, but in a matter where evidence has to be led and witnesses to be called, it is desirable that they should get sufficient opportunity to communicate with their clients in order to prosecute their cases. In the present case I find that the parties have been hustled to a very great extent, with the result that all the trouble and expense which the petitioner bore in coming to the High Court in the civil revision has been frustrated by this action of the Court below.

Mr. Braja Kishore Prasad Sinha urges that no civil revision lies against an order passed under S. 151, Civil P. C. This argument has been advanced on the ground that the Court below has come to the conclusion that O. 9, R. 9 does not apply to this case. This case was heard by me yesterday and it was placed for judgment this morning, but Mr. Ganesh Sharma, who appears as a senior to Mr. Braja Kishore Prasad Sinha, urges that no opinion should be expressed in this case whether O. 9, R. 9 applies or not. We have got authorities in this Court where even against an order under S. 151 this Court has exercised its revisional jurisdiction. I will refer to the case in 4 P L J 20.[1] This being my view in the case, I would set aside the order passed by the Court below and restore the pauper application to be disposed of in accordance with law. The petitioner is entitled to his costs: hearing-fee one gold mohur.

G.N./R.K. *Order set aside.*

1. Braja Bhusan Trigunait v. Sris Chandra Tewari, (1918) 5 A I R Pat 100=47 I C 719=4 P L J 20.

A. I. R. 1940 Patna 476

FAZL ALI AND MEREDITH JJ.

Mt. Deorati Kuer — Appellant.

v.

Dasarath Dubey and another — Respondents.

Appeal No. 217 of 1939, Decided on 28th February 1940, from appellate decree of Sub-Judge, Arrah, D/- 2nd December 1938.

(a) Bihar Tenancy Act (8 of 1934), Sch. 3, Art. 3—Art. 3 applies even if dispossession by landlord is as auction-purchaser *(Obiter)*.

Dispossession by the landlord as auction-purchaser comes under the provisions of the special law of limitation under Art. 3, Sch. 3: *A I R 1927 Cal 488 and A I R 1938 Cal 276, Rel. on ; A I R 1930 Pat 256 (F B), Expl.* [P 477 C 2]

(b) Bihar Tenancy Act (8 of 1934), Sch. 3, Art. 3—Holding originally belonging to certain tenant purchased by *A*—Suit for rent by landlord against original tenant — Landlord in execution of decree obtaining dakhal dehani — Landlord taking advantage of *A's* conviction in criminal case dispossessing him — Suit by *A* for possession held governed by Art. 3, Bihar Tenancy Act, and not by Art. 142, Limitation Act.

A holding belonging to certain tenant was purchased by *A*. The landlord brought a suit for rent against the original tenant, and obtained dakhal dehani from Court. Subsequently *A* was convicted in a criminal case and taking advantage of this the landlord dispossessed him. *A* brought a suit for possession :

Held that as the decree obtained against the original tenant was only a money decree and the tenancy continued, the landlord was auction-purchaser only of the right, title and interest of the original tenant whatever that might have been and not of the holding or of the tenancy right of *A*. Therefore, in dispossessing *A*, the dispossession was not really in the capacity of auction-purchaser of his interest, but merely upon the excuse of being an auction-purchaser, just as it was upon the excuse of having got the decision of a Criminal Court in the landlord's favour. Hence, this was clearly a case where the special limitation under Art. 3, Sch. 3, Bihar Tenancy Act, was applicable. [P 477 C 2]

Hareshwar Prasad Sinha and Rajeswari Prasad — *for Appellant.*

Rai Indra Behari Saran — *for Respondents.*

Meredith J. — This case has been referred to a Division Bench by a learned Judge sitting singly. The appeal is by the landlord, defendant 1, in the suit, and the only point that arises is one of limitation, namely whether the suit is governed by the special rule of limitation under Art. 3, Sch. 3, Bihar Tenancy Act, which provides two years' limitation from the date of dispossession in the case of a suit to recover possession of land claimed by the plaintiff as a raiyat or an under-raiyat, or governed by the general rule of limitation whereby twelve years is provided under Art. 142, Limitation Act. The respondent brought a suit for recovery of possession of a sarahmoayan holding bearing khata No. 311 in village Chorain in the Shahabad District. This holding originally belonged to defendant 3 and the plaintiff purchased it on 9th June 1923. Later on, the landlord (defendant 1) brought a rent suit against defendant 3 (the original tenant), obtained a decree, and in execution of that decree obtained dakhal dehani from the Court on 12th September 1929. The plaintiff sued on the allegations that he was not a party in that suit, knew nothing about it and was not dispossessed by the dakhal dehani. In 1933 however a criminal case was brought against the plaintiff by defendant 2, a servant of defendant 1, in which the plaintiff

was convicted and his conviction was maintained by the High Court in revision on 18th December 1933. Taking advantage of this decision the landlord dispossessed him on 30th December 1933.

The present suit was brought on 18th December 1936. If two years' limitation applies, it would be barred by limitation. If twelve years, it would not. The Courts below came to concurrent findings that the decree obtained by the appellant against defendant 3 was only a money decree that the plaintiff remained in possession after the delivery of possession by the Court and that he was only dispossessed, as alleged by him, after his conviction in the criminal case. The learned Munsif held that the case was governed by two years' limitation under Art. 3, Sch. 3 and so the claim was barred by limitation. The learned Subordinate Judge was of opinion however that the case was governed by Art. 142 and twelve years' limitation and so he decreed the suit.

The basis for the decision of the learned Subordinate Judge was the Full Bench ruling of this Court in 9 Pat 788[1] where it was laid down that where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession through Court, such dispossession of the tenant is not a dispossession within the meaning of Art. 3, Sch. 3, Ben. Ten. Act, 1885. The learned Subordinate Judge in holding that this decision was applicable to the case seems to have forgotten his own finding that the ouster was not under the decree but took place forcibly years later as a result of the plaintiff's conviction in the criminal case. It is quite obvious that in the present case the dispossession was not through Court at all and the Full Bench ruling has no application. It is argued for the respondent that though dispossession may not have been through Court, still it was by the landlord, not as such, but as auction-purchaser, and, that where the dispossession is by the landlord, qua not landlord but as auction-purchaser, the special two years' limitation does not apply. It is sought to make 9 Pat 788,[1] a Full Bench case, authority for this proposition, but it is not such authority. It merely laid down that the special limitation did not apply where both features were present, namely dispossession through Court, and as auction-purchaser. The judgment in this Full Bench case was delivered by Kulwant Sahay J., and what Kulwant Sahay J.'s opinion on the point in question really was is to be found clearly expressed in 8 P L T 243[2] in which case this learned Judge observed, no doubt by way of obiter :

> If in execution of the decree, only the right, title and interest of the judgment-debtor was sought to be delivered to the purchaser and after taking possession of the holding which represented the right, title and interest of the judgment-debtor, the purchaser subsequently dispossessed the plaintiff, then in that case Art. 3 of Sch. 3 to the Ben. Ten. Act would have applied.

The point which has been raised was considered at length by the Calcutta High Court in a Letters Patent Appeal, 54 Cal 450,[3] where it was held that the special two years' limitation applied even where the landlord took possession as auction-purchaser, and it was pointed out that Art. 3, Sch. 3 does not provide, even by implication, that dispossession must be by the landlord as such. The same view was taken by the Calcutta High Court in 175 I C 697[4] where the Court held that dispossession by the landlord as auction-purchaser comes under the provisions of special law of limitation under Art. 3, Sch 3, Ben. Ten. Act. If I may say so, these decisions appear to me to express the correct view. In any case, however, I think that the point does not really arise in the present case, since the finding is that the decree obtained against the original tenant was only a money decree and the tenancy continued. The landlord therefore was auction-purchaser only of the right, title and interest of the original tenant (defendant 3), whatever that might have been, and not of the holding or of the tenancy right of the plaintiff. Therefore, in dispossessing the plaintiff, the dispossession was not really in the capacity of auction-purchaser of his interest, but merely upon the excuse of being an auction-purchaser, just as it was upon the excuse of having got the decision of a Criminal Court in the landlords' favour. In my opinion this is clearly a case where the special limitation under Art. 3, Sch. 3, Bihar Ten. Act, is applicable. I would therefore allow the appeal and dismiss the suit with costs throughout.

Fazl Ali J. — I agree.

D.S./R.K. *Appeal allowed.*

1. Gajadhar Rai v. Ram Charan Gope, (1930) 17 A I R Pat 256=125 I C 565=9 Pat 788 = 11 P L T 197 (F B).
2. Mahadeo Rao v. Pargash Rai, (1927) 14 A I R Pat 43 = 97 I C 629 = 8 P L T 243.
3. Satish Chandra Banerji v. Hasemali Kazi, (1927) 14 A I R Cal 488=103 I C 124=54 Cal 450 = 31 C W N 634.
4. Amir-ud-din Sircar v. Nisaruddin Sarkar, (1938) 25 A I R Cal 276 = 175 I C 697.

A. I. R. 1940 Patna 478

HARRIES C. J. AND MANOHAR LALL J.

Shiva Prasad Singh — Appellant.

v.

Smt. Mandira Kumari Debi — Respdt.

Appeal No. 76 of 1937, Decided on 19th January 1940, from original decree of Sub-Judge, Dhanbad, D/- 15th October 1936.

Landlord and Tenant—Forfeiture—Waiver—Breach of covenant—Issue of notice to quit and acceptance of rent with knowledge of breach amount to waiver of forfeiture.

The general rule is, that if a lessor or other person legally entitled to the reversion, knowing that a forfeiture has been incurred by the breach of any covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture. Acceptance of rent accruing due after a forfeiture amounts to a waiver, and the giving of a notice to quit premises also amounts to a waiver because the giving of the notice recognizes the continuance of a tenancy. [P 478 C 2; P 479 C 1]

P. R. Das, N. N. Ray and Vishundeva Narayan — *for Appellant.*

S. C. Mazumdar and Ramanugrah Narain Sinha — *for Respondent.*

Harries C. J. — This is a first appeal from a decree of the learned Subordinate Judge of Dhanbad dismissing the plaintiff's claim for possession of certain property. On Baisakh 20, 1325 B. S., the defendant's husband took a lease of certain land described in schedule (ka) of the plaint situate in the town of Jharia from the plaintiff at an annual rental of Rs. 31-8-9. This lease was in due course registered. It was a term of the said lease that the defendant's husband would not alter the condition of the leasehold land in any way or render it unfit for cultivation, and if he did so, the plaintiff would be entitled to evict him from possession. According to the plaintiff, the defendant's husband did not cultivate this land but, on the contrary, let it out for building purposes. In Magh 1333 B. S. the defendant's husband died, and the defendant became entitled to his property. The plaintiff alleged in his plaint that the defendant's husband had no right under the lease to let the land to tenants for building purposes and as there had been a breach of the condition in the lease the plaintiff was entitled to treat the lease as forfeited and accordingly to recover possession of the same. It is expressly pleaded in the plaint that the plaintiff gave notice to the defendant on Agrahayan 6, 1341 B. S. to give up possession of the property with effect from Pous 1, 1341, B. S. In spite of the notice the defendant had refused to relinquish possession of the property, hence the present suit. There was an alternative claim that if the plaintiff was declared not entitled to obtain khas possession of the property, he should be given a decree for arrears of rent at the rate of Rs. 6 per katha which was the prevailing rate in Jharia for homestead land.

The defendant denied that there had been any breach of covenant or that the plaintiff was entitled to claim forfeiture of the lease and possession of the land in suit. It was pleaded that the defendant was entitled by the terms of the lease to let the land out for building purposes and in any event the plaintiff had been aware of this for a considerable time and had waived his right to forfeiture by acceptance of rent and other acts recognizing the existence of the tenancy. The learned Subordinate Judge was of opinion that the plaintiff was not entitled to claim forfeiture of the lease, and even if there had been a breach of a covenant, the plaintiff had stood by with full knowledge of such breach. Accordingly the learned Subordinate Judge held that the plaintiff's claim was barred by reason of estoppel, acquiescence and waiver. In my view the decision of the learned Subordinate Judge cannot be challenged. It is conceded that after the plaintiff had full knowledge of the breach of the covenant, if any, he gave the defendant notice to quit the land and thus recognized the existence of the tenancy. Further, Mr. P. R. Das had to admit in the course of argument that rent had been accepted, and this was done with full knowledge of the breaches, if any, of the covenants of the lease. Further, in the plaint the plaintiff stated that if he was not given possession of the property, he was willing to allow the defendant to remain on the land at a rental of Rs. 2022 per annum which is at the rate of Rs. 6 per katha.

Courts of law in England and in India always lean against forfeitures; therefore whenever a landlord means to take advantage of any breach of covenant or condition so that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the continuance of the tenancy, and so operate as a waiver of the forfeiture. Merely lying by and witnessing the breach is no waiver; some positive act must be done. The general rule is, that if a lessor or other person legally entitled to the rever-

sion, knowing that a forfeiture has been incurred by the breach of any covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture. Acceptance of rent accruing due after a forfeiture amounts to a waiver, and the giving of a notice to quit premises also amounts to a waiver, in this case, because the giving of the notice recognized the continuance of a tenancy. The whole pleading in this case amounts to an acknowledgment of the continuance of the tenancy until Pous 1, 1341 B. S., when the notice to quit expired. This aspect of the case does not appear to have been appreciated by the Court below; but in argument Mr. Das had to admit that there was no answer to this point. In my view if there had been a breach of covenant in this case, the plaintiff after knowledge of the same recognized the existence of the tenancy and thereby waived any right which he might have had to forfeiture. In this view of the case, it is unnecessary to consider the difficult points arising as to whether there had or had not been a breach of covenant and whether such entitled the plaintiff to claim forfeiture of the lease. The result therefore is that this appeal fails and I would accordingly dismiss it with costs.

Manohar Lall J. — I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 479

VARMA J.

Moti Dusadh and others — Petitioners

v.

Emperor.

Criminal Revn. No. 20 of 1940, Decided on 19th January 1940, from order of Senior Deputy Magistrate, Saran, D/- 24th November 1939.

(a) Penal Code (1860), Ss. 147 and 323 — Participation doubtful — Accused is entitled to benefit of doubt.

In the case of a prosecution for offences under Ss. 147 and 323 where the participation of the accused in the riot in question is doubted, the accused is on that ground alone entitled to the benefit of doubt. [P 480 C 2]

(b) Penal Code (1860), S. 225-B—Person in lawful custody cannot rescue himself.

A person in lawful custody cannot rescue himself and hence his conviction under S. 225-B cannot in any way stand. [P 480 C 2]

Murari Prasad and Hareshwar Prasad Sinha — *for Petitioners.*

Awadesh Nandan Sahay for Asst. Govt. Advocate — *for the Crown.*

Order. — The petitioners Moti Dusadh, Doma Dusadh, Bisar Dusadh and Sampat Dusadh have been convicted under Ss. 147, 323 and 225-B, I. P. C., and have each been sentenced to two months rigorous imprisonment and a fine of Rs. 20 or in default fifteen days rigorous imprisonment under S. 147, there being no separate sentences under Ss. 323 and 225-B, I. P. C. The occurrence is said to have taken place on 9th May 1939, in the evening. The charges framed against all the petitioners were as follows :

First. — That you, on or about 9th May 1939, at Goldenganj Railway Station, were members of unlawful assembly whose common object was to assault the A. S. M. and his staff, Shamlal, Sukhari and Nandan and to commit mischief by breaking the glass of the station windows and to rescue Moti Dusadh from lawful custody of A. S. M. and Shamlal, pointsman, and thereby committed an offence punishable under S. 147, I. P. C. *Secondly.*—That you, on or about 9th May 1939, at Goldenganj Railway Station voluntarily caused hurt to Shamlal, Sukhari and Nandan and thereby committed an offence punishable under S. 323, I. P. C. *Thirdly.*—That you on or about 9th May 1939 at Goldenganj Railway Station rescued away Moti Dusadh from the lawful custody of A. S. M. and Shamlal and thereby committed an offence unders S. 225-B, I. P. C. . . . .

The case for the prosecution was that on 9th May 1939, S. K. Mazumdar, Travelling Ticket Examiner of the B. N. W. Ry., detected Moti Dusadh travelling without ticket at Goldenganj Railway Station. As a result of Moti's refusal to pay the railway fare on demand, the Ticket Examiner handed him over to the Assistant Station Master of Goldenganj under T. T. E. 3 voucher (Ex. 1). After the train had left the station, the Assistant Station Master made over Moti Dusadh to Shamlal, pointsman to watch him, and himself went to Station Office to give out and in reports to the Controller and station ahead. On his return the Assistant Station Master collected tickets from the inward passengers who had alighted from the train and during that time he saw a group of 15 or 20 persons who had got down from the train going from west to east on the platform and not through the main gate. He demanded tickets from those persons but they refused to deliver any ticket and abused him. It is unnecessary to quote the real words of abuse. Then the Assistant Station Master asked Shamlal to stop them and realize the railway fare. When Shamlal stopped them, they began to assault him with lathis. Even the Assistant Station Master, when he remonstrated, was chased

and he took shelter in his office. These persons then broke the glass of the station windows and fled away. When the Assistant Station Master came out of his office after the rioters had gone, he saw injuries upon the three persons mentioned in the charge—viz., Shamlal, Sukhari and Nandan. He wired to the Controller at Sonepore, who directed him to send the injured men to the Sonepore hospital. He also sent wires to the District Traffic Superintendent and the Government Railway Police at Sonepore, and issued charge sheet against Moti Dusadh, who also joined the rioters.

The defence version was that the petitioners had committed no offence; that they never travelled without tickets or got down at Goldenganj Station. It was said that the real fact was that one Mt. Dhanesri, a relation of Moti Dusadh who came from Chandernagar and had ticket up to Sonepore got down at Goldenganj on 8th May 1939, at 11 A. M., and paid excess fare. On the same evening she came again to Goldenganj Station for going to Chapra with her belongings. The pointsmen Sukhari and others finding her alone at the station wanted to detain her for the night. On her refusal, they used force and Moti and other accused arrived and rescued Dhanesri and were assaulted by the pointsmen. Mt. Dhanesri and the injured persons came to Chapra, got their injuries examined by a doctor and filed a complaint. The complaint was filed by Dhanesri on 11th September last. The Courts below have accepted the prosecution version and have discarded the defence version.

In revision before me it is argued that the Courts below have not attached due importance to very material evidence in the case, and that, had they done so, they would have accepted the defence set out. In order to substantiate this point, the learned advocate for the petitioners has drawn my attention to (Ex. 1) which is known as T. T. E. 3 voucher in which the name of Moti Dusadh is mentioned as a passenger who was travelling without a ticket. My attention has been next drawn to Ex. B, a draft telegram in which the time mentioned is 9-30 P. M. Now in this telegram the name of Moti is not mentioned. Reference is then made to Ex. 8, the station diary which again does not mention the name of Moti Dusadh. Reference is also made to Ex. 2, a telegram despatched at 22.50 hours on 9th May 1939, which does not mention Moti Dusadh. These documents do not as a matter of fact mention the name of any of the accused persons. But the case of Moti is distinguishable from those of the other petitioners, inasmuch as Moti was known to the railway staff at least through Ex. 1, and the fact that he has not been mentioned in any of these documents as the person who took part in the assault or committed the rioting leaves some room for doubt with regard to his participation in the affair as alleged by the prosecution. It may not be necessary to state anything more after I have doubted his participation in the affair because on that ground alone he is entitled to the benefit of the doubt. But it is worth noting that in the charge under S. 225-B, I. P. C., it is said that the accused persons, including Moti himself, 'rescued away Moti Dusadh from the lawful custody of A. S. M. and Shamlal.' That is not possible, because Moti could not rescue himself from the lawful custody and the conviction against him under S. 225-B could not in any case stand. However, for the reasons already given, I am of the opinion that it is very doubtful if Moti Dusadh participated in the riot. So far as the other petitioners are concerned, after giving full weight to the argument advanced on behalf of them, I see no reason to interfere with their convictions and sentences. In the result the petitioner Moti Dusadh is acquitted and the application of the other petitioners is rejected.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 480

AGARWALA AND ROWLAND JJ.

Bansidhar Seth — Plaintiff — Appellant.

v.

Gopi Lal Seth and others — Defendants — Respondents.

Appeal No. 457 of 1938, Decided on 15th January 1940, from appellate decree of Sub-Judge, Hazaribagh, D/- 21st April 1938.

(a) Civil P. C. (1908), S. 100—Question whether transferee exercised due caution within meaning of S. 41, T. P. Act, is one of fact.

The question whether transferee has exercised due care and caution within the meaning of S. 41, T. P. Act, is a question of fact and cannot be interfered with in second appeal : *A I R 1929 Cal 636 and A I R 1920 Pat 1, Ref.* [P 481 C 1,2]

(b) Civil P. C. (1908), S. 100—Estoppel—Plea when not raised in plaint or disclosed by evidence cannot be taken up in second appeal.

Where no case of estoppel is made out in the plaint or disclosed by the evidence, it is too late in

second appeal for the plaintiff's plea of estoppel to be entertained in the absence either of reference to it in the pleadings or of unambiguous evidence on the point: *20 Cal 296 and A I R 1937 Pat 169, Disting.* [P 482 C 1]

B. C. De and U. N. Banarji — *for Appellant.*

S. M. Mullick, B. N. Rai and B. K. Prasad for T. K. Prasad — *for Respondents (minors).*

Agarwala J.—This is an appeal by the plaintiff from the decision of the Subordinate Judge of Hazaribagh confirming a decision of the Munsif. The appeal arises out of a suit for recovery of 10 annas of village Koladih. In 1920, one Khirodhar purchased this 10 annas in the name of his samdhi Biseshwar. Thereafter the plaintiff obtained a money decree against Khirodhar. In the meanwhile, Biseshwar had died and Jageshar, on 20th March 1928, executed in favour of the plaintiff-decree-holder a mortgage of the 10 annas share. It is conceded that this was in discharge of the decree which the plaintiff had obtained against Khirodhar. In 1930 the plaintiff obtained a preliminary decree on the mortgage in a suit to which Khirodhar was not a party and in 1934 he purchased the mortgaged property in execution of the final decree obtained in the mortgage suit. Delivery of possession was resisted by the defendants. They had purchased the same property in execution of a decree for money against Khirodhar in 1931. In the proceedings in execution of the decree obtained by the defendants Jugeshar raised an objection under O. 21, R. 58, which was allowed. Thereupon the defendants instituted a suit under R. 63, and this suit succeeded. In the present suit the plaintiff alleged in his plaint that the 10 annas share in village Koladih was purchased by Biseshwar and that Khirodhar had no concern with it. He further alleged that Jageshar had mortgaged the property in order to discharge the decree obtained against Khirodhar.

The point raised by the present plaintiff in the Courts below was that as Khirodhar had allowed the property to stand in the name of Biseshwar and the plaintiff had bona fide belief that the property belonged to Biseshwar, S. 41, T. P. Act, barred the defendants' claim. To this the defendants' answer was that the plaintiff was entitled to the protection of S. 41 only if he had exercised reasonable care and caution. Both Courts found that the plaintiff had not exercised such care and caution. The question whether a transferee has exercised due caution within the meaning of S. 41 is a question of fact: *see* 49 C L J 532[1] and 5 Pat L J 521[2] at p. 534. In second appeal the learned advocate for the appellant has contended that the defendants are estopped under S. 115, Evidence Act, from challenging the plaintiff's title by reason of the conduct of Khirodhar. No case of estoppel was made out in the plaint or disclosed by the evidence. The plaint contained no allegation that Khirodhar had by his representations, declarations, acts or omissions led the plaintiff to believe that the state of affairs was different from the real state of affairs. The allegation simply was that Jugeshwar whom the plaintiff believes to be the real owner had mortgaged it in discharge of Khirodhar's liability. There is not one word in the plaint to suggest that the plaintiff was led to believe that Jugeshwar was doing this because he was a benamidar for Khirodhar. The learned advocate referred to and relied on the decision of the Privy Council in 20 Cal 296.[3] The facts of that case were that one Umed Ali had transferred some property in the name of his wife Arju Bibi by a hibanama. This transfer was found not to have been bona fide or for consideration and was in fact merely a benami transaction. After Umed Ali's death his son, Ahmed Hossein, and his daughter, Rahimunnissa, succeeded to shares in this property. Ahmad Hossein acted for his mother in a transaction by which she mortgaged the property. It was held that the fact that Umed Ali had allowed the property to stand in the name of his wife did not raise an estoppel but that Ahmad Hossein's action while representing his mother in the mortgage transaction estopped him from asserting that he had a beneficial interest in the property that was mortgaged. The facts of that case are entirely different from the facts of this case, because as I have already stated, neither the pleading nor the evidence disclosed any act or omission on the part of Khirodhar that could have deceived the plaintiff.

The evidence of two witnesses examined on behalf of the plaintiff was referred to by the learned advocate for the appellant but

1. Rajani Kanta Deb v. Bashiram Mestari, (1929) 16 A I R Cal 636=121 I C 409=49 C L J 532.
2. Kanhu Lal Marwari v. Palu Sahu, (1920) 7 A I R Pat 1=57 I C 353=5 Pat L J 521=1 P L T 546.
3. Sarat Chunder Dey v. Gopal Chunder Laha, (1893) 20 Cal 296=19 I A 203=6 Sar 224 (P C).

that evidence is of so vague a nature that it is impossible to accept it as proof that Khirodhar made any representation either by his declarations, his actions or his omissions. Reference was also made to the decision of this Court in 15 Pat 721.[4] The facts there were that a cosharer mortgaged certain houses alleging that they were his self-acquisition, and the other cosharers, knowing the true facts and the contents of the mortgage bond, attested the same and on the strength of this representation the mortgagee advanced the loan which was secured by the bond. In execution of a decree on the basis of the bond the mortgagee purchased the property. When he attempted to obtain delivery of possession he was resisted by persons who claimed to have purchased the interest of the cosharers who had witnessed the mortgage bond. The plaint in that suit to which we have been referred contained a distinct allegation that the mortgagee had represented that the mortgaged properties were his self-acquired properties and that his cosharers who were defendants 2 and 3 had confirmed this representation. In my view, it is too late in second appeal for the plaintiff's plea of estoppel to be entertained in the absence either of reference to it in the pleadings or of unambiguous evidence on the point. I would therefore dismiss this appeal with costs.

Rowland J. — I agree.

G.N./R.K. *Appeal dismissed.*

4. Janki Ram Sital Ram v. The Chota Nagpur Banking Association Ltd., (1937) 24 A I R Pat 169=165 I C 98=15 Pat 721=17 P L T 697.

A. I. R. 1940 Patna 482

HARRIES C. J. AND FAZL ALI J.

Sheikh Mohammad Murtaza and others — Appellants.

v.

Cyril Indernath Dey and others — Respondents.

Appeal No. 718 of 1936, Decided on 13th September 1939, from appellate decree of Judicial Commr., Chota Nagpur, Ranchi, D/- 11th June 1936.

(a) Chota Nagpur Encumbered Estates Act (6 of 1876), S. 21-B—Appeal against holder — Holder dying after appeal—His estate managed by manager appointed under the Act — Substitution of heirs of holder is necessary.

The manager appointed under the Act can figure in the suit or appeal only as a representative of the holder and not as a principal. Hence where after the filing of an appeal against the holder but before its hearing the holder dies the substitution of his heirs is necessary and if such substitution is not made in time the appeal abates as against the holder. [P 483 C 2; P 484 C 1]

(b) Chota Nagpur Tenancy Act (6 of 1908), Ss. 208 and 211 — Tenure held by certain tenants transferred to other persons — Suit by landlord for rent against transferors without impleading transferees — Decree obtained by landlord is not rent decree even if transferees are not recorded as tenants in landlord's sherista.

There is nothing in S. 211 to suggest that the non-registration will defeat the claimant in the suit which he is authorized to bring under S. 211, cl. (2) (which corresponds to O. 21, R. 63). There is also nothing in the Section to show that the transferee's failure to get himself recorded in the landlord's sherista shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for recovery of rent he is to assume that the transferee is represented by the old tenants. Hence where certain tenure held by certain tenants is transferred to other persons and the landlord brings a suit for rent against old recorded tenants without impleading the transferees and in execution of the decree brings the property to sale, the sale is not a sale under S. 208 and the decree is not for rent. This being so the sale does not affect transferee's share in the tenure : *A I R 1933 P C 122, Rel. on.* [P 484 C 2; P 485 C 2]

(c) Chota Nagpur Tenancy Act (6 of 1908), S. 208 — Non-representation of tenure-holders.

The sale is not a sale under S. 208 of the Act, if all the tenure-holders are not represented in the suit. [P 486 C 1]

B. C. De, M. Azizullah, and L. K. Chaudhari — *for Appellants.*

G. C. Mukherjee K. P. Upadhaya, Thakur A. D. Sinha and Govt. Pleader — *for Respondents.*

Fazl Ali J. — The facts so far as they are material to this appeal may be briefly stated as follows: It appears that in the District of Palamau there is a tenure which was formerly held by defendants 9 to 11 and the father of defendant 8 under defendant 7, the superior landlord. In this tenure defendants 1 to 6 acquired 12 annas interest before 1927 and one anna interest after 1927 and the plaintiffs acquired the remaining 3 annas interest after 1928. In 1927 defendant 7 brought a suit for recovery of rent against defendants 9 to 11 and the father of defendant 8, and in execution of the decree passed in that suit, the tenure was sold and purchased by a benamidar of the plaintiffs in 1928. Defendants 1 to 6 thereupon deposited the decretal amount and the sale was set aside. In 1930 defendant 7 brought another suit against defendants 9 to 11 and father of defendant 8 for the rent of the years 1984 to 1987 Sambat. The suit was decreed and in execution of the decree the tenure was sold again and

this time it was purchased by defendant 1. The plaintiffs then brought the present suit to recover possession of their share, their case being that the decree obtained by defendant 7 was not a rent decree inasmuch as the suit had been brought without impleading the plaintiffs, defendants 1 to 6 and certain other persons who were necessary parties to the suit and accordingly the sale held in execution of the decree did not affect their share. The Courts below did not accept the plaintiffs' contention and dismissed the suit. They held amongst other things that inasmuch as neither the plaintiffs nor defendants 1 to 6 were recorded as tenants in the landlord's sherista, the latter was entitled to sue the persons who were so recorded and that these persons must be deemed in the eye of the law to have represented the plaintiffs and other tenants in the suit. The plaintiffs have accordingly preferred this second appeal.

Before dealing with the points raised on behalf of the plaintiffs, I wish to dispose of a preliminary objection raised on behalf of the respondents. The objection is that the appeal has abated, because the plaintiffs failed to substitute within the time prescribed by law the heirs of defendant 7 who had died some time after the appeal was filed but before it was heard. On a reference to the record it appears that the appeal was filed on 21st September 1936, and defendant 7 died on 19th December 1937, after notice of the appeal had been served on him. The Court was informed of the death of this defendant on 31st October 1938, and on 16th November 1938, the appellants filed an application in which after stating that they had come to know about his death for the first time on 31st October 1938, they prayed that the delay in making the application might be excused and his heirs be substituted in his place. On 15th December 1938, the appeal was put up for hearing before Agarwala J. who after hearing the parties passed the following order :

> Let the record be amended by substituting for the name of Kuar Jagatmohan Nath Sahi Deo, the names given in para. 8 of the petition for substitution.
>
> Mr. De states that this will serve his purpose but the legal effect of this amendment will be considered at the time of the hearing.

On 13th February 1938, Agarwala J. referred this case to a Division Bench. It appears that at the time when defendant 7 died, his estate was being managed under the Chota Nagpur Encumbered Estates Act (6 of 1876) and he was represented in the appeal by a manager appointed under the Act. In 3 Pat 625,[1] the Privy Council dealing with the status of a manager appointed under the Act has pointed out that he

> is in the eye of the law fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office.

The position in law therefore was that after the death of defendant 7, the management of the estate continued to vest in the manager who was already on the record and he was the only person who could under S. 21-B, Chota Nagpur Encumbered Estates Act, represent the heir or heirs of defendant 7 (the new holders) in the appeal. Such being the case, it is argued on behalf of the appellant that no question of abatement arises in the appeal and all that was necessary for them to do was to ask for a formal amendment of the memorandum of appeal by introducing the names of the heirs of the deceased defendant. In my judgment the answer to this argument is provided by S. 21-B, Chota Nagpur Encumbered Estates Act, which is the very Section on which the appellants rely. That Section runs as follows :

> During the period of management
>
> (1) every suit or appeal by the holder shall be instituted in his name by the manager ;
>
> (2) in every pending suit or appeal in which the holder is plaintiff or defendant, the manager shall be named as the representative of the holder for the purpose of suit or appeal; and no application in any such suit or appeal shall be made to the Court on behalf of the holder except by the manager ;
>
> (3) no person other than the manager shall be ordered to sue or to be sued as next friend or guardian, or be named as guardian of the holder for a pending suit, and
>
> (4) the Court, upon application by the manager or by any party to a suit, may order that the plaint or memorandum of appeal be amended so as to conform with the requirements of cl. (1), or that the manager be named as the representative of the holder as required by cl. (2) of this Section.

It is to be noted that under this Section the suit or appeal is to be instituted in the name of the holder and it is he who is to be described as plaintiff or defendant. No doubt the holder cannot be represented by any other person than the manager nor can he make any direct application so long as the management of the estates vested in the manager. The fact however remains that the manager can figure in the suit or appeal only as a representative of the holder and not as a principal. Thus at least technically the substitution of the heirs of de-

1. Hukum Chand v. Ban Bahadur Singh, (1924) 11 A I R P C 156=80 I C 841=51 I A 208 = 3 Pat 625 (P C).

fendant 7 was necessary and such substitution not having been made in time, the appeal abated as against defendant 7. The fact however remains that the heirs of defendant 7 could not be represented in the appeal otherwise than through the manager who was already on the record and for that reason and also because I fully believe the statement made by the plaintiffs in their affidavit dated 16th November 1938, I am of the opinion that this is a proper case for setting aside the abatement assuming that it has not been set aside already by the order passed by Agarwala J. on 15th December 1938.

In the application made by the appellants on 16th November 1938, which was in substance an application for setting aside the abatement, they have clearly stated that they came to know of the death of defendant 7 for the first time on 31st October 1938. This statement is supported by an affidavit which I have no reason to disbelieve. It is stated in a counter-affidavit filed on behalf of the respondent that a cosharer of the plaintiff had attended the sradh ceremony of defendant 7 after his death and from this we are asked to infer that the plaintiffs must have known about the death of defendant 7 long before 31st October 1938. In my opinion, such an inference is wholly unwarranted. There is no statement in the counter-affidavit that the cosharer of the plaintiffs actually informed them either of the death of defendant 7 or his having attended his sradh. I am also not prepared to believe that in spite of being aware of the death of defendant 7 the plaintiffs did not deliberately take any action to substitute his heirs. In my opinion, the plaintiffs have made out a strong case for excusing the delay in making their application for substitution and the abatement should be set aside.

The next point to be decided is the main question in the appeal, viz. whether the sale impugned by the plaintiffs affected their share in the tenure in dispute. It is common ground that at the time when the suit for rent was brought, the defendants of that suit had parted with their interest and the tenure was in possession of the plaintiffs and defendants 1 to 6. That being so, the present case in my judgment is governed by the decision of the Privy Council in 12 Pat 626.[2] In that case a landlord had brought a suit for rent without impleading the widow of one Maheshanand, one of the tenants, who had died before the institution of the suit and it was found that this widow had neither been recorded in the landlord's sherista nor had she paid any rent to the landlord as a tenure-holder. Notwithstanding these facts, the Privy Council held that the decree obtained in that suit was not a rent decree and the Revenue Court had no jurisdiction to order a sale of the property under S. 208, Chota Nagpur Tenancy Act. Their Lordships referred in their judgment to S. 11, Chota Nagpur Tenancy Act, which runs as follows:

> When any tenure or portion thereof is transferred by succession, inheritance, sale, gift or exchange, the transferee or his successor-in-title shall cause the transfer to be registered in the office of the landlord to whom the rent of the tenure or a portion is payable.

The argument which seems to have been put forward before the Privy Council was that the failure of the widow of Maheshanand to have her name entered in the landlord's sherista as provided by S. 11, along with the fact that she had never paid rent to the landlord or been recognized by him as a tenure-holder entitled him to proceed with the sale of the tenure under S. 208, without joining her as a defendant. Their Lordships overruled this contention and observed as follows:

> Their Lordships agree with the High Court. No such sanction as forfeiture of right in the tenure in respect of failure to comply with the provision of S. 11, is provided by the Act ; such failure only affects the transferee's power to recover rent from his under-tenants as provided in sub-s. (4).

It is contended by the learned advocate for the respondent that this decision cannot govern the present case, firstly, because in this case it has been found as a fact by the Courts below that the plaintiffs were represented in the rent suit by the persons who were sued as tenants, and secondly, because the case before the Privy Council was one affecting a person claiming an interest in a tenure by succession and not as a transferee. The first point admits of a simple answer: The finding of the Judicial Commissioner as to the representation of the plaintiffs in the rent suit is based on the following two grounds only: (1) that the purchase of the tenure by the plaintiffs in the sale held in 1928 in execution of the decree passed in rent suit of 1927 raised the inference that they had no objection to the suit having been brought against defendants 9 and 10 and father of defendant 8 ; and (2) that their failure to get

2. Jagadishwar Dayal Singh v. Pathak Dwarka Singh, (1933) 20 A I R P C 122=142 I C 781 =60 I A 176=12 Pat 626 (P C.)

their names recorded in the landlord's sherista raised the presumption that they were willing to be represented by the persons who stood recorded as tenure-holders in the landlord's office.

In my opinion, neither of these two grounds can be supported in law. The plaintiff's purchase at the sale of 1928 is wholly irrelevant, because at that time they had no interest in the tenure, and that being so, it is meaningless to say that either in the suit of 1927 or in the execution proceedings which followed the decree passed therein, they had allowed themselves to be represented by the old tenants. The second ground is equally untenable because if that is a good ground, the decision of the Privy Council should have been quite different in 12 Pat 626.[2] The next point to be decided is whether the decision of the Privy Council in 12 Pat 626[2] applies to the case of a transferee. So far as this point is concerned, the learned advocate for the respondent relies strongly on certain observations made by Couch C. J. in 21 W R 94,[3] a case decided under Act 10 of 1859. The observations were to the following effect :

> It appears to me taking Ss. 105 and 106 together with proviso, that it was intended that the zamindar should be at liberty to treat as the holder of the tenure, and the person whom he might sue for arrears of rent, the person who is registered in his book as the owner, unless any one could show that there had been a transfer and that there was sufficient cause for its non-registration.

The learned advocate for the respondents contends that because S. 211, Chota Nagpur Tenancy Act, corresponds exactly to Ss. 105 and 106 of Act 10 of 1859, the rule laid down by Couch C. J. applies fully to a case governed by the former Act and in support of his argument has referred us to the following observations made by Sir George Lowndes in delivering the judgment of the Judicial Committee in 34 C W N 821[4] :

> Before the Act of 1885 (the Bengal Tenancy Act) came into force, the duty was laid specifically upon the transferee of a tenure to see that his name was recorded in the landlord's sherista, and it may well have been that, if he failed without reason to do this, he could not be heard to object to a decree passed against the recorded tenants, even though their interest in the tenure had in fact ceased. But the Act of 1885 made a radical change in this respect.

According to the learned advocate for the respondent, these observations show that the rule laid down by Couch C. J. has been approved by the Privy Council and he contends that this is an additional ground for applying it to the present case. A reference to S. 211 will show that this provision corresponds more or less to O. 21, R. 58, Civil P. C. Cl. (1) of the Section states that if before the date fixed before the sale of any tenure or holding in pursuance of S. 208, a third party appears before the Deputy Commissioner and alleges that he and not the person against whom the decree has been obtained was in lawful possession or had some interest in the tenure or holding when the decree was obtained, the Deputy Commissioner shall examine such party and if he sees sufficient reason for so doing and if such party deposits in Court or gives security for the amount of the decree, the Deputy Commissioner shall stay the sale and shall after taking evidence adjudicate upon the claim. Then follow two provisos to the Section. Proviso 1 states that no such adjudication shall be made if the Deputy Commissioner considers that the claim was designedly or unnecessarily delayed ; and proviso 2 runs thus :

> Provided also that no transfer of a tenure shall be recognized unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner.

It appears to me that the effect of the two provisos is that in the summary enquiry which the Deputy Commissioner is required to hold under S. 211, the claimant can be put out of Court at once, if it appears either that his claim was designedly or unnecessarily delayed, or that he is not registered in the office of the landlord and there was no sufficient cause for non-registration. The effect of proviso 2 is merely this, that the claim cannot succeed before the Deputy Commissioner, if the claimant is not registered in the office of the landlord, but there is nothing in the Section to suggest that the non-registration will also defeat the claimant in the suit which he is authorized to bring under S. 211, cl. (2) (which corresponds to O. 21, R. 63). There is also nothing in the Section to show that the transferee's failure to get himself recorded in the landlord's sherista shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for recovery of rent he is to assume that the transferee is represented by the old tenants. The view that S. 211 cannot bear the meaning attributed

3. Sham Chand v. Brojonath Pal, (1874) 21 W R 94=12 Beng L R 484 (F B).
4. Jitendra Nath Ghose v. Monmohan Ghose, (1930) 17 A I R P C 193 = 126 I C 422 = 57 I A 214=58 Cal 301=34 C W N 821 (P C).

to it by the learned advocate for the respondent is confirmed by the decision of the Privy Council in 12 Pat 626[2] wherein their Lordships considered both Ss. 11 and 211, Chota Nagpur Tenancy Act. In dealing with S. 11 they expressly dealt with the case of a transferee and observed as follows :

> No such sanction as forfeiture of rights in the tenure in respect of failure to comply with the provisions of S. 11 is provided by the Act; such failure only affects the transferee's power to recover rent from his under-tenants as provided in sub-section (4).

These observations show that their Lordships decided the case before them on a broad ground and did not intend to draw a distinction between a transferee and an heir. Further, the rule laid down in that case has been applied by the Calcutta High Court as well as by this Court to protect transfers in several cases : *see* 56 Cal 462,[5] 20 P L T 346[6] and *Karunamai Pandey* v. *Pradhan Ram Sewak Lall*, decided by a Division Bench of this Court in Second Appeal No. 760 of 1937 on 19th December 1938. In my opinion the sale impugned by the plaintiffs was not a sale under S. 208, Chota Nagpur Tenancy Act, because all the tenure-holders were not represented in the suit. The sale therefore did not affect the plaintiffs' three annas share in the tenure and they are accordingly entitled to a decree for possession so far as that share is concerned. I would therefore allow this appeal, reverse the decisions of the Courts below and direct that a decree be passed declaring that the plaintiffs' 3 annas share is not affected by the sale and that they are entitled to recover possession of that share. The plaintiffs will be entitled to costs in the Courts below as well as in this Court as against respondent 1 (the principal contesting defendant); but so far as respondents 7 (a) to 7 (g) are concerned, there will be no order for costs, because the plaintiffs have failed to establish that the sale brought about by defendant 7, the predecessor-in-interest of these defendants, was tainted with fraud.

Harries C. J.—I agree and have nothing to add.

D.S./R.K. *Appeal allowed.*

5. Faridpur Loan Office Ltd. v. Nirode Kishore Ray, (1929) 16 A I R Cal 452=118 I C 864 = 56 Cal 462.
6. Manki Kanak Ratan v. Sunder Munda, (1939) 26 A I R Pat 225=179 I C 834=20 P L T 346.

A. I. R. 1940 Patna 486

DHAVLE J.

Baij Nath Bhagat — Petitioner

v.

Emperor.

Criminal Revn. No. 568 of 1939, Decided on 17th January 1940, against order of Sub-divisional Magistrate, Araria, D/- 12th July 1939.

(a) Penal Code (1860), S. 471 — Accused altering date of copy of decree sought to be executed from 2nd to 24th August under erroneous impression that decree was time-barred — Alteration held amounted to forgery under S. 471—Intent to cause loss or risk of loss is not necessary—Threat of forged decree that cannot be executed by competent Court amounts to harm or injury within meaning of S. 44.

The accused altered the date of the certified copy of a decree sought to be executed by him from 2nd to 24th August under the erroneous impression that the decree had become time-barred while the decree in fact was within time by reason of a subsequent amendment :

Held that a sufficient intent to defraud was involved in the advantage directly aimed at by the accused on the basis of the altered dates, and it was immaterial that the alterations were brought about under an erroneous impression that the decree was time-barred. A fraud was attempted upon the Court. It was unnecessary for the prosecution to go further and establish an intent to cause loss or risk of loss. But even if the contrary were to be held, the definition of injury in S. 44 was very wide and threat of a decree that could not be executed by any competent authority was threat of harm or injury within the meaning of the Code. The unauthorized alterations in the dates actually made the copy of the decree "more efficacious" than the genuine decree in the sense that the accused took the real decree to be time-barred and attempted to bring into existence a decree of a later date, not that it was essential to a forgery. Therefore the fact that the accused held a decree which was capable of execution did not prevent the alterations in the certified copy from being forgeries, or the user of it from being fraudulent : *English and Indian case law discussed.*

[P 491 C 2; P 492 C 1]

(b) Penal Code (1860), S. 464, Illus. (k) — Illus. (k) contemplates not loss that may result to *Z* but advantage aimed at by *A*.

Illustration (k) to S. 464 contemplates not the loss that may possibly result to *Z* from the contract of service which he may be induced by the forgery and deceit to offer to *A* but rather the advantage of employment primarily aimed at by *A*.

[P 491 C 2]

P. C. Manuk and Mrs. Dharmashilla Lall — *for Petitioner.*

Asst. Govt. Advocate — *for the Crown.*

Order. — The petitioner has been convicted of the offence of fraudulently or dishonestly using as genuine a certified copy of a decree which he knew or had reason to believe to be a forged document. In 1935

he brought a money suit on a handnote for Rs. 250. The suit was decreed on 4th July 1935, and the decree was signed on the 8th of that month. On 21st July 1938, a petition for execution of the decree was filed in the Court of the Munsif by Babu Satnarain Bhagat, pleader and brother of the petitioner. This petition was accompanied by a certified copy of the decree in which the date of the judgment was palpably altered in two places from 4th to 24th July 1935, and the date of the decree was similarly altered from the 8th to 28th of that month. On the following day Shamsuddin Ahmad, the Civil Court mohurrir who had received the execution petition, compared the copy of the decree with the money suit register and discovered that the dates looked suspicious both in the copy and in the money suit register. After consulting his colleagues, he brought the matter to the notice of the Munsif, who also examined the entries, and pending the receipt of the original record of the suit from the district headquarters, held an enquiry. It was thus that on 26th July 1938, he questioned the petitioner and was told by him that he had obtained the certified copy of the decree, that in the certified copy the date of disposal of the money suit was copied as 24th July 1935, and that "it was all along as it is now." The Munsif also examined his mohurrirs, the pleader, the pleader's clerk Ajab Lal and the writer of the execution petition, Baleshwar Prasad, who happened to be the clerk of another brother of the petitioner, who had also been a member of the bar but was then a paralytic. As a result of the Munsif's inquiry the petitioner was placed on his trial.

There is no dispute now that the execution petition with the dates as we find them was filed by the petitioner's pleader on 21st July 1938. There is also no dispute that the dates in the original decrees were 4th and 8th July 1935. The copyist who prepared the certified copy filed on behalf of the petitioner was examined as a Court witness and swore that he had copied the dates correctly, and denied that the figure "2" in three places in the dates given in the certified copy (twice before the 4th and once before 8th July), was his writing. The evidence of the copyist was supported by the circumstances, for the copy was prepared in August 1935, when there was no reason whatsoever to tamper with the dates, and towards the end of the month the copy was amended by order of the Court in respect of two items (besides the total) in the statement of costs given, as usual, at the end of the decree.

It seems to have been suggested in the trial Court that Samsuddin, the Court mohurrir, may have altered the dates. The suggestion was repelled by the Magistrate and was, quite rightly, not repeated before the Sessions Judge. The principal defence was that long before the filing of the execution petition the petitioner had made over the copy of the decree to Ajab Lal in order to put the decree into execution, and that Ajab Lal had allowed the decree to become barred by limitation and then tried to save it by altering the dates. This was put by way of suggestion only to Ajab Lal in cross-examination, and denied by him. The lower Courts have both accepted Ajab Lal's denial, rejecting the evidence of Baleshwar, who happens to be a cousin of the petitioner and who wrote the execution petition although he was not the mohurrir of the pleader working for the petitioner in the execution proceedings, that he had written the petition at the instance of Ajab Lal. No evidence was produced on behalf of the petitioner, nor anything of importance elicited from such friendly prosecution witnesses as the petitioners' brother and cousin in support of the suggestion put to Ajab Lal. It was also urged that the petitioner could not possibly have had any motive for altering the dates in the certified copy as the three years limitation for execution ran from the date of amendment and had therefore not yet expired. But the dates were in fact altered, and altered so palpably that, as the learned Sessions Judge had remarked, "no man with any common sense can fail to realize that there is suspicion in the dates." It is also obvious that whoever brought about the alterations did not realize how limitation was saved by the amendments of 30th August 1935.

Learned counsel for the petitioner has contended that the fraudulent user of the forged copy of the decree has not been conclusively brought home to the petitioner, that the lower Appellate Court has acted on inadmissible evidence, and that the decree not being really time-barred, the alterations were immaterial and did not constitute forgery as they did not make the document "more efficacious."

Now, it is necessary for the prosecution when the charge is under S. 471 to show that the accused knew or had reason to believe the document to be forged and used it fraudulently or dishonestly. The execution

petition of 21st July 1938 was signed by the petitioner himself in the three usual places. It gave 24th July 1935 as the date of the decree, and the Courts below had before them the palpably altered dates in the copy of the decree filed with it besides the statement Ex. 12 made by the petitioner to the Munsif on 26th July 1938. The petitioner did not on that occasion suggest anything about Ajab Lal having received the copy of the decree long before and having allowed the decree to become time-barred : but said, on the contrary, that the date "24th July 1935" in the copy "was all along as it is now." Learned counsel has endeavoured to meet the comment of the lower Appellate Court on this failure of the petitioner to state such an important fact on the earliest occasion by urging that the petitioner was not then on his defence. I am not impressed by this, because if the story about Ajab Lal had been true, there was no reason why the petitioner should not only have kept it back at the time— unlike Baleshwar, Ajab Lal is not even related to the petitioner — but should also have stated that he himself had obtained the certified copy and that the date of disposal of the money suit shown in it had all along been 24th July 1935. Mr. Manuk has also referred to a suggestion made by the prosecution in the cross-examination of Baleshwar after the witness had gone the length of saying that he did not recognize the handwriting of the petitioner's signatures on the execution petition. This suggestion was that the petitioner had given the decree to Baleshwar, that Baleshwar found that it was time-barred after showing it to the pleader Satnarain Bhagat, that Baleshwar then asked Ajab Lal to write the execution petition, that Ajab Lal refused and that Baleshwar then wrote the petition, asking Ajab Lal only to sign as scribe. The contention is that this completely exonerates the petitioner. But it is nobody's case that that is what actually took place, and the prosecution seems merely to have thrown out a not very fully thought out suggestion to make out that the witness was telling very much less than he knew about the affair. Baleshwar himself denied the suggestion. It has also been suggested by learned counsel that the petitioner may not have noticed the alterations in the dates in the certified copy, but this suggestion is entirely irreconcilable with the petitioner's statement to the Munsif, the whole of which is in evidence.

As to inadmissible evidence, the contention on behalf of the petitioner is that what Satnarain Bhagat told Shamsuddin on the evening of 23rd July, in the absence of the petitioner is no evidence against the petitioner. According to Shamsuddin, Satnarain told him that the decree (that is to say, the certified copy) had been shown to him by the petitioner, that Satnarain had pointed out that it was time-barred, and that Baleshwar had taken it away. The trial Court, as a matter of fact, was not inclined to believe this incident as given by Shamsuddin. The lower Appellate Court, on the other hand, found nothing improbable in it and preferred to believe the mohurrir rather than the pleader. The matter was reported to the Munsif on the next working day, namely 25th July and if the mohurrir did not go up to the Munsif at once, the learned Sessions Judge thinks it not unnatural for Shamsuddin to have displayed a slight amount of sympathy to the pleader who had been at school with him. The learned Sessions Judge certainly considers the incident as an important piece of evidence, but it is by no means clear that he uses it as evidence against the petitioner. It was certainly evidence against the pleader who, when cross-examined by the prosecution with the leave of the Court, went so far as to say that he did not remember if he filed the execution petition on the instructions of the petitioner, adding that he had authorized him to file it. The pleader, who occupied a dual position in the matter because he was the petitioner's brother as well, has made himself thoroughly unreliable as a witness, and the conclusion that the petitioner knew the certified copy to be forged was arrived at by the trial Court irrespective of this incident between Shamsuddin and the pleader. Indeed, in my opinion, the petitioner's statement to the Munsif on the earliest occasion makes it impossible not only to entertain seriously his later suggestion in cross-examination that Ajab Lal had allowed the decree to be time-barred and may, therefore, have made the alterations, but also to doubt that the petitioner was aware of the alterations in the dates. Coming now to the last argument on behalf of the petitioner, learned counsel has cited 126 I C 862[1] and contended that as by reason of the amendment the decree was not in fact time-barred, this was not a case of forgery since the offence requires a

1. Aparti Charan v. Emperor, (1930) 17 AIR Pat 271=1933 CrC 458=126 IC 862=31 CrLJ 1126.

possibility of some person being defrauded by it, that is to say being not only deceived but injured by the forgery. The case cited was one in which a plaint was filed on behalf of a lady by her husband, and what he described as the thumb-impression of his wife was shown not to be her thumb-impression at all. It was a suit for rent, and the defendant was liable for it and no damage was caused to him. As to the lady, she had given a general permission to her husband to file papers in Court on her behalf, and had given him authority to sign on her behalf and file papers in Court. The plaint being filed in her interest, and as she said, under her authority, there was no fraud on her. It is true that the plaint was not really signed by her, but this was found to be only a defect in procedure which was curable. Ross J. who decided 126 I C 862[1] referred to the similar cases in 43 I C 828[2] and 11 Bom H C R 3[3] in the latter of which reference was made to the view of Cresswell J. in (1846) 2 Car & K 356[4] about the possibility of some person being defrauded —that is to say, not only deceived but injured—by the forgery being essential in point of law to constitute an intent to defraud. But as Cresswell J. himself pointed out in (1852) 2 Den C C 493[5] the case in (1846) 2 Car & K 356[4] was decided before 14 and 15 Vict., C. 100, which made it unnecessary to allege the intent of the defendant to defraud any particular person, while the three counts in the indictment of Marcus mentioned the intent to defraud the London and Croydon Railway Company and two specific individuals. Maule J. in (1852) 2 Den C C 493[5] pointed out that in order to convict a person of an intent to defraud, it is not necessary that any person should be in a situation to be defrauded. As the learned Judge had observed during the arguments, a man may have an intent to defraud and yet there may not be any person who could be defrauded by his act:

> Where a person has no account at his banker's but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case although no person could be defrauded.

It would thus seem somewhat doubtful whether in England it is still regarded as essential indictments for forgery that there should be a possibility of some person being injured in consequence of the forgery: see foot-note (o) at p. 587 of Halsbury's Laws of England, Vol. 9, Edn. 2. One well-known writer deduces the English law from (1846) 2 Car & K 356[4] and other cases to be that

> if the person whose signature has been forged as the drawer of a cheque has ceased to have any account at the particular bank, this will not deprive the forgery of its full criminality. But the fraudulent intent necessary will not exist unless the offender had reasonable grounds for supposing (however wrongly) that someone or other might possibly be defrauded: Kenny's Outlines of Criminal Law, Edn. 11 p. 262.

Be that as it may, it would seem to be clear under the English law that a forgery is nonetheless so because it was committed in order to support a title which was good without it, for it is settled that a man may be fully guilty of forgery although the money which he aimed at getting by the forgery was only a sum that was legally due to him. Coming to Indian law, 126 I C 862[1] was a case in which a claim was made which only suffered from an informality curable under our Civil Procedure Code, while in the present case execution was sought on the basis of a copy of the decree in which the dates were altered under the impression that the decree was time-barred. S. 471, I. P. C., contains the expressions "fraudulently or dishonestly" terms which are defined in Ss. 24 and 25, the latter being equivalent to " with intent to defraud"—and " a forged document. " Our definition of forgery is to be gathered from Ss. 463 and 464, and may, for present purposes, be taken to be that a person commits forgery who, with intent to support any claim or title, alters a document in any material part without lawful authority, dishonestly or fraudulently. In construing the expression 'dishonestly or fraudulently,' which thus occurs in the definition, it is important to bear in mind one of the illustrations under S. 464 which has a bearing on the question how far loss or risk of loss is an element in fraud as contemplated in the Code. This illustration is :

> *(k)* *A* without *B's* authority writes a letter and signs it in *B's* name certifying to *A's* character, intending thereby to obtain employment under *Z*. *A* has committed forgery inasmuch as he intended to deceive *Z* by the forged certificate, and thereby to induce *Z* to enter into an express or implied contract for service.

Reference was made to this illustration in 13 Bom 515*n*[6] where Le Blanc J.'s des-

2. Ramsarup v. Emperor, (1918) 5 A I R Pat 640 =43 I C 828=19 Cr L J 236.
3. Reg. v. Bhavani Shankar, (1874) 11 Bom H C R 3.
4. Reg. v. Marcus, (1846) 2 Car & K 356.
5. Reg. v. Nash, (1852) 2 Den C C 493=21 L J M C 147=16 Jur 553.
6. Queen-Empress v. Vithal Narayan, (1889) 13 Bom 515*n*.

cription of fraud in (1801) 2 East 92[7] was adopted :

> By fraud I understand an intention to deceive ; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial.

The meaning of the word 'fraudulently' in our Code has been the subject of many decisions, which are not all easy to reconcile, especially in connexion with the cognate offence of falsification of accounts under S. 477-A, created in 1895 and embodying as an essential ingredient "wilfully and with intent to defraud." In 25 Cal 512[8] a Full Bench of the Calcutta High Court held that deprivation, actual or intended, is not a necessary ingredient of the intent to defraud referentially imported into S. 464 and S. 471. Maclean C. J. who delivered the judgment of the Full Bench added

> though we are in no way bound by the decisions of the English Courts, still we are fortified in the view we take of the expression 'intent to defraud' by the decision in (1849) 4 Cox C C 33,[9]

the forgery in the case before the Full Bench relating to a certificate qualifying for admission to a certain professional examination. In 28 Mad 90[10] a Full Bench of the Madras High Court followed the decision in 25 Cal 512[8] and White C. J. after referring to Sir James Fitz-James Stephen's well-known observations about 'fraud' or 'intent to defraud' or 'fraudulently' in his History of the Criminal Law of England (Vol. 2, p. 121), pointed out that under S. 24 of the Code it is not necessary for a thing to be done 'dishonestly' that there should be an intention to cause both wrongful gain and wrongful loss. The learned Chief Justice was apparently inclined to the view, on the analogy of that Section, that

> either an intention to secure a benefit or advantage on the one hand, or to cause loss or detriment on the other, by means of deceit is an intent to defraud,

though he did not consider it necessary to decide whether an intention to secure a benefit or advantage by means of the deceit by itself constitutes an intention to defraud, because the accused who had submitted to the University a certificate qualifying for admission to an examination with the intention that the University should admit him to the examination, was taken to have done so with the intention of causing loss or detriment to the University. This was in fact the point on which two of the learned Judges differed from the majority of the Full Bench, and Subrahmania Ayyar J. distinguished (1849) 4 Cox C C 33[9] and Illus. (K) to S. 464. In 63 I C 617[11] a chemist had been induced to supply twelve tubes of morphia on the basis of three prescriptions which were for one tube each, but in which the words 'one tube' had been altered to 'four tubes.' Shadi Lal C. J. and Moti Sagar J., held that the alterations were fraudulent. They referred to Sir James Fitz-James Stephen's observations :

> A practically conclusive test as to the fraudulent character of a deception for a criminal purpose is this : — Did the author of the deceit derive any advantage from it which he could not have had, if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to someone else, and if so there was fraud.

The deception practised upon the chemist was taken by the learned Judges to have deprived him of his right to refuse to sell morphia in quantities exceeding those specified in the genuine prescriptions and thus to have supplied the element of loss or the risk of loss essential to a forgery. The loss to the chemist is comparable to the loss to *Z* in Illus. (K) or to the loss to the Munsif in having to deal with the execution petition of 21st July 1938 in this case. It was also urged in 63 I C 617[11] that fraud was unnecessary. The learned Judges overruled this contention and referred to Norris J.'s observation in 9 Cal 53 :[12]

> Let a person's title to property be ever so good yet if in the course of an action brought against him to gain possession of the property he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document .... I am clearly of opinion that he uses it fraudulently.

In our own Court the meaning of "intent to defraud" was considered in 16 Pat 688,[13] a case under S. 477-A, where Rowland J. said that he did not find that any of the later cases had gone so far as Norris J. in 9 Cal 53.[12] The attention of the learned Judge does not seem to have been drawn to 63 I C 617[11] nor to the decision in 96 I C 850.[14] in which the question arose whether the alteration of a plot number in a parti-

7. Haycraft v. Creasy, (1801) 2 East 92 = 6 R R 380.
8. Queen-Empress v. Abbas Ali, (1898) 25 Cal 512 = 1 C W N 255 (F B).
9. Reg v. Toshack, (1849) 4 Cox C C 33.
10. Kotamraju Venkatarayadu v. Emperor, (1901) 28 Mad 90=1 Weir 538 (F B).
11. Robinson v. Emperor, (1921) 63 I C 617=22 Cr L J 681.
12. Empress v. Dhunum Kazee, (1883) 9 Cal 53= 11 C L R 169.
13. Sukhamoy Maitra v. Emperor, (1938) 25 A I R Pat 165=173 I C 759=39 Cr L J 374=16 Pat 688=19 P L T 297.
14. In re Shivananda Mudali, (1926) 13 A I R Mad 1072=96 I C 850=27 Cr L J 994.

tion deed could amount to forgery if the accused had an independent title to the new plot. Devadoss J. said:

> If a person in order to resist a false claim for money makes a false receipt, does he or does he not commit forgery? Even if the Court holds that the claim is false, that would not make the false receipt any the less a forgery. Whether a document is a false document or not does not depend upon the adjudication of the Court on the claim or title which is intended to be propped up by the false document.

Norris J.'s observation was quoted. The alteration was held to be a forgery on the ground (to quote Waller J.) that

> if a man intends to gain an unfair advantage by deceitful means and uses a false document for that purpose, his conduct is fraudulent,

the intention being taken to be as Devadoss J. put it—to defraud the Court or the party against whom the document is used. In the Bombay High Court the point was considered in 37 Bom 666[15] where Batchelor J. considered (1801) 2 East 192[7] and the observations of Sir James Fitz-James Stephen as applied in India and came to the conclusion that the word "fraud" is used in our Penal Code in its ordinary and popular acceptation. In a recent Allahabad decision, 55 All 783[16] a case under S. 477-A much the same view was taken, the learned Judges observing that where there is an intention to obtain an advantage by deceit there is fraud and if a document is fabricated with such intent, it is forgery. Page J. in 52 Cal 881[17] reviewed previous decisions on the questions of fraud under the Penal Code and referred not only to (1801) 2 East 92[7] and other old English cases but also to (1914) 23 Cox C C 609[18] in which the Court of Criminal Appeal followed Buckley J.'s definition in (1903) 1 Ch 728[19]:

> To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

The learned Judge's conclusion was:

> That an offence is committed under S. 471 whenever a document known or believed by the accused to have been forged is used as genuine with the intention that some person, thereby should be deceived, and by means of such deception that either an advantage should accrue to the person so using the document or injury should befall some other person or persons.

The indictments for common law forgery in the case of Toshack,[9] who had fabricated a certificate qualifying for examination as a master mariner, alleged an intent "to deceive, injure, prejudice and defraud" the four examiners and the Corporation of Trinity House which used to issue certificates to act as masters upon such examination; and when the point was referred to the Court of Criminal Appeal the counts in question were held to be good and the conviction right. In such cases as those from 25 Cal 512[8] and 28 Mad 90[10] (already referred to) where the question was whether an intent to defraud within our Penal Code was brought home to the accused who had submitted a false certificate in order to obtain admission to an examination, there was a clear primary intention of deceiving and by deciet of inducing a course of action on the part of the person deceived and obtaining an advantage from him. Except so far as loss or detriment is almost necessarily involved when an advantage is thus obtained, any intention of causing loss was a matter of remote inference. Illus. (K) to S. 464 seems to contemplate not the loss that may possibly result to Z from the contract of service which he may be induced by the forgery and deceit to offer to *A*, but rather the advantage of employment primarily aimed at by *A*. In 63 I C 617[11] the chemist must have been paid whatever he would have charged any ordinary customer for the morphia supplied on the forged prescriptions. He had of course a right to refuse to sell except on a genuine prescription but he was perhaps not bound to sell even on such prescriptions. The loss or risk of loss from the violation of his right to refuse to sell is far less clear and much more indirect than the advantage that Robinson obtained by the forgery and deceit. The petitioner before me had the forged copy of the decree filed in order to obtain execution as upon a decree of 24th July 1935. There was no such decree in existence and the fact that he sought to gain this advantage is not in the least affected by the circumstance that if he had been correctly advised, he would have known that the decree of 4th July 1935 was saved from the time-bar by the amendment of August 1935. In my opinion a sufficient intent to defraud is involved in the advan-

15. Emperor v. Balkrishna Waman, (1913) 37 Bom 666=20 I C 998=15 Bom L R 708.
16. Emperor v. Ragho Ram, (1933) 20 A I R All 525=1933 Cr C 850=145 I C 749=34 Cr L J 1056=55 All 783=1933 A L 1372.
17. Emperor v. Mohit Kumar, (1926) 13 AIR Cal 89=91 I C 993=27 Cr L J 177=52 Cal 881.
18. Rex v. Newton and Bannet, (1914) 23 Cox C C 609=109 L T 747.
19. In re London & Globe Finance Corporation Ltd., (1903) 1 Ch 728=72 L J Ch 368=51 WR 651=88 L T 194=19 T L R 314=10 Manson 198.

tage directly aimed at by the petitioner on the basis of the altered dates; and it is immaterial that the alterations were brought about under an erroneous impression that the decree was time-barred. A fraud, it is clear, was attempted upon the Court. I am not prepared to hold that in such a case it is necessary for the prosecution to go further and establish an intent to cause loss or risk of loss. But even if the contrary were to be held, the definition of injury in S. 44 of our Penal Code is very wide, and 27 C W N 479[20] shows how the threat of a decree that could not be executed by any competent authority—in this case the decree of 24th July 1935 — is a threat of harm or injury within the meaning of the Code. Mr. Manuk also referred to the observation of Bramwell, B. in (1858) 8 Cox C C 32[21]:

> Forgery supposes the possibility of a genuine document and that the false document is not as good as the genuine document and that the one is not as efficacious for all purposes as the other.

That observation referred to some printed wrappers which were found to be as good for describing the powers for which they were to be used as other wrappers which they imitated were for describing their own contents. The mere printing of the wrappers was held not to constitute forgery, but this seems to have no application at all to the facts of the present case. A genuine copy of the decree would, it is true, have entitled the petitioner to execution of a decree passed on 4th July 1935 and amended on 30th August 1935, but the copy filed by the petitioner sought execution of a decree passed on 24th July 1935. The unauthorized alterations in the dates actually made the copy of the decree "more efficacious" than the genuine decree in the sense that the petitioner took the real decree to be time-barred and attempted to bring into existence a decree of a later date, not that this is essential to a forgery. In my opinion the fact that the petitioner held a decree which was capable of execution on 21st July 1938, does not prevent the alterations in the certified copy filed on behalf of the petitioner from being forgeries or the petitioner's user of it from being fraudulent. The petitioner has been rightly convicted. The application in revision is dismissed.

G.N./R.K. *Application dismissed.*

20. Priyanath Gupta v. Lal Jhi Chowkidar, (1923) 10 A I R Cal 590=72 I C 508=24 Cr L J 396 =37 C L J 526=27 C W N 479.
21. Reg v. John Smith, (1858) 8 Cox C C 32.

A. I. R. 1940 Patna 492

DHAVLE J.

Bhuneshwar Prasad and others — Petitioners.

v.

Rommoy Roy—Opposite Party.

Criminal Revn. No. 699 of 1939, Decided on 2nd February 1940, from order of Deputy Commissioner, Hazaribagh, D/- 30th October 1939.

Criminal P. C. (1898), Ss. 144 and 145—No bona fide dispute about possession—Apprehension of imminent danger of breach of peace — Order under S. 144 is proper.

It is only where there is a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and the dispute requires to be decided on evidence that resort to S. 145 becomes necessary and for this purpose the dispute has to be a real dispute and not a mere pretence on behalf of one of the contesting parties. Where there is no such real dispute and there is an imminent danger of breach of the peace, order under S. 144 is proper. [P 494 C 1]

Sir Sultan Ahmad and Brahmadeva Narain — *for Petitioners.*

Sir M. N. Mukherji and S. C. Mazumdar — *for Opposite Party.*

Order. — This is an application in revision against an order passed in proceedings under S. 144, Criminal P. C. The original order which was passed ex parte against the petitioners is dated 24th August 1939. The petitioners thereupon appeared before the Magistrate and asked him to rescind the order. This application was refused by the Magistrate on 10th October 1939, though the opportunity was seized to make some small amendments in the order. Against this order of 10th October, the Deputy Commissioner was moved in revision, and on the 30th of that month he rejected that petition. The petitioners applied to this Court on 18th December in revision against the order of the Sub-divisional Magistrate which the Deputy Commissioner had declined to interfere with.

It appears that lot Itkhori was a khorposh jagir under the Ramgarh Raj; and it is stated on behalf of the petitioners, representing some servants and some tenants of the Ramgarh Raj, that such grants are resumable on failure of the male line of the grantee. The last holder of the Itkhori lot khorposh was Degnarain Sahi, and it is common ground that he died on 18th July last. In 1934-36 the opposite party before me, representing one Buto Kristo Roy, purchased six villages of the lot from Deg-

narain Sahi, and it is common ground that the purchaser came into actual possession. The case of the opposite party is that Degnarain has left a son. The case of the petitioners, on the other hand, is that Degnarain left no issue and that consequently on his death the Ramgarh Raj became entitled to resume possession of the jagir and that it succeeded in doing so peacefully by publishing notices under S. 51, Chota Nagpur Tenancy Act. The order of the Sub-divisional Magistrate as finally settled by him concerns, I understand, these six villages out of the jagir. About a month after the death of Degnarain, Buto Kristo Roy began to move the authorities against the interference of the Ramgarh Raj with his possession. Police officers were deputed to Itkhori to see that the peace was preserved. The Magistrate himself appears to have been at Itkhori on 24th August, when he directed the Senior Police Officer deputed there to report clearly "in respect of which properties the Ramgarh Raj people wanted to exercise acts of possession and who has been in possession of these properties." The result was a police report that there was an imminent danger of a breach of the peace as the employees of the Ramgarh Raj would "certainly do some overt acts to take possession over the villages" which had been coming on in the possession of Buto Kristo Roy. In his order of 10th October, the learned Sub-divisional Magistrate says:

> In fact at the time of arguments it was clearly stated on behalf of the second party (that is to say, the petitioners before me) that B. K. Roy has been in direct and sole possession of the aforesaid six villages . . . . . that the second party had not so far exercised any act of possession except making a proclamation under S. 51, Chota Nagpur Tenancy Act, that the second party wanted to take possession peacefully by accepting rent from those tenants who offered it voluntarily and that so no action under S. 144, Criminal P. C., was necessary. The learned Magistrate referred to the police report, which was endorsed by the Inspector of Police, that the second party wanted forcibly to dispossess B. K. Roy, and he found it impossible to think that Buto Kristo Roy who had purchased these villages for a very big sum of money would tamely allow the second party to dispossess him.

He came to the conclusion that all the members of the second party had been acting jointly and severally forcibly to dispossess the first party, and he therefore affirmed his ex parte order under S. 144 (2) with certain modifications which do not require any specific mention. It has been contended by Sir Sultan Ahmad who appears on behalf of the petitioners that the Sub-divisional Magistrate had completely misunderstood the petitioners, for they could not have pleaded themselves out of Court by conceding that they had not so far exercised any act of possession except making the proclamation under S. 51, Chota Nagpur Tenancy Act, and by adding that they wanted to take possession peacefully by accepting rent from those tenants who offered it voluntarily. In support of the contention that the Magistrate must have misunderstood the petitioners, learned counsel has referred me to para. 10 of the petition in revision made by these petitioners to the Deputy Commissioner. It seems to me, however that the misunderstanding, if any, is of little consequence in the circumstances of this case. There is no dispute that Buto Kristo Roy was in possession down to the death of Degnarain, and the Deputy Commissioner, no less than the Sub-divisional Magistrate, has found it impossible to think that Buto Kristo Roy would have allowed himself tamely and quietly to be put out of possession by whatever tactics that may have been adopted by the petitioners.

Sir Sultan Ahmad points out that the petitioners before me are not all employees of the Ramgarh Raj, but include some tenants as well. The mere fact that the Ramgarh Raj has got a few tenants on its side does not by any means indicate that the Ramgarh Raj is in peaceful possession of these khorposh villages, or even make out a fair case of a bona fide dispute as regards possession. The Ramgarh Raj may if Degnarain has died without issue, be entitled to resume possession, but unless the transferee from Degnarain chooses voluntarily to walk out (which one need hardly say is unlikely to a degree), the Raj will have to sue to recover possession from him.

Sir Sultan Ahmad has urged that this was not a case to which S. 144 should have been applied at all. As I have already indicated, there was an apprehension of a breach of the peace which the police reported as an "imminent danger of a breach of the peace," and though the dispute did refer to the possession of these mauzas, it was not a case where, under the principles laid down in 2 Pat 94[1] and 10 P L T 542,[2] it was obligatory on the Magistrate to drop

1. Shebalak Singh v. Kamar-ud-din Mandal, (1922) 9 A I R Pat 435= 68 I C 149 = 2 Pat 94=23 Cr L J 549=3 P L T 573 (F B).
2. Lachman Das v. Ramchhabila, (1929) 16 A I R Pat 415=1929 Cr C 198 = 115 I C 683 = 30 Cr L J 510=10 P L T 542.

the proceeding under S. 144 and proceed to act under S. 145, Criminal P. C., for his finding (endorsed by the learned Deputy Commissioner) is perfectly clear that there was not a bona fide dispute about possession at all and that what had happened was that while Buto Kristo Roy was continuing his possession the Ramgarh Raj was trying to take it by means which it called peaceable, but which appeared to the police and the Magistrates to be very likely to lead to breach of the peace. It is only where there is a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and the dispute requires to be decided on evidence that resort to S. 145 becomes necessary; and it must be remembered that for this purpose the dispute has to be a real dispute and not a mere pretence on behalf of one of the contesting parties. The judicial pronouncements already referred to are clear that where there is no such real dispute orders under S. 144 are not improper. There may even be occasions where an order is first appropriately passed under S. 144 and the proceeding is afterwards converted into one under S. 145 in order to pass an even more appropriate and permanent order. But this is not a case of that kind; and though I can quite believe that the petitioners did not intend by their pleader to say to the Magistrate what the Magistrate took him to mean, his decision really turns not so much on what the pleader stated as on facts which to use the term adopted in 10 P L T 542[2] can be called transparent.

Sir Sultan Ahmad has also argued that the petitioners have not been given an opportunity of proving that they are in fact in possession; but the answer to this is that the case was not put on that footing either before the Magistrate or before the Deputy Commissioner, for the contention only means that there should have been proceedings under S. 145 rather than a final order under S. 144. The initial contention before me was that there was no dispute such as to warrant an order under S. 144, and this fails in view of the definite police report received and accepted by the Sub-Divisional Magistrate. From this point of view it does not seem necessary to deal with the contention of Sir Manmatha Nath Mukherji for the opposite party that the period of two months for which the order of the Magistrate was to remain in force runs from the date of the ex parte order and has expired long ago—indeed this is not disputed by the other side—and that this Court should therefore not entertain the application in revision. As I have already shown, the application fails on the merits. The application is dismissed.

D.S./R.K. *Application dismissed.*

A. I. R. 1940 Patna 494

AGARWALA AND ROWLAND JJ.

Maksudan Lal Sahu — Plaintiff — Appellant.

v.

Niranjan Nath Das and others — Defendants — Respondents.

Appeal No. 745 of 1938, Decided on 24th January 1940, from appellate decree of Addl. Judicial Commissioner, Chota Nagpur, D/- 1st June 1938.

Chota Nagpur Tenancy Act (6 of 1908), S. 46 — Usufructuary mortgage in violation of S. 46—Mortgagee subsequently dispossessed — Time runs from expiry of five years from date of mortgage and not from date of dispossession — Mortgagee cannot claim benefit of enjoying usufruct of property under S. 20 (2), Limitation Act—Mortgage cannot form basis of valid decree for sale.

Where a usufructuary mortgage is executed in violation of S. 46 and the mortgagee is subsequently dispossessed, time for a suit for money decree runs from the expiry of five years from the date of the execution of the mortgage and not from the date of dispossession. The mortgage being invalid after the expiry of five years from the date of its execution the possession of the mortgagee must be deemed to be that of a trespasser, and therefore he cannot claim the benefit of S. 20 (2), Limitation Act, for extending limitation by treating the usufruct of the property as payment within the meaning of S. 20 (2), Limitation Act. The mortgagee in such a case is not entitled to a mortgage decree as well for the mortgage having been in violation of S. 46 cannot form basis of a valid decree for sale: *A I R 1920 Bom 48; 7 Mad 539 and 19 Bom 663, Rel. on; A I R 1933 Pat 288; A I R 1921 Mad 410; A I R 1915 Bom 131 and A I R 1938 Pat 479, Disting.; A I R 1923 P C 205 and A I R 1936 P C 183, Expl., and Disting.*

[P 496 C 1, 2]

K. K. Banarji — *for Appellant.*

A. C. Sinha and S. C. Chakravarty — *for Respondents.*

Rowland J. — This is an appeal by the plaintiff who brought on 25th April 1936, a suit to recover principal Rs. 250 and interest Rs. 225 due on a mortgage bond secured on a house situated in cadastral survey plot No. 1055, in Khata No. 82 in village Lohardaga, District Ranchi. The mortgage bond was executed on 22nd De-

cember 1911, by Sheotahal Ram, ancestor of defendants 1 to 9 in favour of Banshi Sahu, the father of defendants 10 and 11. The mortgagee was put in possession of the property hypothecated of which he was under the document to remain in possession for three years after which the mortgagor was to be entitled to redeem. It was further stipulated that the mortgagee would continue in possession until redemption and in case of dispossession there was a covenant to repay the money with interest at 15 per cent. per annum. The mortgagee assigned his interest by sale deed dated 10th February 1916 to Mohan Lal, the father of the plaintiff. Thereafter the plaintiff remained in possession of the house until 1930 when the defendants first party dispossessed him.

The sons of Bansi Sahu have not contested the suit but the other defendants raised various objections to the claim, one was that by oral agreement the plaintiff was allowed to remain in possession and the usufruct of the property was to be set off against both principal and interest as a result of which the debt has been extinguished. This defence was negatived by the Courts. Another defence taken was that the plaintiff was dispossessed in 1917 or 1918 and that the suit was barred by time whether regarded as a mortgage suit or as a suit for recovery of money on the personal covenant to repay. The Courts have found the facts otherwise holding that dispossession of the plaintiff by the defendants took place in 1930 that is just within the period of six years before the institution of the suit. A third objection was that the mortgage was a transaction contrary to S. 46, Chota Nagpur Tenancy Act, and as such was void either at the outset or, at any rate, after five years. Therefore, it was said that limitation to recover the money ran from either 1914, the date on which the mortgage money was made repayable by the bond or from 1916 if it be assumed that the possession of the plaintiff as mortgagee was valid for five years. Ss. 46 and 47 are a bar to the plaintiff obtaining a mortgage decree for sale of the property and the period of six years' limitation calculated either from 1914 or 1916 bars the relief of the money-decree on the basis of the personal covenant. This defence was accepted by the Courts below who have dismissed the suit, the view taken being that the suit should have been brought within six years from 22nd December 1916 and that the plaintiff could not take advantage of his subsequent possession of the property because it was that of a trespasser. The Additional Judicial Commissioner thought that S. 20 (2), Limitation Act, could not avail the appellant because the receipt by him of the usufruct of the property was not as mortgagee in possession but as a trespasser. It is this finding of the Courts below which is assailed on appeal.

Assuming, it is said, that the plaintiff was a trespasser in possession it is contended that by holding possession for 12 years adversely to the true owner he acquired a title as claimed by him, namely the status of a lawful mortgagee. In support of the contention reliance is placed on some observations of Macpherson J. in 14 P L T 294.[1] It was there said that the mortgagee begins to prescribe from the date of the mortgage and if he holds adverse possession as such for the statutory period, the raiyat can only recover possession by redeeming him. That observation was in the nature of an obiter dictum, for in the case before him which was resisted by the defendant on the ground that he had been in possession not as a mortgagee but as a raiyat it was held that in fact the defendant had been in adverse possession of an interest as raiyat. There are decisions of other High Courts in which a person in possession as a mortgagee under a mortgage inviolate by statute has been held to have prescribed and obtained by lapse of time the limited right of a mortgagee. It was so held in 44 Mad 946[2] and 39 Bom 587,[3] in a suit to redeem where the defendant held under an invalid mortgage for over 12 years and set up an absolute title, it was held that he could prescribe only for the limited interest of a mortgagee in possession. On the other hand, doubt has been expressed in this Court whether such a limited interest as the relation of mortgagor and mortgagee can be created by prescription. In 19 P L T 489[4] the question was not expressly decided but both Wort Ag. C. J. and Manohar Lall J. inclined to the opinion that this limited interest could not accrue by adverse possession. In 47 Bom

1. Abdul Jabbar v. Gulab Khan, (1933) 20 A I R Pat 288=144 I C 439=14 P L T 294.
2. Gopala Dasu v. Rami, (1921) 8 A I R Mad 410 =64 I C 328=41 M L J 194=44 Mad 946.
3. Ramchandra Venkaji v. Kallo Deoji, (1915) 2 A I R Bom 131=30 I C 396=39 Bom 587= 17 Bom L R 630.
4. Bhukhan Mian v. Radika Kumari Debi, (1938) 25 A I R Pat 479=176 I C 35=19 P L T 489.

798[5] the question arose whether tenants claiming a permanent tenancy in service watan lands on the strength of a lease contrary to the prohibition in Bombay Act 3 of 1874 against alienation by a watandar had by adverse possession established a right to a permanent tenancy. Sir John Edge, in delivering the judgment of their Lordships, said, without expressly deciding the point, that:

> They are constrained to say that it is somewhat difficult to see how a stranger to a watan can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the state, prohibited.

Again in 59 Mad 809[6] the question was raised but not decided. But the decided cases mainly deal with the position in which the true owner seeks to redeem or to eject a person in possession under an invalid mortgage. In the present case the position is changed because the defendants who are the true owners have succeeded in recovering possession of the mortgaged property. Hence it is not necessary for us to decide what would have been the position had the present plaintiff been in possession and in the situation of a defendant to a suit of that nature. The point which we have to decide is whether limitation for the suit instituted by him which is to recover his mortgage money is to run from 1916 at latest or from 1930, the date on which he lost possession. The position seems analogous to that in 44 Bom 500.[7] Here a mortgage of watan lands was by statute permissible so far as it affected the life interest of the grantor but beyond that it was not valid so as to affect the interest of his successor. A suit was brought by the successor to recover possession of the property and he succeeded on the finding that the mortgagee was since the death of his mortgagor, a trespasser. The latter then sued to recover his money and he sought to date limitation for the suit from the date when he was dispossessed of the land treating the receipt of the rent or produce of the land as a payment within the meaning of S. 20 (2), Limitation Act, giving a fresh start to limitation. It was held that time ran against him from the date of the death of his mortgagor on which date the mortgage as such came to an end. His possession thereafter

> was the possession of a trespasser claiming a limited interest in the property as a mortgagee, but not the possession of a mortgagee.

A similar view was taken in 7 Mad 539[8] and 19 Bom 663.[9] That being so, we are unable to hold that the enjoyment of the usufruct of the property by the plaintiff year by year gave him a fresh start for limitation for a suit to recover the money. On that finding the claim to a money decree fails. As to the alternative claim for a mortgage decree Mr. K. K. Banarji for the appellant did not feel himself in a position to press it and said he would be content if his client got a money decree but it may be pointed out that the mortgage having been entered into in violation of S. 46, Chota Nagpur Tenancy Act, could not, under that Section or S. 47, form the basis of a valid decree for sale. It is true that the land (and house) now in suit has ceased to be raiyati land and its status is chhaparbandi. But the change took place apparently about 1928 and will not validate a transaction regarding the land which was previously invalid. It was faintly contended that if relief under the bond could not be given to the plaintiff he might be permitted to amend his pleading and asked to be treated as a person who has by prescription acquired an absolute title as owner. For this purpose he might be permitted to amend his plaint by adding a prayer to be restored to possession of the house. I do not think that at this late stage the plaintiff can be allowed to make such an amendment which would alter the character of the suit to a degree which does not seem to be permissible. In the result I would dismiss the appeal with costs.

Agarwala J. — I agree.

G.N./R.K. *Appeal dismissed.*

5. Madhovrao Waman v. Raghunath Venkatesh, (1923) 10 A I R P C 205=74 I C 362=50 I A 255=47 Bom 798 (P C).
6. Daivasikhamani Ponnambala Desikar v. Periyanan Chetti, (1936) 23 A I R P C 183 = 162 I C 465=63 I A 261=59 Mad 809 (P C).
7. Ksishnaji Sakharam v. Kashim, (1920) 7 A I R Bom 48 = 57 I C 76 = 44 Bom 500 = 22 Bom L R 385.
8. Pichandi v. Kandasami, (1884) 7 Mad 539.
9. Venkaji Babaji Naik v. Shidramapa Balapa, (1895) 19 Bom 663.

A. I. R. 1940 Patna 497

AGARWALA AND ROWLAND JJ.

Chhatranath Das and others —
Plaintiffs — Appellants.

v.

Kashinath Das and others —
Defendants — Respondents.

Appeal No. 695 of 1938, Decided on 5th February 1940, from appellate decree of Dist. Judge, Purnea, D/- 17th June 1938.

Registration Act (1908), S. 17 (as amended in 1929)—Documents executed before amendment of S. 17 and not requiring registration —Amendment does not require them to be registered.

The amendment of S. 17 in 1929 does not require documents executed before that Act came into force and not requiring registration when they were executed, to be registered : *18 Bom 93 and 9 Cal 68, Rel. on ; A I R 1934 Bom 194, Disting.*

[P 497 C 2 ; P 498 C 1]

S. C. Mazumdar and P. N. Sanyal — *for Appellants.*

Jafar Imam, Rajanikant Sinha and Ram Anugarh N. Sinha — *for Respondents.*

Agarwala J.—This is an appeal by the plaintiffs from a decision of the District Judge of Purnea reversing a decision of the Munsif. The appeal arises out of a suit for recovery of possession of khewats 13 and 14 of village Maranga. The principal question in the suit was whether there had been an award by arbitrators in 1913 by which these khewats had been allotted to the plaintiffs or whether, as alleged by the defendants, there was no award in 1913 but that there was an award in 1919 by which the land in dispute was allotted to the defendants. The plaintiffs relied on Ex. 1 which purported to be an award made on 1st January 1913. The defendants relied on a similar document relating to an award purporting to be made in 1919. The trial Court refused to take in evidence the document tendered by the defendants on the ground that it was unregistered and found that the award of 1913 was genuine. The Appellate Court has rejected Ex. 1 also on the ground that it was not registered and has omitted to consider much of the evidence that was adduced by the plaintiffs.

The first point that arises in this appeal is whether the two awards of 1913 and 1919 should have been admitted in evidence and considered by the Court below. It has been contended in support of the judgment of the Court below that S. 49, Registration Act of 1908 is a bar to the admissibility of either of the awards. That Section provides that no document required by S. 17 to be registered shall be received as evidence of any transaction affecting any immovable property or conferring any power to adopt, unless it has been registered. There is no dispute that the two documents were of a nature which S. 17, Registration Act, as amended in 1929, requires to be registered or that such documents were not compulsorily registrable under S. 17 as the Act stood before the amendment of 1929. The question therefore resolves into this, whether the amendment of S. 17 in 1929 requires documents executed before that Act came into operation to be registered. A similar question was raised in 18 Bom 92[1] in which it was held that S. 17, Registration Act of 1877, should not be construed as requiring a document to be registered which would not have required registration when it was executed.

The learned Judges who decided that case followed the earlier decision of the Calcutta High Court in 9 Cal 68[2] in which it was held that neither S. 17 of the Act of 1877 nor the corresponding sections of the preceding Acts had the effect of rendering a document, which was not compulsorily registrable under the Act of 1864, inadmissible in evidence under the succeeding Acts, without registration. Learned counsel for the respondents referred to the recent decision of the Bombay High Court in 58 Bom 419[3] in which a question arose regarding the admissibility of a rent-note executed in 1865. Such a note was not compulsorily registrable at the time when it was executed but it was compulsorily registrable under S. 17 of the Act of 1908. The Act of 1866 had also rendered such documents compulsorily registrable and it contained a provision in S. 100 that documents which had not been compulsorily registrable before 1865 but were then declared to be so registrable might be registered within one year from the date from which the new Act came into operation. The holder of the rent-note had not taken the precaution of availing himself of the benefit of this provision of the Act of 1866 and in those circumstances it was held that the document was rendered inadmissible in evidence by S. 49 of the Act of 1908. That case is clearly distinguishable from the present case. The Amending Act of 1929 does not

1. Desai Motilal Mangalji v. Desai Parashotam Nandlal, (1894) 18 Bom 92.
2. Ram Coomar Singh v. Kishari, (1883) 9 Cal 68.
3. Datto Shivram v. Babasaheb Malhar, (1934) 21 A I R Bom 194=150 I C 555=58 Bom 419 =36 Bom L R 359.

contain any provision similar to that of S. 100 of the Act of 1866 and the T. P. Amendment (Supplementary) Act (Act 21 of 1929), S. 15, clearly supports the principle of the earlier Bombay decision. S. 15 (1) (b) provides that: "Nothing in this Act shall be deemed to affect the validity, invalidity, effect or consequences of anything already done or suffered before 1st April 1930" when the Supplementary Act came into operation.

The decree of the Court below must be set aside and the case be reheard. The Appellate Court will afford the defence an opportunity of giving formal proof of the award of 1919 but no other fresh evidence will be admitted. The Court will also take into consideration, in determining the questions which arise before it, the documentary and oral evidence in the case. The particular documents which the appellants complained had not been referred to by the Court below are Ex. 11 [(a rent decree obtained by the plaintiffs against certain tenants) and rent receipts produced by the plaintiffs (Ex. 4 series)]. It has also been a matter of grievance that the Court below has omitted to consider the fact that the rent receipts produced by the defendants were receipts granted by zamindari servants who had been dismissed for misappropriation and that it was the plaintiffs who produced all the documents of title relevant to the property in dispute. These matters will now be considered by the Court below and given their proper weight. The costs of this appeal will abide the result.

Rowland J. — I agree.

D.S./R.K. *Decree set aside.*

A. I. R. 1940 Patna 498

AGARWALA J.

Kuer Rai — Appellant.

v.

Baburam Kuer and others — Respondents.

Appeal No. 363 of 1939, Decided on 29th February 1940, from decision of Dist. Judge, Saran, D/- 21st January 1939.

(a) Lease—Registration — Person relying on unregistered patta admittedly in possession — He can refer to it for explaining nature of his possession.

If a person relying on the unregistered patta is admittedly in possession, he is entitled to refer to the unregistered patta for the purpose of explaining the nature of his possession, that is to say, for the purpose of explaining that he was let into possession as a tenant : *18 P L T 1012, Disting.*; *A I R 1924 Pat 641, Rel. on.* [P 498 C 2; P 499 C 1]

(b) Landlord and tenant—Landlord receiving rent and not interfering with possession of tenants holding under settlement made by landlord's mukhtar-am — Landlord can be held to have ratified settlement made by his mukhtaram.

Where a settlement is made by a landlord's mukhtar-am and the landlord receives rent from the tenants holding under such settlement and does not interfere with their possession, this is a circumstance from which it may not only be inferred that landlord ratified settlement by his mukhtar-am but it is also a circumstance from which it can be inferred that the mukhtar-am had authority to make the settlement. [P 499 C 1]

Sarjoo Prasad — *for Appellant.*

G. S. Prasad and Girijanandan Prasad — *for Respondents.*

Judgment. — This is an appeal by the plaintiff from a decision of the District Judge of Saran reversing a decision of the Munsif of Chapra. The appeal arises out of a suit for recovery of 2 bighas odd. The plaintiff claimed the land under a registered patta dated 15th September 1936, granted by defendant 4, the admitted landlord of the property. Defendants 1 to 3 resisted the claim on the basis of an unregistered patta granted to them on 1st May 1929, by Kedar Prasad the mukhtar-am of defendant 4. The Court below has found that defendants 1 to 3 were granted settlement by Kedar Prasad, that he had authority to make the settlement, that even if he had not such authority the settlement was ratified by defendant 4 and that defendants 1 to 3 are settled raiyats of the village. The decision is challenged on various grounds. In the first place, it is contended that the unregistered patta on which the defendants relied was inadmissible for the purpose for which it has been used by the Court below, namely for explaining the nature of the defendant's possession. Reliance was placed on the decision in 18 P L T 1012.[1] In that case a person who was not in possession sued to recover possession basing his title on an unregistered patta and on receipts granted by the landlord, it was held that the Courts below were not justified in admitting the unregistered patta or the receipts for the purpose of proving that the plaintiff was entitled to recover possession. The facts of the present case are quite different. A person relying on the unregistered patta is admittedly in possession and under the decision of this Court in 5 P L T 541[2] he is entitled to refer to the unregis-

1. Ramautar Singh v. Juthi Tatma, (1937) 18 P L T 1012.
2. Janki Kuer v. Brij Bhikhan Ojha, (1924) 11 A I R Pat 641 = 79 I C 26 = 3 Pat 349 = 5 P L T 541.

tered patta for the purpose of explaining the nature of his possession, that is to say for the purpose of explaining that he was let into possession as a tenant. The first objection of the appellant is therefore overruled.

With regard to the finding that defendant 4 ratified the settlement made by her mukhtar-am, the Court relied on a money-order coupon evidencing the receipt of money as rent of the disputed land by defendant 4 from defendants 1 to 3, and on receipts for rent granted by the gomasta and patwari of defendant 4. The learned advocate referred to the proviso to S. 54 (2), Bihar Tenancy Act, which provides that where rent is paid by money order an entry in the money order shall not be evidence of the relationship of landlord and tenant between the persons who are described as such in the money order form. To the extent to which the Court below relied on the coupon its finding with regard to ratification of the contract of defendant 4 is vitiated. It was also contended that the receipts granted by the gomasta and patwari of defendant 4 were insufficient to establish ratification in the absence of it being shown that they were authorized to settle land with tenants by defendant 4. Now these receipts bear the words "tahsil khas malik" indicating that they were receipts granted by the gomasta or patwari for money actually received by the landlord herself. The question of the authority of the gomasta and patwari therefore does not arise to be considered. If the money was received by the landlord herself that is evidence on which a finding of ratification of the contract could be based. In addition to the receipts for rent there is the fact that from 1929 onwards defendants 1 to 3 have been in possession of this land without any interference from the landlord. That is a circumstance from which it may not only be inferred that the landlord ratified the settlement by her mukhtar-am but it is also a circumstance from which it may be inferred that the mukhtar-am had authority to make the settlement. In my opinion therefore the finding of the Court below that the mukhtar-am had implied authority to make the settlement and also the finding that the settlement by the mukhtar-am was ratified by defendant 4 is based on evidence which supports the finding although the Court committed an error in relying also on the money order coupon.

It was strenuously argued that the Court of Appeal below was wrong in placing on the plaintiff the onus of proving that the mukhtar-am had authority to make the settlement with defendants 1 to 3. In view of the evidence that I have already referred to, the question of onus is entirely immaterial. There was evidence, as I have already indicated, on which the finding with regard to ratification and implied authority could be based and those findings must therefore be accepted. The appeal is accordingly dismissed with costs to defendants 1 to 3.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 499

VARMA AND MEREDITH JJ.

Nathu Chaudhury and others
Petitioners
v.
Emperor.

Criminal Revn. No. 5 of 1940, Decided on 8th February 1940, against order of Sess. Judge, Darbhanga, D/- 12th December 1939.

(a) Criminal P. C. (1898), S. 239 (d) — Infringement of S. 239 (d) is illegality—S. 537 is of no avail to remedy defect.

The infringement of the provisions of S. 239 (d) would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed, and S. 537 can be of no avail to remedy the defect : *A I R 1938 P C 130, Rel. on.* [P 500 C 2]

(b) Criminal P. C. (1898), S. 239 (d)—Question of joinder and misjoinder depends upon form of accusation — Criminal intimidation by different servants of same master on different places on different occasions—Case does not fall under S. 239 (d) and joint trial is illegal.

The question of joinder and misjoinder depends on the form of the accusation made rather than on the facts actually proved at the trial. This being so, the nature of the charge is really the crucial point. [P 501 C 1]

Where the charge is that different servants of the same master have committed the offence of intimidation at different places on different occasions such acts would certainly not be part of the same transaction. The common purpose would not be enough to make offences part of the same transaction, if the offenders act independently. Hence, the case is not one which falls within the terms of S. 239 (d) and the joint trial of the accused therefore is illegal. [P 501 C 1, 2]

(c) Criminal P. C. (1898), S. 239 (d)—"Same transaction," — Meaning of.

The phrase "same transaction" used in S. 239 (d) suggests in particular continuity of action and purpose. [P 501 C 1]

Sir Sultan Ahmad and Harinarayan Prasad — *for Petitioners.*

Government Pleader — *for the Crown.*

Meredith J.—The four petitioners have been convicted under S. 506, I. P. C., and have been sentenced to undergo rigorous imprisonment for one year each. Their

appeal has been dismissed by the learned Sessions Judge. The facts of the case are that the motor car of a certain Magistrate was damaged by the elephant of a rich zamindar, Janki Raman Misser, and a case was thereafter run against the zamindar, as master of the elephant, under S. 289, I. P. C. This case was eventually withdrawn after a transfer to another district, an apology having been made for the incident. On 10th July 1939, while the case was pending ten witnesses came to the Court at Laheriasarai to be examined, and the same day a joint petition was filed by all ten before the Sub-Divisional Officer in the following terms :

The facts for submission are that we are witnesses in the case *Emperor* v. *Janki Raman Misser*. One Nathu Chaudhury, servant of Janki Raman Misser was saying in presence of Sheikh Tabarak of village Rajkha, Jumrati of village Anar, Biso Mistry, Badri Mistry, Khubi Sahu of village Rajkha, Gulzar of village Anar and Dahaur Chaukidar of village Rajkha and Nathu Mallah, that I will also be killed in the same way as Mahendra Singh, clerk of Anar Factory, was killed and that he was the person who got him killed. Rijhan Misser, Rajnarain Singh and Satruhan Singh and others, his servants, are always threatening us and asking us not to depose in the case. It is therefore prayed before your honour that investigation be made so that I may not be put in danger of my life. The names of witnesses and their thumb marks are on the reverse.

This petition was sent to the police with instructions to treat it as a first information. It will be observed that in the petition the only specific charge made is of criminal intimidation on 24th July 1939, against one person, Nathu Chaudhury, petitioner 1. The police, however, eventually submitted charge sheet against all four petitioners : against Nathu Chaudhury and Rijhan Misser for criminal intimidation at Laheriasarai on the 24th and against the other two petitioners Rajnarain Singh and Satruhan Singh, for a different incident, namely criminal intimidation of the witnesses said to have taken place on 10th July, at Anar Kothi, the village of the zamindar. The charge framed, upon which the petitioners were convicted was as follows :

That you Rajnarain Singh and Satruhan Singh on or about 10th July 1939 and you Nathu Chaudhury and Rijhan Misser on 24th July 1939, at Anar Kothi and Laheriasarai, respectively, committed criminal intimidation by threatening Madhusudan Lal Das, Sheikh Tabarak and others with injury to their person with intent to cause alarm to the said Madhusudan Lal Das and others and thereby committed an offence punishable under S. 506, I. P. C.

The evidence led in Court, which consisted only of the testimony of five of the persons who had joined in the petition, and of the investigating Sub-Inspector, was to the effect that on 10th July the witnesses had met together to come to Court on foot at a place near the elephants' stable of Janki Raman Misser. Rajnarain Singh and Satruhan Singh (petitioners 3 and 4), servants of Janki Raman Misser, tried to persuade the witnesses not to depose for the Crown, and finally, threatened them that they would be killed as a certain Mahender Prasad had been killed. On 10th July the case was adjourned without hearing. The next date fixed was 24th July and the evidence was that on that date the other two petitioners, Nathu Chaudhury and Rijhan, who are also servants of Janki Raman Misser, met the witnesses in the Court compound and again asked them not to depose. Finally, they threatened the witnesses that they would be murdered like Mahender Prasad. In the afternoon, when the witnesses had been examined, they again met Rijhan and Nathu in the Court compound, who told them that they should now prepare themselves to die as Mahender Prasad had died. On this the witnesses filed their joint petition, to which I have already referred.

The principal point taken for the petitioners is that the charge and the joint trial of all the petitioners upon that charge were illegal, as the occurrences were quite separate and were not part of the same transaction. This point was taken in the lower Appellate Court but the learned Judge was of opinion that the case was covered by S. 239 (d), Criminal P. C., which provides that persons accused of different offences committed in the course of the same transaction may be charged and tried together. In my opinion, the case was not one which falls within the terms of S. 239 (d) and the joint trial of the petitioners was therefore illegal. There are many rulings upon the question of the exact significance of S. 239 (d), but it is necessary to refer only to one —the Privy Council case 42 C W N 621.[1] It is of course well-settled that the infringement of the provisions of S. 239 (d) would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed, and that S. 537 can be of no avail to remedy

1. Babulal Chaukhani v. Emperor, (1938) 25 A I R P C 130=174 I C 1=65 I A 158=ILR (1938) 2 Cal 295=32 S L R 476=39 Cr L J 452=42 C W N 621 (P C).

the defect. That has been reiterated in the ruling which I have just referred to. And we get it also from this ruling of the Privy Council, that the question of joinder and misjoinder depends on the form of the accusation made rather than on the facts actually proved at the trial. This being so, the nature of the charge is really the crucial point.

The learned Judge in the Appellate Court below has observed, and rightly observed, that the phrase "same transaction," used in S. 239 (d), suggests in particular continuity of action and purpose. But can it be said, having regard to the terms of the charge which I have quoted, that the accusation in the present case makes out any continuity of action and purpose? Can it be said that the petitioners have all been charged in this charge with offences of criminal intimidation committed as part of the same transaction? In my view it certainly cannot. There is nothing at all in the charge from which it can be said that the alleged incidents of 10th July and of 24th July form part of the same transaction. The learned Judge has commented on the fact that all the petitioners are servants of the same master. That may be; but the fact that they are all servants of the same master and so connected with the same person, does not necessarily involve connexion with each other for the purposes of the offences charged. It seems to me perfectly possible that the petitioners' master, who is a big zamindar, might be above conduct of this sort, while his underlings through excess of zeal on his behalf might independently resort to action of this kind at different places on different occasions. Such acts would certainly not be part of the same transaction.

It has been pointed out that there is no evidence at all in the case of any conspiracy between the petitioners for the purpose of intimidation, nor was there any charge of conspiracy. It has been urged for the Crown that in matters like this each case must depend upon its own facts, and whether offences are or are not part of the same transaction is more a question of fact than of law. We must however, as I have said, depend more on the nature of the accusation than on the facts proved; and the accusation in the present case does not involve anything from which it could be said that the accused are charged with different offences as forming part of the same transaction. No doubt it may be possible to infer a common purpose in the varions acts alleged : but common purpose would not be enough to make offences part of the same transaction if the offenders act independently. The petitioners in the present case might all be under the orders of the same master, but that in itself would not justify the inference that they were in conspiracy with each other.

In my view this is a clear case of misjoinder and the joint trial of petitioners 1 and 2 with petitioners 3 and 4 was illegal and involved moreover a clear possibility of prejudice. This being so, the convictions and sentences must be set aside. There remains the question whether a re-trial should be ordered. Our attention has been drawn to the harassment which the petitioners have undergone, to the long period that has elapsed, to the fact that the sole evidence is that of five of the complainants, even though the offence is said to have taken place actually in the Court compound. These are circumstances to which we must attach great weight. But we must also attach weight to the fact that the petitioner Nathuni at least was charged then and there without any delay and that both the Courts below were very favourably impressed by the evidence of the witnesses. The learned Sessions Judge has observed :

> The trying Magistrate was obviously impressed by the prosecution witnesses and on reading through their deposition I am also impressed.

Later he says : "The prosecution evidence in the present case carries conviction." He also observes that after the occurrence Nathu absconded for 12 days and the other petitioners for 26 days. I have already noticed the fact that the petition of complaint makes a specific charge only for the incident of 24th July and only against the petitioner Nathu Chaudhury. This being so, I am of opinion that a re-trial of the other three petitioners against whom nothing specific was alleged in the complaint, is not necessary or desirable ; but in the case of the petitioner Nathu Chaudhury there was an accusation then and there, and there was the evidence of five witnesses upon which I do not desire to express any personal opinion, but with which, as I have said, the Courts below were much impressed. This being so, unless the Crown does not consider it necessary to proceed against him, Nathu Chaudhury should be re-tried for the alleged offence of 24th July. In the result therefore I would set aside the convictions and sentences and direct that the petitioners, Rijhan Misser, Rajnarain Singh and Satru-

han Singh be acquitted and discharged from their bail and that the petitioner Nathu Chaudhury be re-tried unless the executive authorities do not desire to proceed against him.

Varma J. — I agree. I should like to say a few words on the question of misjoinder of charges and misjoinder of trial. The lower Appellate Court has come to the conclusion that the offences of 10th July 1939 and 24th July 1939 were committed in the course of the same transaction although the time and the place of occurrence were different. An argument was advanced in the Court below that the accused may have acted independently in an excess of zeal for the cause of their master. But the learned Judge says :

In my opinion the circumstances definitely indicate otherwise. The witnesses were approached on two successive dates of hearing, and twice on the second day, by the servants on the same man in respect of the same case. These servants had no personal interest in the verdict in that case. The conclusion is obvious that either their master or some connexion of his was behind them in an attempt to intimidate the witnesses. The difference of dates and of place is immaterial.

When the learned Judge says that the conclusion was obvious that either their master or some connexion of his was behind them in an attempt to intimidate the witnesses, he may be perfectly right. Each of these accused may have been influenced by the master or some person connected with the master ; but before a joint trial can be held to be permissible or justifiable it must be established that each one of the accused was so connected with the other accused that the act done by one of them may be said to have been done conjointly with the others. It is this aspect of the law which has been dealt with in the decision of the Privy Council in 42 C W N 621.[1] Evidently the learned Judge was thinking that perhaps a case of conspiracy was made out ; but as there was no charge of conspiracy in this case the joint trial must be held to be illegal.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 502

AGARWALA AND ROWLAND JJ.

Satruhan Prasad Singh and others — *Plaintiffs* — Appellants.

v.

Udai Pratap Narain Singh and others, Defendants and others, Plaintiffs — Respondents.

Appeal No. 942 of 1937, Decided on 31st January 1940.

(a) Specific Relief Act (1877), S. 42 — Suit for declaration that plaintiff has unqualified right to maintain and cut part of existing bunds according to necessities of irrigation is maintainable.

A suit for declaration that plaintiff has an unqualified right to maintain and cut a part of the existing bunds according to necessities of irrigation and to close and repair them is maintainable.

[P 503 C 2]

(b) Practice—High Court interferes with discretion of Court below when that discretion is not exercised judicially on full consideration of evidence.

High Court does not interfere ordinarily with the discretion of the Court below when that discretion has been exercised judicially on a full consideration of the evidence in the case. Where the Court below has not directed its mind to the evidence in the case at all but has disposed of the suit on a preliminary objection, the High Court is not deviating from the ordinary rule in the matter of interfering with the discretion of the Court below when it does not accept the decision of the Court below.

[P 504 C 1]

Ray Gurusaran Prasad and Ray Paras Nath — *for Appellants.*

Brahamdeva Narayan for B. P. Sinha — *for Respondents.*

Agarwala J.—This is an appeal by the plaintiffs from a decision of the District Judge of Muzaffarpur reversing a decision of the Munsif of Sitamarhi. The plaintiffs are the proprietors of Mauza Kushahar in the Sub-Division of Sitamarhi. The defendants who are residents of villages Harnahi, Sundarpore, Mahuaria, Rasidpur, Kamarauli, Siubar and Parsauni on the north and northwest of village Kushahar, have been sued in a representative capacity. The plaintiffs claim that they have a right to maintain and to cut a part of the existing bunds in the Lapaha Nala and Kabiria Bari and Bhuthie pynes according to the necessities of irrigation of the lands in Mauza Kushahar and also to close and repair the bunds. In 1911 by a notification under S. 6, Bengal Embankment Act of 1882, the provisions of cl. (b) of S. 76 of the Act were extended to the District of Muzaffarpur. This had the effect of prohibiting the obstruction of any water course within the boundary of the Muzaffarpur District without the previous permission of the Collector of the district.

In 1924 the plaintiffs erected a bund in the pynes mentioned above and on a dispute arising with Nawab Singh and others, who are defendants in the suit out of which this appeal has arisen, the latter were prohibited by an order under S. 144, Criminal P. C., from interfering with the bunds. In 1928, some of the plaintiffs again erected bunds and were prosecuted under S. 76 (b), Embankment Act, and fined for having erected

the bunds without having obtained the permission of the Collector. As a result of this dispute between the plaintiffs and the defendants regarding the right to erect and cut the bunds as occasion requires, the plaintiffs instituted the present suit to establish the right which they claimed. The suit was decreed by the first Court after consideration of all the issues raised in the case. On appeal by the defendants the learned District Judge has held that the suit was not maintainable by reason of provisions of the Embankment Act read with S. 42, Specific Relief Act. He has therefore dismissed the plaintiffs' suit without considering the other issues raised in the case.

The reason for the learned District Judge's decision is that in his view the plaintiffs were not entitled to what he calls declaration based on a mere contingent right. This contention has been supported by the learned advocate for the respondents. The learned advocate contends that the effect of the notification under S. 6, Embankment Act, was to abrogate any right the plaintiffs may have had to erect or demolish the bunds complained of except with the permission of the Collector of the District and that as it is impossible to predicate whether the Collector's decision would be granted or withheld, the claim for a declaration which would be of use to the plaintiffs only if the Collector permitted them to erect or demolish the bunds should not be granted. Reliance was placed on a decision of the Allahabad High Court in A I R 1934 All 1064,[1] in which it was held that

> Declaratory relief being in the discretion of the Court, it should not be granted in anticipation of a contingency which may not arise.

It may be observed however that the ground of the decision was that the learned Judges of the High Court were of opinion that in the circumstances of the case the Court below was not justified in exercising its discretion in granting the relief claimed by the plaintiff. No reference was made to Illus. (c), (d) or (e) of S. 42, Specific Relief Act, which are all cases of declaratory reliefs founded upon contingent rights, and the case was decided purely on its own facts. The next case referred to was 1 Pat 1,[2] in which a claim for a declaration that the plaintiff was entitled to contribution from the defendants if and when the occasion arose was negatived. The learned Judges who decided that case pointed out that the plaintiff was neither claiming a declaration as to his legal character nor a declaration of his rights to any property in the sense in which the word "property" is used in S. 42, that is to say, a right to existing property. Here, in the present case, the plaintiffs are claiming an existing right in respect of the bunds.

The decision of the Privy Council in 39 Mad 634[3] was also referred to. That was a case in which the Privy Council held that a presumptive reversionary heir was not entitled to a declaration of his right as reversionary heir during the lifetime of the widow of the last male holder. The decision in that case does not appear to have any bearing on the facts of the present case. In 10 Cal 324[4] the Privy Council held that although the granting of a declaratory decree is discretionary with a Court yet in the class of case before it, which was a suit during the lifetime of a Hindu widow by a presumptive heir for a declaration that an alienation by her operated only during her lifetime, the grounds for the discretionary refusal of the decree should be very strong. This decision follows Illus. (d) of the Section and gives effect to it. In my view, therefore the ground given by the learned District Judge for holding that the plaintiffs were not entitled to a declaration sought for is not sustainable. As I have already pointed out above, the relief which the plaintiffs claimed in their plaint was an unqualified right to maintain and cut a part of the existing bunds according to necessities of irrigation and to close and repair them. Whether the effect of the Notification under S. 6 of the Act is to abrogate the existing right to open or close bunds according to the practice prevailing at the date of Notification, for the purposes of irrigation, I have myself considerable doubt; but it is not necessary in the present appeal to decide that question because the learned advocate for the plaintiffs-appellants stated that he would be satisfied with a declaration that subject to the permission of the Collector the plaintiffs have the right to maintain and cut the bunds as claimed.

The learned advocate for the respondents contends that the plaintiffs are not entitled to this qualified right inasmuch as the right

1. Faryad Fatima Bibi v. Mujahid Abbas, (1934) 21 A I R All 1064=152 I C 360.
2. Rafiq-ud-din v. Asgar Ali, (1922) 9 A I R Pat 392=63 I C 38=1 Pat 1=3 P L T 793.
3. Janaki Ammal v. Narayanasami Aiyar, (1916) 3 A I R P C 117=37 I C 161=43 I A 207=39 Mad 634 (P C).
4. Isri Dutt Koer v. Hansbutti Koerain, (1884) 10 Cal 324 = 10 I A 150=13 C L R 418=4 Sar 459 (P C).

they claimed in the plaint was an unconditional right. The only case on which reliance was placed to this proposition is the decision of the Privy Council in 12 All 587.[5] That was a case however in which their Lordships held on the evidence that the plaintiffs had failed to establish the rights which they claimed. The last objection of the learned advocate of the respondents was that this Court should not interfere with the discretion of the Court below in refusing a declaration. This Court does not interfere ordinarily with the discretion of the Court below when that discretion has been exercised judicially on a full consideration of the evidence in the case. In the present instance the Court below has not directed its mind to the evidence in the case at all but has disposed of the suit on a preliminary objection. We are not therefore deviating from the ordinary rule of this Court in the matter of interfering with the discretion of the Court below when we do not accept the decision of the Court below in a case where the discretion has not been exercised judicially. I would therefore set aside the order of the Court below and direct under O. 41, R. 23, that the appeal be re-admitted and disposed of in accordance with law. The costs of this appeal will abide the result.

Rowland J.—I agree. The Munsif had framed nine issues and the District Judge refers only to the plea raised by the defence that the provisions of the Embankment Act are a bar to the suit. This was issue 4. Now the relevant provision of the Civil Procedure Code is S. 9 which enacts that the Courts shall, subject to the provision herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. There is nothing in the Embankment Act which is a bar to any right of suit. In discussing this issue the learned District Judge mixed up considerations of the effect of the Embankment Act which, it was contended, had taken away private rights. This appears to be the subject-matter of issue 9; but that issue is not recited as one of the points for determination. The learned District Judge also refers to S. 42, Specific Relief Act, which has nothing to do with the question whether the provisions of the Embankment Act are a bar to the suit and which Section incidentally he refers to as S. 41. I think it desirable that Courts of Appeal in writing judgments should bear in mind the provisions of O. 41, R. 31, Civil P. C., which are analogous to those of O. 20, R. 4, regarding the judgment of the first Court. Each point which is for determination should be clearly set out, otherwise confusion of mind arises as in this case in which it hardly seems clear whether the District Judge regards himself as having disposed of issue 9 or not.

D.S./R.K. *Order accordingly.*

5. Maina v. Brijmohun, (1890) 12 All 587 = 17 I A 187=5 Sar 624 (P C).

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* A. I. R. 1940 Patna 504

HARRIES C. J. AND MANOHAR LALL J.

Ramnandan Prasad Narayan Singh and another — *Defendants* — Appellants.

v.

Chandradip Narain Singh and others — *Plaintiffs* — Respondents.

Appeal No. 9 of 1937, Decided on 26th February 1940, from original decree of Sub-Judge, Gaya, D/- 24th September 1936.

*** (a) Registration Act (1908), S. 28—Parcel of land not intended to form part of security inserted in mortgage deed to give jurisdiction to Sub-Registrar in whose district such land is situate — Registration is invalid — Such plea can be raised by mortgagor defendant even if he is party to fraud.**

There is no effective registration unless the deed of mortgage or sale relates to land situate in the sub-district in which the deed is registered. It is not sufficient that the land mentioned in the sale or the mortgage deed exists. The document cannot be said to relate to land in a registration district unless it was the intention of the parties that such land, even if it exists, should in a sale deed be transferred or in a mortgage deed form part of the security. [P 509 C 1]

Hence where a parcel of land which was never intended to form part of security is inserted in the mortgage deed in order to give jurisdiction to the Sub-Registrar within whose district the land is situated the registration is invalid, there being fraud on the law of registration. The mortgagor can raise the plea of want of valid registration even if he is party to the fraud on the law of registration : *Case law discussed.* [P 509 C 1, 2]

(b) Evidence Act (1872), S. 92 —Evidence is admissible to show that parcel of land inserted in mortgage deed was not intended to form part of mortgage security.

Evidence is admissible though it may tend to show that the property ostensibly mortgaged was not in fact intended to be mortgaged. There is nothing in S. 92 to render such evidence inadmissible. It is not evidence which varies the terms of the written document as between the parties and their representatives. It is evidence which goes to show that the document did not relate to land within the jurisdiction of the Sub-Registrar who registered it. Further, evidence of this kind is evidence which tends to render the document invalid and as such is admissible under proviso 1 to S. 92 of the Act. [P 510 C 2; P 511 C 1]

(c) Registration Act (1908), Ss. 21 and 87—Property within district of Sub-Registrar not sufficiently described in mortgage deed so as to identify it—It cannot be said that Sub-Registrar has no jurisdiction to register it.

From the fact that a land situate within the district of Sub-Registrar is not sufficiently described in the mortgage deed so as to identify the property it cannot be said that the Sub-Registrar has no jurisdiction to register the deed : *18 Cal 556; A I R 1928 Cal 385 and 31 All 523, Dissent.; A I R 1929 P C 279 and dictum in 2 I A 210 (P C), Rel. on.* [P 512 C 1]

S. M. Mullick, B. P. Sinha, Shambhu Banneshwar Prasad, Prem Lall and J. C. Mullick — *for Appellants.*

Sir Manmatha Nath Mukerji and Lal Narain Sinha — *for Respondents.*

Harries C. J. — This is a defendants' appeal from a decree of the learned Third Subordinate Judge of Gaya decreeing the plaintiffs' claim in a mortgage suit. On 9th July 1921 the mortgage in suit was executed by defendants 1 and 2 in favour of Deoki Singh, the deceased father of plaintiffs 1 to 3 and grandfather of plaintiff 4. The mortgage was for a sum of Rs. 10,000 carrying interest at the rate of 13 annas 3 pies per cent. per mensem with annual rests. The claim was for Rs. 34,268-13-6. A mortgage decree was passed by the learned Subordinate Judge for Rs. 39,261-0-11 with future interest at six per cent. per annum till realization. The properties mortgaged consisted of a 16 annas share in a village called Bara Keyam Faridpore and 16 annas share in village Daniala covered by touzi No. 287 and situate in the District of Gaya together with 5 kathas of land in village Mera within the Mahal Akbarpore Bhadwa covered by touzi No. 4593 and situate in the District of Patna. The mortgage bond was registered in the District of Patna.

The defendants took a number of pleas in their written statement but for the purposes of this appeal it is only necessary to refer to one of them. They pleaded inter alia that the mortgage bond could not be enforced by reason of the fact that it had not been validly registered. According to the defendants the only properties mortgaged effectually were the villages of Bara Keyam Faridpore and Daniala. Both these villages were situate in the Gaya District and therefore the Sub-Registrar at Patna had no jurisdiction to register the mortgage. It was alleged by the defendants that the 5 kathas of land in village Mera situate in Patna District were never intended to form part of the mortgage security and that that parcel of land was only inserted in the mortgage deed as a device to defraud the registration laws.

The learned Subordinate Judge found all the issues except the one as to registration in favour of the plaintiffs. He however accepted the defendants' contention that the 5 kathas of land in village Mera in the Patna District were never intended to form part of the security and that the insertion of the same was a device to defeat the registration law. The Subordinate Judge however came to the conclusion that the defendants were themselves parties to this fraud and therefore they could not set up their own fraud to avoid the effect of the mortgage bond which they had executed. The result of his findings was that he passed a decree as indicated previously. The appellants' argument has been confined in the main to the question of registration. No point has been taken on any other of the issues which the learned Subordinate Judge decided against the defendants.

On this question of registration the defendants' case was that the 5 kathas of land in Mera in the Patna District had been inserted to defraud the registration law. According to the defendants they were in urgent need of money. Defendant 1 had to meet the expenses of a criminal case which had been instituted against him, and he had instructed a well-known lawyer in this district, namely Mr. Hasan Imam, who required his fees in advance. It was estimated that Rs. 10,000 would be required for the expenses of the defence in this criminal case and accordingly the defendants approached Deoki Singh for a loan of that amount. Deoki Singh agreed to lend the money and it is said that he was quite satisfied with 16 annas share in the two villages in the Gaya District. It appears that he already held a usufructuary mortgage of these two villages, but the interest of the mortgagor in the villages far exceeded the value of Rs. 10,000. As these two villages were situate in the Gaya District registration would have to be effected either at Gaya or Jehanabad ; but according to the defence, there was no time to go to either Gaya or Jehanabad as the presence of defendant 1 at Patna was essential to instruct his counsel, Mr. Hasan Imam.

An attempt was made to obtain the money before the deed was registered, but Deoki Singh would not agree to this. On behalf of the defendants it is said that owing to this urgency Deoki Singh agreed

that 5 kathas of land in Mera in the Patna District should be inserted in the mortgage in order to enable the deed to be registered in the Patna District and thus avoid the delay in going to Gaya or Jehanabad. It is to be observed that the 5 kathas of land in village Mera are not defined in any way. No boundaries are given and there is nothing in the deed to suggest what kind of land in Mera was mortgaged. Mortgaging a mere 5 kathas of land without any description whatsoever would give the mortgagee no security of any kind. It would be impossible to bring such land to sale because it could not be identified.

On behalf of the plaintiffs however, it was alleged that the 5 kathas of land in village Mera were intended to form part of the security. It is said that one Bedman Missir negotiated the loan and that he persuaded Deoki Singh to insist that some property in village Mera should be included. It was alleged that Bedman Missir who lived in Mera had acquired under a deed of gift some land in a village called Puran from his mother-in-law and Bedman Missir persuaded Deoki Singh to obtain a mortgage of some property in Mera so that Bedman Missir could exchange his property in Puran for property in Mera in the event of Deoki Singh enforcing his mortgage and obtaining possession of the Mera property by purchase in execution of his decree.

The learned Subordinate Judge declined to accept the plaintiffs' version of this transaction. It is clear that the explanation given by the plaintiffs of the part played by Bedman Missir in this transaction cannot possibly be true, as Bedman Missir did not obtain any property in Puran by deed of gift until 20th May 1922, whereas the mortgage in suit was dated 9th July 1921. Further, it would be extremely difficult to accept the plaintiffs' version that the land in village Mera was intended to form part of the security. As I have stated, the land is not described in any way and could not effectively be brought to sale in execution of a mortgage decree. Chandradip Narain (P. W. 2) admitted that he was aware that a full description of property should be given in deeds, and he admitted that when his father saw the draft mortgage bond he did not require the boundaries of the 5 kathas of land to be mentioned. Neither did they require defendant 1 to mention in the kobala the khasra number of the land at Mera nor whether the land was raiyati bakasht or sikan or waste or cultivated land. From the evidence adduced on behalf of the plaintiffs, it is clear that the land at Mera was never inspected and Deoki Singh appears to have known little or nothing about this village. Yet 5 kathas of land in this village is stated to be part of the security.

On behalf of the defendants a number of witnesses were called who stated that the 5 kathas of land in Mera in the Patna District were mentioned in the mortgage deed merely for the purposes of registration. According to these witnesses, it was never the intention of either of the parties to the mortgage deed that this 5 kathas of land should be effectually mortgaged and form part of the mortgage security. Sir Manmatha Nath Mukerji who has appeared on behalf of the plaintiff-respondents has challenged the finding of fact of the learned Subordinate Judge and has asked the Court to accept the evidence of Raktoo Singh (D. W. 5). This witness supported the defendants' story that there was great urgency in the matter. At page 31 in the supplemental paper-book he stated :

> He (Deoki Singh) said that he would pay the money after the bond was registered. Ramnandan then said that as the counsel wanted Ramnandan the next morning there was no time for registration of the deed and so he would execute the bond and get it attested by any pleader if Deoki Singh so chose and on that Deoki Singh should advance the loan. But Deoki Singh said that he would not pay the money before the registration of the bond. Ramnandan then said that he could not go to Jehanabad to register the deed as his counsel wanted him the following morning with the papers. To that Deoki Singh said that there was no necessity to go to Jehanabad to register the bond and that the bond could be registered at Patna if 2 to 4 kathas of land situate at Patna was given as security in the mortgage bond. Ramnandan agreed to this proposal. Ramnandan then asked Lalli Lal to say what 2 to 4 kathas of land in the district of Patna should be mortgaged by the bond and Lalli Lal said that 2 to 4 kathas of village Mera should be given as mortgage. Deoki Singh and Ramnandan agreed to the same.

It is true that this witness says that 2 to 4 kathas of land were agreed to be given in mortgage but it is clear that no attempt was made to identify this land and that the 2 to 4 kathas of land were only to be inserted in the mortgage to enable it to be registered at Patna. The other witnesses make it clear that the 5 kathas mentioned in the mortgage deed were never intended to form part of the security, and in my view that is the true effect of Raktoo Singh's evidence. The very fact that no attempt whatsoever was made by either of the parties to identify the land, though the plaintiffs well knew that such was essen-

tial, establishes to my mind beyond all doubt that 5 kathas of land in Mera in the Patna district were only mentioned in the mortgage deed to enable the document to be registered in Patna. The nature of the property and the urgency support the defendants' contention, and in my view the learned Subordinate Judge was right in holding that the 5 kathas mentioned in the deed were never intended to form part of the mortgage security. It has been urged by Sir Manmatha Nath Mukerji on behalf of the respondents that as the 5 kathas of land exists it must be regarded as having been mortgaged, and that being so the deed could validly be registered in the Patna District. S. 28, Registration Act, 1908, deals with the place for registering documents relating to land. The Section is in these terms :

> Save as in this part otherwise provided, every document mentioned in S. 17, sub-s. (1), cls. (a), (b), (c) and (d), and S. 18, cls. (a), (b) and (c), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.

A mortgage bond for Rs. 10,000 requires registration, and by the terms of S. 28 it can be registered in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which the mortgage relates is situate. The question to be decided in this case is whether this mortgage related to or included any property in the sub-district of the Sub-Registrar who registered it. If the document relates to no such property, then the mortgage bond has not been validly registered. This Section has been considered by their Lordships of the Privy Council in a number of cases. The first case was 41 Cal 972.[1] In that case the plaintiffs' (appellants') claim was based on a mortgage decree passed in a suit brought in the High Court at Calcutta on its original side to enforce a mortgage executed in the plaintiffs' favour. The defendants (respondents) were the mortgagor (who did not appear) and two other persons who disputed the mortgagee's title. These defendants (who had not been parties to the suit on the mortgage) alleged that the mortgage deed had not been legally registered, because no portion of the property mortgaged was situated in Calcutta where the deed had been registered and the decree had therefore been made by a Court which had no jurisdiction to entertain a suit on the mortgage, and the plaintiff had no title to maintain the suit.

The only portion of the property in the mortgage deed alleged in the suit on the mortgage to be situate in Calcutta, was parcel No. 28 in the schedule, and was described as "25 Guru Das Street;" but the property so described was found to be non-existent, the wrong description being said to be due to a mistake though no evidence of it was given. The Court directed an amendment, and the description was altered to "25 Ashutosh Dey Lane" which was in Calcutta, and was comprised within the same boundaries as those given in parcel No. 28 of the schedule to the mortgage deed. In the present suit no evidence was given either by the mortgagor or the mortgagee to show that there had been any mistake in the description of the property, but it was proved by the defendants that the property contained within the boundaries given in parcel No. 28 was property which did not belong and never had belonged to the mortgagor. Both the Courts below, like the High Court in the suit on the mortgage, found without any evidence that there had been a mistake in the entry of parcel No. 28 and held that part of the property being in Calcutta the deed had been properly registered there, and that the decree in the mortgage suit had been rightly made and with jurisdiction.

It was held by their Lordships of the Privy Council, reversing the decision of the High Court, that it was open to the defendants (not having been parties to the mortgage suit) to contest the validity of the decree, and for the same reason the direction of the High Court that the entry in the schedule should be amended did not affect them, and that under the circumstances of the case the onus was on the plaintiff to show that the entry in that parcel was not a fictitious entry, which onus he had not discharged. Further, their Lordships held on the conduct of the parties and the evidence in the case, that that parcel was in fact a fictitious entry and represented no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact existed, was a fraud on the registration law and no registration

1. Harendra Lal Roy v. Haridasi Debi, (1914) 1 A I R P C 67 = 23 I C 637 = 41 I A 110=41 Cal 972 (P C).

obtained by means thereof was valid. No such fictitious item inserted to give a colourable appearance to the deed relating to property in Calcutta when in reality such was not the case, could bring the deed within the limited jurisdiction of the Court. The High Court therefore had no jurisdiction to make the decree; and the deed not having been registered in accordance with the Registration Act (3 of 1877), the mortgagee had no title to maintain the suit.

It will be noted in this case that the property inserted in the deed was a fictitious property which did not belong to the mortgagor. The mortgage deed, therefore, did not relate to any property in Calcutta and could not be registered there so as to give the High Court of Calcutta jurisdiction in the matter.

This case was followed in 48 Cal 509.[2] In that case a mortgage bond for Rs. 8000 which purported to mortgage a 7 anna share in a village in the Darbhanga District and 1 kauri share in the Muzaffarpur District was registered only in the Muzaffarpur District. The mortgagor had purchased the 1 kauri share shortly before the execution of the mortgage and in order that he might register in Muzaffarpur. He paid Rs. 50 for the 1 kauri share, but there was no registered instrument or delivery of possession as required by S. 54, T. P. Act, 1882. Their Lordships found that none of the parties intended that the 1 kauri share should vest in the mortgagor, or pass under the mortgage and subsequently, held that the mortgage was invalid under S. 54, T. P. Act, under which a mortgage for over Rs. 100 can be made only by a registered instrument. In this case the property inserted in the mortgage actually existed, though the mortgagor's title to it was defective. It was not fictitious property in the sense that it did not exist, but as the property had not vested in the mortgagor and was never intended to pass under the mortgage it was held that the document did not relate to any property situate in the Muzaffarpur District, and therefore the mortgage could not be validly registered in that district.

The matter was again considered by their Lordships of the Privy Council in 56 All 468.[3] In that case a sale deed comprised four villages within the *D* sub-district for registration purposes and also a one-third share in a garden-room within the *G* sub-district. The deed gave the purchasers no access to the garden-room, and one of the purchasers admitted that it was of no value to them. The deed was registered in the *G* sub-district. It was held that the deed was not validly registered under the Registration Act, 1908, S. 28, as the evidence showed that the parties did not intend that the share in the garden-room should really be sold, its inclusion in the deed being a mere device to evade the Act. It was further held that the word "fictitious" used in 41 Cal 972,[1] is not confined to non-existing property; it is satisfied if the deed does not relate to a specified property for any effective purpose of enjoyment or use. At p. 495 Lord Blanesburgh, who delivered the judgment of the Board, observed as follows :

> In reaching that conclusion however they failed to refer to or take into account all the circumstances which their Lordships have detailed, and it becomes the duty of the Board to consider the question afresh in their light.
>
> They have done so and, having regard specially although not exclusively, to the facts that this undivided share in this sitting room was agreed by one of the purchasers to be of no value, that both in respect of the interest taken in it and in respect of its complete inaccessibility it was incapable either of being utilized or enjoyed by the purchaser, that the vendor refused to include in the sale any subject in Gorakhpur to which these disadvantages did not attach, they think that one of two inferences alone is possible : either that it was never intended by either party that the sitting room should for any purpose other than that of registration be subject of sale at all, or that the vendor only included it because he knew that it never could become an effective subject of enjoyment or occupation by the purchasers. The word 'fictitious' used in 41 Cal 972[1] is not confined to non-existing properties. It is satisfied if the deed does not 'relate' to the specified property for any effective purpose of enjoyment or use.

The last case decided by their Lordships of the Privy Council is the case in 59 Mad 539.[4] In that case in a sale of land situated in one registration district there was included a yard of land situated in another registration district in which the purchaser neither resided nor owned property. There was no explanation of the use to which he could put it. The title of the vendor to it was doubtful, the purchaser made no attempt to take possession of it and it was built over by the owner of adjacent property. In those circumstances, their Lord-

2. Biswanath Prasad v. Chandra Narayan, (1921) 8 A I R P C 8=63 I C 770 = 48 I A 127=48 Cal 509 (P C).
3. Collector of Gorakhpur v. Ram Sunder Mal, (1934) 21 A I R P C 157=150 I C 545=61 I A 286=56 All 468 (P C).
4. Venkata Rama Rao v. Sobhanadri Appa Rao, (1936) 23 A I R P C 91 = 161 I C 29=63 I A 169=59 Mad 539 (P C).

ships held that there was no intention to convey the square yard of land and the registration of the sale deed in the district in which the yard of land was situated was a device to evade the law of registration. There was therefore no effective registration and the deed was invalid.

In my view these cases lay down that there is no effective registration unless the deed of mortgage or sale relates to land situate in the sub-district in which the deed is registered. It is not sufficient that the land mentioned in the sale or the mortgage deed exists. The document cannot be said to relate to land in a registration district unless it was the intention of the parties that such land, even if it exists, should in a sale deed be transferred or in a mortgage deed form part of the security. In the present case 5 kathas of land certainly exist in village Mera ; but the insertion of these 5 kathas in the mortgage deed gave the mortgagee no security whatsoever. The land being undefined could not effectually form part of the security, and on the evidence it is clear that it was never intended to form part of such security. It follows therefore that if the defendants can raise this question the registration of this mortgage deed must be held to be invalid.

The learned Subordinate Judge, as I have already stated, came to the conclusion that as the defendants were a party to this fraud on the registration law, they could not now allege that the document had not been validly registered. The learned Judge relied upon the case in 55 Mad 507[5] in which it was held that a vendor of immovable property cannot be allowed to plead or to take advantage of the invalidity of the registration of his sale deed on the ground that by the inclusion of a particular item of property in the document and getting the document so registered in an office where otherwise it could not have been registered a fraud on the registration law was committed, in which he participated. Their Lordships laid down that as a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in that matter was not made better by showing that the defendant had joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal. The rule applied even where the fraud or illegality disclosed was in contravention of some rule of public policy embodied in a statute. In this case Reilly J. relied on a number of English authorities and did not refer to the decisions of their Lordships of the Privy Council to which reference has already been made in this judgment. Anantakrishna Ayyar J. also referred to a large number of English cases and at the end of his judgment stated :

> The Privy Council decisions in 41 Cal 972[1] and 48 Cal 509[2] are not really applicable to the exact point that we are now considering. The question there was not whether the plaintiff could be allowed to set up his own fraud, but whether registration was properly and validly effected when the question arose with reference to third parties.

In my judgment, this Madras case is no authority for the proposition that a mortgagor defendant cannot raise this question of want of valid registration though he may be a party to the fraud on the registration laws. In 48 Cal 509[2] a mortgagor defendant raised the same question ; and their Lordships of the Privy Council held that the deed had not been validly registered. That was a case in which the executants of the mortgage deed were sued and where they, who were parties to the fraud, successfully pleaded want of valid registration. The question did not arise with reference to third parties, as stated by Anantakrishna Ayyar J. but arose in a suit between the mortgagees and the mortgagors. Again in the most recent case, namely 59 Mad 539,[4] the plaintiff was allowed to put forward the fraud of his father who had acted as his guardian when the property in question was sold. It appears to me that the Court is bound to hold that the defendants are entitled to raise this plea having regard, in particular, to the decision of their Lordships of the Privy Council in 48 Cal 509.[2] In my view the learned Subordinate Judge was wrong in holding that the mortgagor defendants in this case could not raise the question of want of valid registration. It was further urged by Sir Manmatha Nath Mukerji on behalf of the respondents that the learned Subordinate Judge was wrong in admitting evidence as to the intention of the parties to this mortgage. He relied upon S. 92, Evidence Act. That Section is in these terms :

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last Section, no evidence of any oral agreement or statement shall

5. Venkataswami v. Venkata Subbayya, (1932) 19 A I R Mad 311=139 I C 404=55 Mad 507=63 M L J 77.

be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

To this Section there are a number of provisos, and by proviso (1):

Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Sir Manmatha Nath Mukerji has relied upon a number of cases, the first of which is A I R 1927 All 422[6] in which Ashworth J. appears to have held that evidence as to intention was not admissible in considering the question of registration. The point was again expressly considered by Mukerji J. in A I R 1929 All 578.[7] The learned Judge held that it was not open to a party to a registered sale deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale deed, that in spite of a certain property, belonging to the vendor, being entered in the sale deed, title to it would not pass to the vendee. He further held that where the parties intended to hoodwink the Sub-Registrar by entering a piece of property within his jurisdiction in the sale deed, in order to give that officer jurisdiction, the parties contemplated a fraud on the law of registration and so should not be granted any relief in a Court of Justice. A similar view was taken by the Bombay High Court in 49 Bom 821.[8] At p. 825 Macleod C. J. stated:

The appellant relies for his argument that there was a fraud on registration on two cases, 41 Cal 972,[1] in which it was held that none of the properties appearing in the document to be registered was within the jurisdiction of the Registrar, and therefore registration was invalid, and 48 Cal 509[2] in which it was proved that the transferor had no title to the property mentioned in the transfer deed which would bring it within the jurisdiction of the Registrar. Neither of those cases is applicable to the facts in the present case. But the appellant wishes us to extend those decisions to the facts before us. We are concerned at present with the registration of the sale deed. The Registrar had jurisdiction to register that document, because a portion of the property mentioned in the deed was within his jurisdiction. Clearly, if no property belonging to the transferor appearing in the document to be registered is within the jurisdiction of the Registrar, registration by such Registrar of that document would be invalid. But we are not prepared to go further and say that evidence can be led with regard to the intention of the parties at the time the principal document was registered to deal again with the portion of the property which was within the jurisdiction of the Registrar and which rendered its registration valid.

These cases certainly afford support for the contention that evidence as to the intention of the parties is not admissible; but in my view such evidence has been clearly admitted by their Lordships of the Privy Council in the cases to which I have referred. In the Calcutta cases, evidence was adduced to show that the property was fictitious in 41 Cal 972,[1] and that the mortgagor's title to it was imperfect in 48 Cal 509.[2] Further evidence was admitted in the latter case with a view to showing that the property was never intended to form part of security. In 56 All 468[3] their Lordships at page 494 made the following observation:

In the High Court the learned Judges were of opinion, and their Lordships think rightly so, that they were bound to go into this question of intention, and having done so they arrived at the conclusion that the entry of the sitting room in the deed was not a fictitious entry within the meaning of the decision of the Board already cited.

Here they expressly approved of the view of the learned Judges of the Allahabad High Court that the Court was bound to go into the question of intention. In the judgment of Lord Blanesburgh reference is made to the evidence. At p. 494 there appears this observation:

And this conclusion is assisted by some evidence of Shiam Rathi, the scribe who prepared it. He asked his principal, Ram Ghulam, why a third share of the room was being entered in the deed, as it would be of no use whatever. The answer given in no way disputes that statement of Shiam Rathi's who was an ingenuous witness. He knew, he said, that if he agreed that the room was mentioned in the deed merely to enable its being registered at Gorakhpur the suit would fail on the ground of invalid registration. Yet both Courts held that the registration was valid.

In this case their Lordships dealt at length with the question of intention and the evidence relating to it. In the most recent case, 59 Mad 539,[4] their Lordships again considered the question of the intention of the parties. It appears to me that if the question, which has to be decided, is the intention of the parties, evidence must be admissible though it may tend to show that property ostensibly mortgaged was not in fact intended to be mortgaged. In my view there is nothing in S. 92, Evidence Act, to render such evidence inadmissible.

6. Lachman Das v. Ram Prasad, (1927) 14 A I R All 422=100 I C 1029=49 All 680=25 A L J 349.
7. Ram Krishna v. Anand Krishna, (1929) 16 A I R All 578=118 I C 589.
8. Vishvanathbhat Annabhat v. Mallappa, (1925) 12 A I R Bom 514=92 I C 628=49 Bom 821 =27 Bom L R 1103.

It is not evidence which varies the terms of the written document as between the parties and their representatives. It is evidence which goes to show that the document did not relate to land within the jurisdiction of the Sub-Registrar who registered it. Further, it may well be said that evidence of this kind is evidence which tends to render the document invalid and such is admissible under Proviso 1 to S. 92, Evidence Act. In my judgment, the evidence as to the intention of the parties in this case was admissible and was rightly admitted by the learned Judge. Lastly, it was contended by the appellants that the Sub-Registrar had no jurisdiction whatsoever to register this mortgage by reason of the fact that the property situate in Mera village was not sufficiently described. It was accordingly urged that this provided another ground for dismissing the plaintiffs' claim. This point does not appear to have been urged in the Court below. Section 21, Registration Act, provides :

> No non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same.

It is urged that the land in Mera contains no description sufficient to identify it. What was said to be mortgaged was 5 kathas of land in Mera with no other description of any kind. The description is clearly inadequate to identify the property, and the question arises whether the Sub-Registrar had jurisdiction to register the same. Reliance has been placed by the appellants upon a number of cases. In 18 Cal 556[9] certain property was described in a mortgage bond as bearing touzi No. 10, as paying a sadr jama of Rs. 719, and as lying within the jurisdiction of thana kotwali, Sub-District Bhagalpur, Collectorate Bhagalpur. This description was so far erroneous, in that the property was in reality situated in thana Amarpur, Sub-District Banka, and bore a sadr jama of Rs. 919-15-0. Banka was however within the area of the District of Bhagalpur. The mortgage bond was registered by the Sub-Registrar of Bhagalpur, who was, under S. 7, Registration Act, authorized, in addition to his own duties, to exercise and perform the duties and powers of the Registrar of Bhagalpur. It was held by a majority of the Full Bench that the provisions of S. 21 of the Act, had not been complied with; that the description of the property was misleading and insufficient for the purposes of identification, and that therefore no registration of the document had been effected within the provisions of the Registration Act. The Registration Act referred to in this case is the Act of 1877. S. 21 of that Act was however in the same terms as S. 21 of the present Act. A similar view was taken by a Bench of the Calcutta High Court in 32 C W N 241.[10] It was held that when several immovable properties are mortgaged by the same deed, defect of description in respect of any one of them is sufficient to invalidate the registration of the whole deed. In that case a katha of land in Arrah was misdescribed and the description was not sufficient to identify the same. The Court held that the registration was invalid.

A Bench of the Allahabad High Court in 31 All 523,[11] expressed a similar view and held that where a letter purported to transfer immovable property and was presented as a non-testamentary document for registration but was refused on the ground that it contained no description of the property "sufficient to identify the same," such refusal was under the circumstances proper. The effect of breaches of certain provision of the Registration Act was considered by their Lordships of the Privy Council in 7 Rang 624.[12] Their Lordships were not called upon directly to express an opinion on the point which I am now considering; but Lord Atkin, who delivered the judgment of the Board, expressly approved of a dictum of Sir Barnes Peacock in 2 I A 210.[13] At p. 216 of that report Sir Barnes Peacock observed :

> In considering the effect to be given to S. 49 that Section must be read in conjunction with S. 88 and with the words of the heading of part 10, "of the Effects of Registration and Non-Registration." Now, considering that the registration of all conveyances of immovable property of the value of Rs. 100 or upward is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the

9. Baij Nath Tewari v. Sheo Sahay, (1891) 18 Cal 556 (F B).

10. Nahar Lal v. Baij Nath, (1928) 15 A I R Cal 385=113 I C 855=32 C W N 241=47 C L J 124.

11. Saiyed Mahmud v. Muhammad Zubair, (1909) 31 All 523=3 I C 506=6 A L J 627.

12. Ma Pwa May v. Chettyar Firm, (1929) 16 A I R P C 279 = 120 I C 645=56 I A 379=7 Rang 624 (P C).

13. Sah Mukhun Lall Pandey v. Sah Koondun Lall, (1875) 2 I A 210=15 Beng L R 228=24 W R 75=3 Suther 170=3 Sar 509 (P C).

provision of Ss. 19, 21 or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in S. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance.

Sections 21 and 88, Registration Act, 1866, referred to by Sir Barnes Peacock have now been replaced by Ss. 21 and 87, Registration Act, 1908; but it is to be observed that the sections are in the same terms. As I have stated, this dictum of Sir Barnes Peacock is expressly approved by Lord Atkin in the Rangoon case and therefore I am extremely doubtful whether the cases of the Calcutta High Court and the Allahabad High Court, to which I have referred, can now be regarded as good law. I am therefore unable to hold that the Registrar had no jurisdiction to register this sale deed by reason of the insufficiency of the description of the land situate in Mera. For the reasons which I have given, I am satisfied that the parties in this case committed a fraud on the registration law and that the registration of the document was consequently invalid. The mortgage therefore cannot be enforced and the plaintiffs' claim must fail. The appellants also relied on S. 7, Bihar Money-lenders (Regulation of Transactions) Act, 1939, and contended that in any event a decree could not be passed for more than Rs. 20,000. That contention appears to be well-founded; but it is unnecessary to consider it as I hold that the claim fails in its entirety. I would therefore allow this appeal, set aside the decree of the Court below and dismiss the plaintiffs' claim. The defendants unsuccessfully raised a number of issues in the Court below and have not challenged the findings in this Court. I would therefore give the defendant-appellants their costs in this Court and direct the parties to pay their own costs in the trial Court.

Manohar Lall J. — I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 512

ROWLAND AND CHATTERJI JJ.

Mathura Singh and others — *Plaintiffs* — Appellants.

v.

Palakdhari Rai and others — *Defendants* — Respondents.

Appeal No. 158 of 1939, Decided on 6th February 1940.

(a) Deed—Construction — It is not profitable to construe document by reference to authorities.

It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken, and the Court must ascertain, as best it can, what the intention of the parties was in accordance with the terms expressed by them: *A I R 1938 Pat 585, Rel. on.* [P 513 C 1]

(b) Mortgage — Personal covenant to pay — Payment of principal not secured on land — Money decree for principal may be passed.

Where in a mortgage deed there is promise to repay and the executant mortgages and hypothecates the lands in question not for payment of the principal but to secure payment of the interest on it, there is no objection to giving the plaintiff a money decree for the amount of principal which he claims subject to limitation. [P 513 C 1]

(c) Limitation Act (1908), S. 20 (1), Proviso —Proviso applies only to sub-s. (1).

The proviso to sub-s. (1) of S. 20 was intended to apply to sub-s. (1) and not to sub-s. (2) of S. 20. [P 513 C 2]

S. M. Mullick and Sarjoo Prasad — *for Appellants.*

S. N. Bose and N. N. Ray — *for Respondents.*

Rowland J. — This appeal arises out of a suit by the plaintiff-appellant to recover money advanced to defendant 1 as a loan. The advances amounted to Rs. 1200 and defendant 1 executed two sudhbharna deeds for Rs. 400 and Rs. 800 respectively on 14th February 1924. It was the plaintiff's case that he was put into possession of the mortgaged properties, but was dispossessed on 26th July 1924 by the defendants first party and defendants second party. The defence of the principal defendants was that actual possession of the land was with defendant 1 who made over to the plaintiff the produce thereof to the extent of 48 maunds of paddy annually to the plaintiff. It does not seem necessary to decide whether up to 1341 the plaintiff was in physical possession or in constructive possession by receipt of profits from defendant 1 who held under him. The plaintiff's case was that in 1342 defendant 1 and others dispossessed him and this has been negatived by the Courts who hold that the plaintiff is still in constructive possession. That being so, the question arises whether the plaintiff can sue for his money, which was the form in which the claim was laid at first or alternatively for sale of the mortgaged property which was an additional prayer in the alternative added at the appellate stage. The point turns on whether there is a personal covenant to repay. We have been shown some authorities by both sides, but

as pointed out by Wort Ag. C. J. in 19 P L T 737:[1]

> It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken, and the Court must ascertain, as best it can, what the intention of the parties was in accordance with the terms expressed by them.

In these two documents which are similar in their provisions there is an express promise that:

> I (the executant) on paying up the said amount of principal in full in one lump sum in the month of Jeth 1334 Fasli and getting the endorsement of payment made on the back of this sudhbharna rehan deed by the said creditor shall take back this land.

That appears to be a plain promise to repay. Then the hypothecation clause is curious. The executant mortgages and hypothecates the lands in question not for payment of the principal but to secure payment of the interest on it. So far as appears from the documents themselves, the payment of principal is not secured on the land. That being so, I see no objection to giving the plaintiff a money decree for the amount of principal which he claims subject to limitation. As regards interest, the bond stipulates that no interest shall be payable so long as the plaintiff is in possession of the land. Therefore, there is no cause of action for interest up to the date of suit and if the plaintiff has any grievance with regard to non-delivery of produce of the land which he has sub-let to the defendants, then that would be a separate cause of action.

Finally we have to consider the question of limitation which is raised on behalf of the respondent. The due date of payment of the one bond was about June 1926 and of the other June 1927. The suit was instituted in May 1937. The bond was a registered one. It is contended that the period of six years' limitation bars the suit; but the appellant relies on sub-s. 2 of S. 20, Limitation Act, under which:

> Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-s. (1).

Mr. Bose for the respondent refers to the proviso to sub-section 1 of S. 20 which was inserted by the amendment of 1929. His contention is that this proviso applies to the whole of the Section, whereas for the appellant the contention is that it applies only to sub-s. 1. It does not seem to us that the intention of the Legislature in enacting this proviso was to abrogate the long established and traditional practice by which a mortgagee in possession of land is deemed to be in receipt of interest and to have a fresh start of limitation from the period when his possession ceases and in that view I am of opinion that the proviso was intended to apply to sub-s. 1 and not to sub-s. 2 of S. 20, so that the suit is not barred by limitation. In my opinion the plaintiff-appellant was entitled to a decree for the principal amount claimed and should get interest from the date of suit up to the date of decree at six per cent. simple and thereafter interest on the whole amount at six per cent. The decree will be against defendants 1 to 6 only with costs proportionate to his success. Defendants 2 to 6 being the sons and grandsons of defendant 1 are liable to the extent of their interest in the family property.

Chatterji J.—I agree.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 513

VARMA AND MEREDITH JJ.

Emperor

v.

Dullu Kuer and another — Accused.

Jury Reference No. 1 of 1940, Decided on 9th February 1940, made by Sessions Judge, Saran, D/- 3rd January 1940.

Criminal P. C. (1898), S. 307 — Reference under—Court can go into evidence irrespective of whether there was misdirection or not.

The Court in a reference under S. 307 is entitled to go into the evidence irrespective of whether there was any misdirection or misunderstanding of the law or not: *A I R 1928 All 207 (F B), Foll.; A I R 1929 Pat 313, Expl.; A I R 1932 Pat 246, Rel. on.* [P 514 C 1]

Govt. Pleader—*in support of Reference.*

S. C. Chakravarty — *against Reference.*

Meredith J.—This is a reference under S. 307, Criminal P. C., by the learned Sessions Judge of Saran. Two persons, Dullu Kuer and Rachheya Teli, were tried before him with the aid of a jury: Dullu Kuer upon a charge under S. 457, Penal Code, and Rachheya Teli upon charges under Ss. 457 and 380, Penal Code. The jury after retiring for twenty minutes, returned a unanimous verdict of not guilty in the case of both accused persons. The learned Sessions Judge was not prepared to accept this verdict, and remarked that he considered it perverse and unreasonable, and that he was clearly of opinion that it was necessary for the ends of justice to submit the case in respect of both the accused per-

1. Raj Kumar Bharthi v. Surajdeo Sahi, (1938) 25 A I R Pat 585=177 I C 533=17 Pat 737=19 P L T 737.

sons to the Hon'ble High Court. After the verdict of the jury in accordance with the provisions of S. 310, Criminal P. C., a previous conviction for an offence under S. 396, Penal Code, in the year 1931, upon which he had been sentenced to undergo eight years' rigorous imprisonment, was proved against the accused Dullu Kuer, and was admitted by him. At the opening of this case, a preliminary point was taken by Mr. Chakravarty on behalf of the accused persons. He argued that the Court in hearing a reference against the verdict of a jury under S. 307, Criminal P. C., has only the same powers that it would have in hearing an appeal from the decision of a jury and therefore the Court cannot go into the evidence at all, having regard to the provisions of S. 423 (2), Criminal P. C., unless it is first shown that there has been a misdirection, or that, the jury has misunderstood the law as laid down by the Judge. This argument is based on the wording of S. 307, cl. (3), which provides that :

> In dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto, it shall, after considering the entire evidence, and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it, and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

It is urged that the use of the words "subject thereto" indicates that the direction to consider the entire evidence and so on only can have effect in a case where that could be done in exercise of the ordinary appellate powers, which are limited in the case of jury trials by the provisions of S. 423 (2), Criminal P. C. This view, in my opinion, ignores the specific character of the directions laid down in the latter part of the clause, but I do not consider it necessary to examine this question in detail, because that has been already done by a Full Bench of the Allahabad High Court in 50 All 625.[1] This precise point was the subject of the reference to the Full Bench, and after a full discussion of the matter the Full Bench decided that the Court in a reference under S. 307 was not limited in the way suggested, and was entitled to go into the evidence irrespective of whether there was any misdirection or misunderstanding of the law or not. If I may say so with respect, the view taken in that case appears to me the sensible view of the Section and the reasoning entirely sound. There is nothing I could usefully add to it. Mr. Chakravarty drew our attention to a ruling of this High Court, 8 Pat 344,[2] but this ruling does not really support the proposition which he has attempted to put forward. It was not a case of a reference under S. 307, but a case where the Judge had refused to make a reference, and where the Court was merely hearing an appeal from the decision of the jury.

In such a case it was laid down very rightly that the Court would not consider the evidence in the absence of misdirection or misunderstanding of the law by the jury. The Court refused to treat the appeal as a reference by the Judge, merely because the Judge, though he had not made a reference, had observed that he disagreed with the verdict of the jury, and considered that the accused ought not to have been convicted. The implication was that had the Court found it advisable or possible to treat the matter as a reference, then it might have gone into the evidence and come to its own finding, but that was not the case. The ruling therefore provides no support for Mr. Chakravarty's contention. On the other hand, another ruling of this High Court, 11 Pat 669,[3] is directly against him. That is all that it is necessary to say with regard to this preliminary objection, which cannot succeed. (His Lordship then discussed the facts and the evidence and proceeded.) It appears to me that the verdict of the jury in this case was, having regard to the state of the evidence, a wholly unreasonable one, and I am somewhat at a loss to understand it. It is true that Ganesh admitted that he had once undergone four years' rigorous imprisonment for dacoity, and Budhu Kuar admitted that he had been eight years in jail for an offence under S. 304, I. P. C., but, as the learned Judge rightly observed, this was merely a reason for treating the evidence of these witnesses with caution and seeking corroboration; it could be no reason for rejecting it altogether out of hand. Actually there was ample corroboration. There is no reason at all for not believing the evidence of the various

1. Emperor v. Shera, (1928) 15 A I R All 207=108 I C 225=29 Cr L J 353=50 All 625 = 26 A L J 321 (F B).

2. Ramdas Rai v. Emperor, (1929) 16 A I R Pat 313=1929 Cr C 99=117 I C 173 = 30 Cr L J 721=8 Pat 344=10 P L T 409.

3. Emperor v. Rafi Mian, (1932) 19 A I R Pat 246 =1932 Cr C 643=139 I C 885=33 Cr L J 877 =11 Pat 669=13 P L T 418.

villagers. As I have noticed, the first information was lodged without any delay at all and the witnesses had gone to the thana, and were also examined then and there, so that there was no real opportunity for concocting a case. Moreover, the injuries found on the persons of the accused and Ganesh were entirely consistent with the prosecution story, while the defence version left the injuries upon Ganesh at least entirely unexplained. The traces of trampling in Ganesh's courtyard, which were found by the Assistant Sub-Inspector, also corroborated Ganesh's story. In short, the evidence in the case was overwhelming and left no doubt at all that these two accused persons were actually caught red-handed while committing theft at night in the house of Ganesh.

In these circumstances I would accept this reference, set aside the verdict of acquittal of the jury, and convict Dullu Kuar under S. 457 read with S. 75, I. P. C., and Rachheya Teli under Ss. 457 and 380, I. P. C. It is not alleged that Rachheya Teli has any previous conviction. The theft was a petty one, and in the circumstances I would sentence him under each Section to undergo one year's rigorous imprisonment, these terms to run concurrently. I would sentence Dallu Kuar under S. 457/75, I. P. C., to undergo three years' rigorous imprisonment.

Varma J.—I agree.

D.S./R.K. *Reference accepted.*

A. I. R. 1940 Patna 515

ROWLAND AND CHATTERJI JJ.

Agin Singh and another — *Defendants* — Appellants.

v.

Bhudeo Singh and another — *Plaintiffs* — Respondents.

Appeal No. 186 of 1938, Decided on 8th August 1939, from appellate decree of Sub-Judge, Muzaffarpur, D/- 21st January 1938.

Bihar Tenancy Act (8 of 1934), S. 48-A, as amended by Act 11 of 1938—S. 48-A is retrospective.

Section 48-A by use of the words "shall be deemed to have acquired" is expressly made retrospective. [P 515 C 2]

Where the new S. 48-A which was incorporated by the Amending Act, 11 of 1938, came into force, during the pendency of appeal from suit for ejectment, the defendant must be deemed to have acquired occupancy right in the disputed land if they continuously held the disputed land as under-raiyats for more than 12 years before the institution of the suit. [P 515 C 2; P 516 C 2]

Dr. P. K. Sen and N. K. Prasad II — *for Appellants.*

S. M. Mullick and K. K. Banerji — *for Respondents.*

Chatterji J. — This is an appeal by the defendants in a suit for ejectment sought on the ground that they are under-raiyats of the disputed land and refused to vacate it in spite of service of notice under S. 49, Bihar Tenancy Act. The suit was contested on various grounds with which we are no longer concerned in this appeal. Both the Courts below have decreed the suit. The new point which has been raised in this appeal and must succeed is that under the provisions of the new S. 48-A, Bihar Tenancy Act, which was incorporated by the Amending Act, 11 of 1938 and came into force, during the pendency of this appeal, on 10th December 1938, the defendants must be deemed to have acquired occupancy right in the disputed land. The relevant portion of S. 48-A runs as follows:

> Every person who, for a period of 12 years, whether wholly or partly before or after the commencement of the Bihar Tenancy (Amendment) Act, 1938 has continuously held land as an under-raiyat in any village, whether under a lease or otherwise, shall be deemed to have acquired, on the expiration of that period, a right of occupancy in the land which he has so held for the said period.

It is not disputed that the defendants continuously held the disputed land as under-raiyats for more than twelve years before the institution of the suit. Now S. 48-A by use of the words "shall be deemed to have acquired" is expressly made retrospective. Therefore, by operation of this Section, the defendants shall be deemed to have acquired occupancy right in the disputed land before the institution of the suit. The effect of the words "shall be deemed to have" when used in a new statutory enactment came up for consideration before their Lordships of the Judicial Committee in 15 Pat 268.[1] In that case their Lordships had to deal with S. 26-N (since repealed and replaced by S. 26-B), Bihar Tenancy Act, which came into force when the appeal before the Judicial Committee was pending. S. 26-N was in these terms:

> Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before 1st January 1923, and in the case of the transfer of a portion of a holding to have accepted the distribution of the rent of the holding

1. K. C. Mukerjee v. Ram Ratan Kuer, (1936) 23 A I R P C 49=160 I C 105 = 63 I A 47 = 15 Pat 268 (P C).

as stated in the instrument of transfer, or if there is no such instrument, as settled between the transferor and the transferee.

Their Lordships held that the words "shall be deemed to have given his consent to every transfer of such holding" clearly indicated that the Section was intended to be retrospective. Their Lordships further held that there being no saving clause the Section would apply to pending actions; and accordingly their Lordships decided the rights of the parties before them on the basis of that new Section. The same reasoning will apply with equal force in the present case. The only distinction which is sought to be made by Mr. Mullick on behalf of the respondents is that in the present case a decree for ejectment had already been passed by the lower Courts and it was duly executed and possession taken before the new S. 48-A came into force. To my mind, this makes no difference. The suit shall be deemed to be still pending in appeal before us and we must have to decide the appeal according to the law that is now in force with retrospective effect.

Here it may be useful to refer to certain decisions of this Court which are all based on the above cited Privy Council case, 15 Pat 268,[1] and relate to S. 26-N, Bihar Tenancy Act. These are : 17 Pat 333;[2] 18 P L T 345[3] and L. P. A. No. 20 of 1938.[4] In the first two cases their Lordships had to deal with the rights of unrecorded transferees of occupancy holdings who, having been dispossessed by landlord-purchasers under rent sales, sued them for recovery of possession. Their Lordships held that those transferees had a valid title by virtue of S. 26-N and were therefore entitled to recover possession. In the last case in which the position of the parties was the reverse, that is to say, the landlord-purchaser under rent-sale was the plaintiff and the unrecorded transferee the defendant their Lordships dismissed the suit on the ground that the defendant was protected under S. 26-N, Bihar Tenancy Act. The result of these decisions is that S. 26-N, on account of its retrospective operation, had the effect of reviving rights which had already been extinguished. To put it more clearly, the rent-sales had already extinguished the rights of the unrecorded transferees but S. 26-N revived those rights.

There is therefore no escape from the position that under the provisions of the new S. 48-A, Bihar Tenancy Act, the defendants had occupancy rights in respect of the disputed land at the date of the suit and as such were protected from eviction. The result therefore is that this appeal must be allowed and the decrees of the Courts below set aside and the suit dismissed. In the circumstances the parties should bear their own costs throughout.

Rowland J. — I agree.

D.S./R.K. *Appeal allowed.*

2. Thakur Rai v. Issardyal Parshad, (1938) 25 A I R Pat 559=179 I C 104=17 Pat 333.
3. Mohammad Shafait v. Nithali Ram, (1937) 24 A I R Pat 387=169 I C 1000=18 P L T 345.
4. Chandrika Prasad Singh v. Ram Lal Sahu, L. P. A. No. 20 of 1938, Decided on 2nd August 1939.

A. I. R. 1940 Patna 516

FAZL ALI AND CHATTERJI JJ.

Raja Sri Sri Jyoti Prasad Singh Deo Bahadur — Plaintiff — Appellant.

v.

Samuel Henry Seddon and others — Defendants — Respondents.

Appeal No. 5 of 1935, Decided on 29th January 1940, from original decree of Sub-Judge, Purulia, D/- 25th September 1935.

(a) Lessor and lessee—Lessor by his own act preventing lessee from enjoying demised premises during certain period — Lessor cannot recover rent for that period.

Where the lessor by his own act prevents his lessee from enjoying the demised premises for a certain period he cannot recover rent from the lessee for that period. [P 523 C 2 ; P 524 C 1]

(b) Assignment—Rents and profits — Assignment of rents and profits of property passes property itself including reversion.

So far as bequests are concerned it is well settled that a gift of rents and profits arising out of any defined property held by a testator is sufficient to pass property itself. The rule applies to gifts and assignments as well for after all land is nothing but profits thereof. The assignment of rents and profits passes every thing including the reversion and therefore no question of reversion remaining in the assignor can arise: *(1872) 14 Eq 456; (1854) 10 E R 796 ; (1852) 42 E R 1075 ; (1851) 61 E R 207 ; 11 Cal 684 ; A I R 1921 Mad 563 ; 2 A L J 568 and A I R 1926 Mad 250, Rel. on.*

[P 525 C 1, 2 ; P 526 C 2]

(c) Lessor and Lessee—Mining lease—Mining lease is not mere sale of land or minerals but also lease.

A mining lease is not a mere sale of the land or minerals but also partakes of the character of a lease : *A I R 1932 Cal 775, Rel. on.* [P 526 C 2]

(d) Transfer of Property Act (1882), S. 108 —Principle of privity of estate applies in India —Passing of possessory title is enough—Actual possession is not necessary — Lessor can hold lessee's assignee liable for rent.

The doctrine of privity of estate applies in India also. For the application of the doctrine all that is necessary to be found out is whether possessory

title has passed or not and the question whether actual possession has been taken is immaterial. [P 527 C 2]

Therefore a lessor can hold the assignees from his lessee liable for royalty even though they may not have obtained actual possession under the assignment : *A I R 1939 P C 14, Rel. on.* [P 527 C 2; P 528 C 1]

(e) Lessor and lessee — Assignment by lessee — Assignment of share in demised premises — Lessor can sue assignee for whole rent—Liability of assignee is joint and several with lessee.

In the case of the assignment of a share in the demised premises by the lessee, the lessor is entitled to sue the assignee for the whole rent. The assignees are liable jointly and severally with the lessee for the entire rent : *(1923) 1 K B 469 ; A I R 1916 Mad 768 ; A I R 1927 Mad 931 ; A I R 1925 Cal 1056 (F B) ; A I R 1930 Lah 515 (F B) and (1864) 34 L J Ch 82, Doubted but foll.* [P 528 C 2]

(f) Civil P. C. (1908), O. 22, R. 5—Notice of substitution of legal representative of deceased appellant served on respondent receiver — No objection raised — Successor of respondent receiver cannot challenge order of substitution subsequently—Ex parte order is as much binding on parties as contested one.

Where an application for substitution which is made on the allegation that the applicant is the legal representative of the deceased appellant and notice of that application has been served on the respondents including the late receiver and substitution is made without any objection, it is not open to the subsequent receiver who merely steps into the shoes of the old receiver to challenge the order of substitution which was binding on the latter. When in a suit or an appeal any party dies the question as to who is the legal representative must be decided by the Court under O. 22, R. 5 and its decision is binding on the parties. The fact that an order passed under that Rule is not appealable shows that the decision is of a summary character and for the purposes of the suit or appeal the person who is substituted in place of the deceased party must be deemed to be his legal representative. An ex parte order is as much binding on the parties as a contested order. [P 530 C 2]

(g) Civil P. C. (1908), S. 80 — Receiver is public officer—Suit for royalty of lands in possession of receiver—Non-payment of royalty by receiver or his surrender of lands based on individual contract between him and plaintiff are not official acts.

A receiver appointed in a suit is a public officer within the meaning of S. 80. In a suit for royalty of lands in the possession of the receiver non-payment of the royalty cannot be said to be an official act done by the receiver nor can a surrender of those lands as a result of individual contract between him and the plaintiff be regarded as an official act. S. 80 therefore has no application. [P 531 C 1]

(h) Civil P. C. (1908), O. 40, R. 3—Transaction by receiver without sanction—Third party with eyes open entering into transaction cannot challenge it on ground that it was without sanction of Court.

On general principles a receiver cannot effectively deal with the properties in his possession without the sanction of the Court that appointed him. Where he deals with any property without the sanction of the Court his transaction may be impugned by the party affected thereby and he may be held accountable if he has thereby caused any loss to such party. The object of the Court's sanction to any transaction by a receiver is to ensure that the interest of the parties whose properties the receiver is entrusted to deal with are properly protected. But a third party who has himself with his eyes open entered into a transaction with the receiver cannot challenge it merely on the ground that it was not sanctioned by the Court. [P 533 C 1]

(i) Contract Act (1872), S. 20 — Mutual mistake — Facts constituting, must be pleaded and proved—Plea cannot be raised for first time in appeal.

Mutual mistake such as would render a contract void within the meaning of S. 20 depends upon facts which must be pleaded and proved. But where the plea is not made out either in the plaint or at the hearing before the trial Court, it cannot be raised for the first time in appeal. [P 533 C 2]

(j) Transfer of Property Act (1882), S. 8 — Object.

Section 8 is not intended to lay down any rule as to what words are necessary to effect a transfer of any particular kind of property. What property is actually conveyed by a particular deed depends upon its own terms. [P 536 C 1]

(k) Receiver — Transaction by party in respect of property in receiver's possession and interfering with his rights though not binding on receiver is not void.

The appointment of a receiver operates as an injunction upon the parties not to interfere with the rights conferred on him by the Court. If any party deals with any of the properties in the possession of the receiver the transaction will not be binding on the receiver nor can his possession be interfered with. But from this it does not follow that the transaction is void as being opposed to public policy. [P 537 C 1]

(l) Partnership—Partner entering into transaction on behalf of firm with third person — Binding nature of transaction on other partners cannot be questioned by third person.

In the case of partnership each partner is an agent of the others, and how far a transaction entered into by one partner on behalf of the firm binds the other partners is a question which can properly be raised by those other partners. If they by their acts and conduct assent to the transaction the third party who himself enters into the transaction cannot question it. [P 538 C 2]

Therefore where in an action against the firm one of the partners binds the firm by consenting to a compromise decree against it, although he has no authority to do so, and the other partners have not raised any objection, it is not open to the other party to the compromise to question its binding nature and the compromise decree cannot be said to be ineffective so far as the parties to it are concerned: *(1885) 10 A C 680; 22 All 135 and A I R 1933 Lah 618, Disting.* [P 538 C 2 ; P 539 C 2]

(m) Decree—It can be root of title.

Although the parties to a suit set up their respective rights and the Court has to adjudicate on those rights, but once the Court makes an adjudition, it not only sets at rest the controversy between the parties but creates in favour of the successful party a new title though in many cases

it may be in affirmance of a pre-existing title. It is therefore a fallacy to say that a decree cannot be the root of title: *A I R 1923 Mad 392, Commented upon.* [P 539 C 2; P 540 C 1]

(n) Decree—Construction—Question whether decree operates as assignment depends upon nature of decree.

The question whether a decree operates as an assignment of certain property depends upon the nature of the decree. Where the decree passed on compromise merely declares the plaintiffs' title which is based on a previous assignment and upon the terms of the compromise petition it is impossible to hold that one party was assigning to the other 2 annas share of the leasehold properties, the decree cannot operate as an assignment of 2 annas share of the leasehold properties. It has the effect merely of confirming the title that was already created by the deed of assignment. [P 540 C 1]

Sir Manmatha Nath Mukherjee, Nitai Chandra Ghosh, S. N. Bose, Syed Ali Khan, K. Husnain, H. R. Kazimi, S. C. Mazumdar, Ramanugrah Narain Sinha, Sudhir Chandra Ghosh, J. M. Ghosh, K. N. Moitra and S. S. Rakshit — *for Appellant.*

P. R. Das, N. N. Sen, J. C. Mullick, S. K. Mitra, B. N. Mitter, Bhabananda Mukherji, A. Sen, U. N. Sinha, B. C. Das, Syed Mehdi Imam, Prem Lal, N. N. Ray, P. B. Ganguli, Susil Chandra Sen and R. S. Chatterji—*for Respondents.*

Fazl Ali J.—This appeal arises out of a suit brought by the appellant's father the Raja of Pachet (who will sometimes be referred to hereinafter as the Raja) to recover a sum of Rs. 11,73,309-3-3 from the defendants who are ten in number on account of royalty in respect of 32 villages held under several mining leases by a firm known as Seddon & Co. This firm originally consisted of two partners only named Henry Seddon and Rasaraj Biswas. Later on these persons took into the firm two more partners, these being Kishori Mohan Sarkar (who will be referred to hereinafter as Kishori) and Dakshina Prasad Bhattacharjee (who will be referred to hereinafter as Dakshina.) Out of the 10 defendants in the suit, defendant 1 is Henry Seddon. As Rasaraj, Kishori and Dakshina had died before the suit was instituted, their heirs have been impleaded as defendants 2 to 6. Defendants 7 and 8 are the sons of one Kedar Nath Daga (to be referred to hereinafter as Daga) who along with defendant 9 Mangniram Bangar (to be referred to hereinafter as Bangar) had advanced considerable sums of money to the firm of Seddon & Co. These three defendants—defendants 7 to 9 have been impleaded in the suit on the allegation that Daga and Bangar had acquired a 2 annas interest in the properties for which royalty is claimed. Defendant 10 is a receiver appointed by the High Court at Calcutta in a suit for dissolution of partnership brought by one Sastikinkar Banerjee (to be referred to hereinafter as Sasti) against Seddon and two other persons named Gibson and Ram Ratan. As will appear later, Seddon had in 1922 formed a new partnership consisting of himself, Sasti, Gibson and Ram Ratan, his case being that Rasaraj, Dakshina and Kishori had retired from the original firm before that date.

The suit was contested by defendants 7 to 9 and defendant 10 only, though written statements were filed by all the defendants excepting defendants 2 and 3, the sons of Rasaraj. The contesting defendants raised a number of questions in their written statement, but apart from certain side issues, we are concerned with only two major questions in this appeal. These are: (1) whether any royalty can be recovered by the plaintiff in respect of 15 villages which had been surrendered by defendant 10 as receiver of the estate of Seddon & Co. in 1925, and (2) whether defendants 7 to 9 are liable for the whole or any portion of the royalty claimed. Both these questions have been answered by the trial Court (Subordinate Judge of Purulia) in the negative, that is to say against the plaintiff, and hence this appeal. Before dealing with the points raised in this appeal I consider it necessary to give the following brief summary of certain material facts in chronological order.

August 1915. — Seddon and Rasaraj entered into a partnership, though no formal document was executed and thereafter they proceeded to take mining leases and prospecting licenses in respect of a number of villages from the plaintiff.

July 1920. — There was an agreement between Daga and Bangar on the one hand and Seddon & Co. on the other, by which the former agreed to advance a sum of Rs. 10 lakhs payable within one year from the date of the advance and a further sum of Rs. 10 lakhs payable within three years from the date of the advance, and in their turn Seddon & Co. agreed to assign to them a two annas share in "royalty profits" in certain properties and a two annas share in "the profits of the salamis" to be derived from certain other properties.

3rd November 1920. — A formal document of partnership was executed by Seddon and Rasaraj in which the share of each of the two partners was specified to be eight

annas in the partnership property and it was stated that each of them was to be managing partner of the firm with equal rights and privileges.

12th November 1920. — Dakshina and Kishori were admitted as partners in Seddon & Co. by means of an agreement executed on that date. By this agreement Seddon was to have an eight annas share in the partnership as before; Rasaraj was to have six annas and Dakshina and Kishori were to have one anna each. All the partners accepted their liability to Daga and Bangar to the extent of ten lakhs of rupees and ratified the arrangement by which the former partners had bound themselves to execute a deed of assignment in favour of the latter in respect of a two annas share of "the profits in royalty, salami and minimum royalty to be accrued of all the properties" described in certain schedules.

31st March 1921. — Seddon and Rasaraj executed two deeds in favour of Daga and Bangar: (1) a deed of assignment in respect of two annas share in the salami and royalty accruing from a number of properties described in certain schedules appended to the deed (including the properties for which royalty is claimed in the present suit) and (2) a deed of mortgage in respect of the remaining fourteen annas share in the same.

28th July 1922.—Seddon & Co. brought a suit in the Calcutta High Court against Daga and Bangar claiming from them a sum of Rs. 30,00,000 as damages for their failure to advance the second instalment of Rs. 10,00,000 to the plaintiff.

29th August 1922. — Daga and Bangar instituted a suit at Asansol against Seddon and Rasaraj on the basis of the deeds of assignment and mortgage for a declaration of their title to two annas share of "the properties mentioned in the indenture of conveyance dated 31st March 1921 and to all salamis, rents and royalties and profits arising or issuing therefrom" and for enforcement of their mortgage "by the sale of the 14 annas share of the mortgaged properties together with all salamis, rents, royalties and profits arising therefrom."

25th October 1922. — Seddon agreed to take Sasti Kumar Banerjee as a partner in the firm of Seddon & Co. on his agreeing to pay certain sums of money to Rasaraj, Kishori and Dakshina who were alleged to have ceased to be partners. Under the arrangement entered into on that date the share of Seddon in the partnership was to be 7 annas 6 pies; that of Sasti 6 annas and two other partners Ramratan and Gibson were to have 1 anna 6 pies and 1 anna respectively.

23rd March 1923.—Sasti brought a suit in the Calcutta High Court against Seddon, Gibson and Ramratan for dissolution of partnership and accounts.

10th April 1923. — A consent decree was passed in Sasti's suit for dissolution of partnership, one of the terms of the decree being that five persons including Daga, Bangar and Satish Chandra Sen (defendant 10 in the present suit) were to be appointed as receivers of the properties, assets, etc. of Seddon & Co.

13th June 1923. — Satish Chandra Sen (defendant 10 in the present suit) was appointed sole receiver by the consent of the parties.

30th June 1923. — A compromise petition was filed in the suit instituted by Daga and Bangar against Seddon and Rasaraj at Asansol which contained among others the following provisions: (1) that Seddon & Co., should forthwith withdraw the suit which they had brought in the Calcutta High Court claiming Rs. 30,00,000 as damages from Daga and Bangar and also pay the costs of that suit to the latter; (2) that the suit of Daga and Bangar at Asansol should be decreed under O. 34, R. 2, Civil P. C.; (3) that Rasaraj's name should be expunged from the record and the suit be dismissed against him. To explain why Rasaraj was to be expunged it was recited in the petition of compromise that his own written statement was that

> he had sold his right, title and interest in the joint business of Seddon & Co. with their assets and liabilities together with their interest in the properties of the firm to defendant 1

and had ceased to be a partner of the business on and from 1st January 1923.

3rd July 1923. — The parties filed a supplementary compromise petition in above suit setting forth certain terms which had not been included in the petition filed on 30th June 1923 one of these terms being that the Court should declare the title of Daga and Bangar to a 2 annas share of the properties mentioned in the indenture of assignment dated 31st March 1921 and to all salamis, rents and royalties and profits arising or issuing therefrom.

3rd July 1923.—The Subordinate Judge at Asansol passed in the above suit a preliminary mortgage decree which also declared the right of Daga and Bangar to a 2 annas share in the properties as stated in the compromise petition.

26th September 1924. — Kedar Nath Daga being dead, defendants 7 and 8 his sons, applied to be substituted in his place in the suit at Asansol.

19th November 1924.— The Subordinate Judge at Asansol substituted defendants 7 and 8 in place of Kedar Nath Daga and rejected Sasti's petition asking him to make the receiver of his assets a party to the suit. The receiver who was asked to be impleaded in the suit was not defendant 10 but another person who had been appointed a receiver in a proceeding for adjudicating Sasti to be an insolvent.

20th November 1924.—Bangar and Daga moved the Subordinate Judge to pass a final decree in the mortgage suit.

18th April 1925. —The final decree was passed.

22nd January 1925. — An agreement was entered into between the plaintiff (Raja of Pachet) and Satish Chandra Sen (defendant 10) in his capacity as receiver in the suit brought by Sasti against Seddon & Co. One of the terms of this agreement was that the Raja shall accept the surrender of leases of such mauzas as Seddon & Co., will choose in the month of March 1925 and he will give up the royalties payable in respect of the lands to be surrendered up to the end of the month of March.

29th March 1925. — Defendant 10 gave notice to the plaintiff that he was prepared to surrender nine mauzas specified in the notice.

27th June 1925.—The Raja accepted the surrender of the nine mauzas.

27th July 1925. — Defendant 10 gave notice to the Raja that he was prepared to surrender six other mauzas. Surrender of these mauzas also was accepted by the plaintiff.

7th February 1930. — The plaintiff brought a suit for royalty in the Court of the Subordinate Judge at Burdwan against defendants 1 to 6 and 10. In this suit he neither impleaded defendants 7 to 9 of the present suit as defendants nor did he claim any royalty in respect of those mauzas of Burdwan District which had been surrendered by the receiver in 1925.

10th February 1930.—Defendants 7 and 8 applied for execution of the mortgage decree against Seddon and defendant 10 making Bangar a pro forma party.

19th May 1930 and 21st June 1930. — Defendant 10 and Seddon objected to the execution on the grounds that it was barred by limitation and the decree-holders were not entitled to put the decree into execution as they had failed to carry out the terms of the compromise within the time limited thereby.

3rd February 1931. — Both the objections were dismissed by the Subordinate Judge of Asansol and his judgment was upheld on appeal by the High Court on 3rd March 1933.

20th March 1931. — Bangar filed an application stating that the other decree-holders (the Dagas) had executed the decree in the interest of all the decree-holders and that he had no objection to the execution provided that his interest was safeguarded.

27th July 1931. — Dagas filed an application in the executing Court at Assansol to the effect that they wanted to sell only three of the mortgaged properties in the execution proceeding then pending before it.

7th September 1931.—Dagas applied that the execution proceeding might be struck off.

12th April 1932. — The suit for royalty brought by the Raja at Burdwan was decreed (*vide* the judgment Ex. 10.)

18th April 1933.—The present suit was instituted in the Court of the Subordinate Judge at Purulia.

I will now proceed to deal with the question whether the plaintiff is entitled to recover royalty in respect of the 15 mauzas which were surrendered in his favour by defendant 10. The surrender as will appear from the above summary, took place in the year 1925 and the Raja admittedly did not claim any royalty in respect of any of the surrendered mauzas between that date and the date of the institution of the present suit. His case in the plaint is (1) that towards the end of 1930 he came to know for the first time that defendant 10 was not a receiver in respect of the entire 16 annas of the mauzas (meaning thereby that he did not represent all the persons interested in them) and that defendant 10 had not obtained the permission of the High Court at Calcutta to surrender any of the mauzas, (2) that defendant 10 had deliberately suppressed from him the fact that a two annas interest in the mauzas surrendered by him had been assigned to defendant 9 and the father of defendants 7 and 8 and the remaining fourteen annas had been mortgaged to them and that he (the plaintiff) had accepted the surrender "on account of the suppression and misrepresentation of fact made by the receiver and under the bona fide mistake caused thereby as to the true state of facts" and (3) that

notwithstanding the surrender the plaintiff's lessees and their representatives and assignees continued to be in possession of the surrendered mauzas and the plaintiff himself never got possession of any of them. In this Court the learned Advocate for the appellant frankly conceded that he could not press his case as to misrepresentation on the part of the receiver, but he put forward a new plea which had not been raised in the Court below, namely that both the receiver and the plaintiff had entered into the transaction under a bona fide mistake. To explain the nature of the mistake reference was made to the following statement made by the receiver in his evidence :

From the beginning up to the time of my giving of surrender and up to the time of acceptance of the surrender no one gave me any infortion that two annas share of the concern of Seddon and Co., had been sold to any one.

It was contended that this statement of the receiver was sufficient to establish "mutual mistake," it being the case of the plaintiff also that he was unaware of the deeds of mortgage and assignment in favour of Bangar and Daga at the time when he accepted the proposal of defendant 10 to surrender the mouzas in question. Before dealing with the points raised by the appellant I consider it necessary to refer in greater detail to certain important facts relevant to the question of surrender. On 7th March 1924 Babu Lalit Kishore Mitra, Vakil, wrote a letter (Ex. D-1) on behalf of the Raja to Seddon stating that if he did not pay up all arrears of royalty, minimum royalty and other dues together with interest within a fortnight, the Raja would file a suit against him to recover these dues. Seddon handed over this letter to defendant 10 who on 31st March 1924 sent a reply (Ex. P) in which he blamed the Raja for not having given possession to Seddon & Co. and their sub-lessees of the major portion of the leasehold properties and warned him against writing directly to the lessees of Seddon & Co., for royalty as such a request "would amount to unwarranted interference with the possession of the company." There was further correspondence between the parties in the course of which the receiver made heavy counter-claims against the Raja. On 9th January 1925 Seddon filed a petition (Ex. 24) in the High Court in which after referring to the claims and the counter-claims made by the Raja and the receiver he stated as follows :

(1) That the matter in dispute was ultimately settled by the said receiver as follows :

(a) The Raja will give up all his claims to rents, royalties up to the 31st Aswin 1331.

(b) The said firm or the receiver should also give up all claims for damages for infirmity of the title of the Raja or otherwise against the Raja; that the said receiver should advance to the Raja a sum of one lakh of rupees free of interest on account of future royalties to the Raja under his lease and that the said receiver should also transfer to the Raja all his claims to royalty coal payable by the said sub-tenants of the firm up to the 31st Aswin 1331.

(2) That the above settlement was absolutely beneficial to the firm as it saves expenses and numerous litigations and also thesum of one lakh fifty eight thousand admittedly due to the Raja on account of royalty.

The petition concluded with the prayer that the Court might sanction the settlement and the receiver might be authorized to borrow money to the extent of one lakh of rupees for payment to the Raja. The High Court sanctioned the settlement and on 22nd January 1925 the receiver paid a sum of rupees one lakh to the Raja and on that very day a formal agreement (Ex. L) was executed by them which stated among other things that :

The Raja Bahadur will accept surrenders of such mauzas as Messrs. Seddon & Co., will choose within the month of March 1925. The Raja Bahadur will give up the royalty payable in respect of the lands to be surrendered within the month of March 1925 up to the end of March 1925.

On 9th February 1925 the attorneys of plaintiff wrote to the receiver asking him to furnish them with a copy of the order of the High Court sanctioning settlement with his client on Seddon's petition and on 13th February 1925 the receiver sent him a copy of the order. On 29th March 1925 the receiver gave a notice (Ex. 7) to the Raja to the effect that in pursuance of the terms of the agreement dated 22nd January 1925 he was prepared to surrender 11 mauzas. On 22nd June 1925 the Raja accepted the surrender of 9 mauzas but refused to accept the surrender of the remaining two as Villiers Colliery Ltd., who were joint lessees of these mauzas with Seddon & Co., had not joined in the surrender. On 27th July 1925 the receiver offered to surrender 6 other mauzas as under the mining lease under which they were held, any property granted under that lease could be surrendered by giving six months' notice. On 8th August 1925 the Raja accepted the surrender of these mauzas also. On 17th September 1927 the Raja wrote a letter (Ex. O.4) to the receiver in which after stating that Seddon & Co., had not paid royalty for nearly two years, he made a proposal that the company might surrender certain other

mauzas in which case he was prepared to forego the royalties due in respect thereof. The Raja stated in that letter that certain persons were willing to take settlement of the mauzas in question and "that he hoped that the receiver would agree with him that this was a fair proposal and no doubt most advantageous to him." The letter concluded with the threat that if the receiver decided to hold on the lease the Raja would call upon him to make immediate payment of all royalties due to him. With these facts before us I will now proceed to state briefly some of the conclusions which I have arrived at on a consideration of the evidence adduced in the case. They are as follows :

Firstly, that the Raja having been in close touch with his legal advisers throughout the negotiations which went on between him and the receiver relating to the surrender, it does not seem probable that he would have accepted the surrender without ascertaining who were the persons interested in the properties to be surrendered—whether as partners or as creditors or otherwise, and without being reasonably certain that the surrender was not likely to be questioned by any of these persons. Secondly, that the Raja was anxious to raise money and the proposal as to surrender was probably made by him in the first instance. The receiver's statement as to the conversation which took place between him and the Raja in November 1924 is as follows :

> I do not remember the details of the conversation, but I may say generally that he (the Raja) stated that I should give money or loan. He told me why should Seddon keep so many mauzas which he is not leasing out. He expressed the desire that he would himself like to lease them out, if he got them. He asked to give money on account of future rent.

The fact that the Raja was keen about "surrender" is further supported by his letter dated 17th September 1927 in which he suggested that Seddon & Co., might surrender certain mauzas in addition to those already surrendered in which case he was prepared to forego royalties in respect of those mauzas also.

Thirdly, that the Raja was fully aware of the fact that there was no order of the High Court expressly sanctioning the surrender of any mauzas. It has been proved beyond doubt that the receiver provided him with a true copy of the order of the High Court sanctioning settlement between them and that no less than three copies of that order had been obtained by the Raja himself. The Raja probably never apprehended that the surrender would be questioned by any of the parties interested in the properties.

Fourthly, that the receiver was in possession of and dealt with the entire property of Seddon & Co., including the mauzas to which this suit relates and neither Bangar and Daga nor Dakshina, Kishori and Rasaraj had ever challenged his power to deal with any of the properties. So far as the last three persons are concerned, Seddon's case in his written statement is that by reason of certain arrangements arrived at between them and the other partners they had retired from the partnership altogether and whether in law their interest in the partnership had ceased or not, it seems to be a fact that they never asserted their right in regard to the partnership property after the said arrangements nor did Seddon or any one else treat them as partners. Similarly, there is nothing on the record to show that Bangar or Daga ever questioned the authority of the receiver to deal with the entire property or tried to interfere with his possession. On the other hand one of the terms in the compromise decree which was passed in their favour in Asansol was that one Mr. Leslie was to be appointed as a receiver in that suit only upon the discharge of the receiver appointed by the Calcutta High Court in Sasti's suit.

Fifthly that the case of defendant 10 that he had surrendered the mauzas in question with the consent of Bangar and Daga as well as Sasti and Seddon is not improbable. The evidence on the point is wholly one-sided, because defendant 10 who is undoubtedly a respectable person has stated so on oath and his evidence is supported by the witnesses examined on behalf of Bangar and Daga. As the villages which were surrendered brought no income to Seddon & Co., but merely added to the liability of the partnership by making the partners liable to pay royalty, it is conceivable that none of the parties interested in the properties raised any objection to the proposed surrender.

Sixthly, that though there is no evidence to show that the Raja was aware of the deeds of assignment and mortgage executed by Seddon in favour of Bangar and Daga, yet it is not likely that the Raja did not know that these persons were interested in the affairs of Seddon & Co., at least as their chief creditors. As has been already stated Bangar and Daga were among the five original receivers appointed in Sasti's

suit and it appears that in one of the letters written to Seddon on behalf of the Raja it was clearly stated that his Manager had been informed that "the original lease for the mining rights of certain villages were in possession of Mr. Daga."

It may be recalled here that the main points on which the surrender is attacked are firstly, that it was effected without the leave of the Calcutta High Court; secondly, that the receiver did not represent the 16 annas interest, as it is called, in the mauzas which were surrendered, the suggestion being that he did not represent at least Bangar, Daga, Dakshina, Kishori and Rasaraj at the time the transaction was concluded and thirdly, that the whole transaction was vitiated by mutual mistake.

On behalf of the receiver as well as defendants 7 to 9 it was contended that the leave of the Court was not necessary as defendant 10 by the order appointing him a receiver had been vested with very large powers including the power of winding up the business of the partnership. It was also argued in the alternative that the question of "leave" was a domestic question, that is to say, a question between the Court and the receiver and not one which can be raised properly by the plaintiff. As to the argument that the surrender was effected without the consent of some of the parties interested in the properties, it was pointed out on behalf of the receiver that in fact Dakshina, Kishori and Rasaraj had already ceased to be partners and Bangar and Daga had given their consent to the surrender. It was further contended that the Raja was estopped from challenging the surrender and at any rate he could not avoid the transaction without restoring the benefits which he had received under the agreement dated 22nd January 1925. Lastly it was contended that the plaintiff not having pleaded a case of mutual mistake and not having raised it in the Court below should not be allowed to raise it for the first time in this Court, because if the respondents had proper opportunity to meet it, they would have shown it to be wholly untenable.

In my opinion it is unnecessary to consider these arguments, because even if it be assumed that the plaintiff is entitled to avoid the surrender in a proper proceeding, I am unable to hold on the facts established in this case that he can recover royalty for the period in suit in respect of the surrendered villages. The present suit is merely a suit to recover royalty and the plaintiff has made no prayer in his plaint for declaring the surrender to be invalid or for setting it aside. The plaintiff cannot recover royalty in respect of the surrendered villages in this suit, because until the present suit was instituted he had treated the surrender as a good transaction and for that reason neither the receiver nor any of the other defendants has exercised any act of possession over the surrendered villages since the date of the surrender. The third witness for the Raja when asked whether the surrendered mauzas were or or were not in khas possession of the Raja said, "Yes, they came into the khas possession of the Raja." He also added that the Assistant Manager Gopi Babu had given him instructions "to note the *istafas* (surrender) and they were accordingly noted." This shows that the plaintiff's case in the plaint that the possession of the surrendered villages remained all along with "the lessees and their representatives and assigns" and the surrender was never acted upon is not true. It is common ground that in the accounts which were sent from time to time by the Raja to the receiver between the date of the surrender and the institution of the suit, the royalty for the surrendered mauzas was not included at all. Again in the suit which was brought at Burdwan to recover royalty for the years 1332 to 1336 in respect of the mauzas of that district no claim was made for royalty in respect of any of the surrendered mauzas though several of them are situated in that district. It seems to me that if the surrender had not been acted upon, the Raja would not have allowed his claim to royalty for a considerable period in respect of the surrendered mauzas of Burdwan district and other districts to become time-barred. What is strange is that the surrender is assailed by the Raja who was himself anxious to obtain it and not by any of the partners of Seddon & Co. or the Marwari defendants (Bangar and Daga). However that may be, the issue in the present case is in my opinion a very simple one and may be put thus: Can a lessor, who by his own act has prevented his lessees from enjoying the demised premises during a certain period, recover from them rent or royalty for that period? In my opinion there can be only one answer to that question and that should also be the answer to the Raja's claim in so far as it relates to the surrendered mauzas. Therefore

so far as this claim is concerned, the judgment of the trial Court must be upheld.

The next question to be considered is whether the suit can succeed against defendants 7 to 9. The learned advocate for the appellant conceded before us that defendant 8 is not liable to pay the royalty claimed in the suit, as he has been adopted into another family, but he has pressed the claim against defendants 7 and 9 on the ground that defendant 9 and the father of defendant 7 were assignees of a two annas interest in the lands originally demised to Seddon & Co. The allegations made by the plaintiff on this point are to be found in paras. 2 and 11 (a) of the plaint, the latter paragraph being inserted therein on 29th March 1935 with the leave of the trial Court. Paras. 2 and 11 (a) are as follows :

Paragraph 2. — That the plaintiff has been informed and believes that on 31st March 1921 the said Mr. Seddon and Rasaraj Biswas for themselves and as representatives of their cosharers in the said properties by an indenture of conveyance dated 31st March 1921 conveyed and assigned unto late Kedar Nath Daga, the father of defendants 7 and 8 and defendant 9, an undivided two annas share of their rights in the properties mentioned in the Schedule annexed thereto including the two annas shares of their rights in the properties mentioned in Schedule 1. That by another indenture of the same date the said Mr. Seddon and Rasaraj Biswas for themselves and as representatives of their cosharers mortgaged to the said Kedar Nath Daga and Mungniram Bangar the remaining fourteen annas share of the rights of those properties.

Paragraph 11 (a).—That defendant 9 and father of defendants 7 and 8 also acquired good and valid title to two annas share of the mauzas described in Sch. 1 A and 1 B annexed to the plaint by virtue of the compromise and compromise decree in Suit No. 238 of 1922 in the Court of the Subordinate Judge of Asansole and as such they are liable to pay rents and royalties and deliver royalty coal to the plaintiff as claimed.

The answer of defendants 7 and 9 to para. 2 of the plaint is firstly that the deed of assignment did not convey a two annas share in properties referred to in the deed but only a two annas share in the salamis and royalties payable to the assignors in respect of them and secondly that

having regard to the fact that the said indenture was executed by two out of the four partners of the firm of Seddon & Co. the said indenture was wholly inoperative and ineffectual in law and did not vest in defendant 9 and in the late Kedar Nath Daga any share in what was purported to have assigned by the said indenture.

As to the compromise decree referred to in para. 11 (a) their written statement is to the following effect :

1. With reference to the allegations made in para. 11 (a) of the plaint, this defendant denies that he and the father of defendants 7 and 8 or either of them acquired a title, good and valid or otherwise or at all, to two annas share or any other share in the mouzas described in Sch. (a) and Sch. 1 (b) annexed to the plaint or in either of the said Schedules by virtue of the compromise and the compromise decree or by virtue of any other terms or term or transactions as alleged in the said paragraph.

2. This defendant is advised and believes and he submits that the said compromise and the compromise decree are wholly irrelevant in this suit and he further submits that on a proper construction of the said compromise and compromise decree, 2 annas share of salamis and royalties and not 2 annas share of the mouzas described in the said schedule was declared to belong to this defendant and defendant 9.

In the course of the trial, defendants 7 to 9 further elaborated their defence and attacked the compromise decree as being altogether void on a number of grounds which will be referred to later. The learned Subordinate Judge has accepted their case in regard to the deed of assignment and the compromise decree in its entirety and has held that they are not liable to pay the royalty claimed in the suit.

The first question to be considered is what interest, if any, passed to Bangar and Daga under the deed of assignment. This deed refers to two kinds of properties : (1) properties in respect of which salami was payable at the date of assignment or might become payable in future ; (2) properties in respect of which royalty was payable or might be payable in future. The deed provides in the first place that the assignees were to receive a two annas share in the salamis after deducting (a) a sum equal to 15 per cent. of the salami moneys and (b) a sum or sums payable as salami by the assignors to their superior landlords. As to royalty the deed provides that

assignees were entitled to 2 annas share in them after payment of the royalties payable by the assignors to the superior landlords and to surface owners and occupiers.

The assignees were to enjoy for ever the benefits assigned under the indenture there being no limitation whatsoever as to time and the document contained all the usual clauses which are to be found in a deed assigning real property. One of the clauses provided that "all the estate, right, title, interest, claim and demand whatsoever of the assignors into of or upon the said one-eighth or two annas share" had been assigned. Cl. (2) provided that the "assignees shall and may at all times hereafter peaceably and quietly enjoy and receive the said share of the said salamis and royalties hereby assigned or intended so to be without any let, stay, eviction, interruption, claim

or demand whatsoever from or by the assignors or any person or persons" lawfully claiming through them. The deed further provided that the

> assignors shall or will from time to time and at all times hereafter at the request and cost of the assignees do or execute or cause to be done and executed such acts, deed, matters and things whatsoever for further better and more perfectly assuring the said share of the said salamis and royalties hereby assigned . . . unto the assignees in manner aforesaid as shall or may be reasonably required.

In the concluding clause the assignees bound themselves

> to deliver a full detailed account of salamis and royalties and to verify and prove the correctness of the same in such reasonable manner as the assignee shall require and to inform them of the executions of any lease or other documents that may be executed afterwards at their request and cost supply them with certified copies of the same.

The case of the appellant is that the deed was intended to convey to Bangar and Daga nothing short of a two annas interest in the coal lands and the document was made to appear as a deed assigning only the salamis and royalties with a view to prevent the superior landlord from realizing the royalty directly from the assignees. It was also contended on his behalf that inasmuch as the assignors still held 14 annas share in the coal lands referred to in the deed, they were allowed to manage the whole property and hand over to the assignees their share in the profits which consisted only of salamis and royalties after deducting the royalty payable to the landlord and other incidental expenses and also 15 per cent. as collection charges from the salamis. Defendants 7 to 9 on the other hand contend that the deed was nothing more than an assignment of a share in salamis and royalty with the result that the assignors still had the reversion and were free to settle and deal with the undisposed of properties in any manner they liked. It is pointed out on their behalf that a few of the mouzas had not been sub-leased and were in the khas possession of Seddon & Co. and there was nothing in the deed of assignment to prevent them from carrying on mining operations in them in which case no salami or royalty would be payable to Bangar and Daga in respect of them.

That the construction of the deed owing to its peculiar form does present certain difficulties cannot be denied, but on the whole I am inclined to think that it was intended to convey a two annas interest in the coal lands and not merely in salamis and royalties. So far as bequests are concerned, it is well settled that a gift of rents and profits arising out of any defined property held by a testator is sufficient to pass the property itself : *see* (1872) 14 Eq 456,[1] (1854) 10 E R 796,[2] (1852) 42 E R 1075,[3] (1851) 61 E R 207,[4] 11 Cal 684,[5] 68 I C 631[6] and 2 A L J 568.[7] It has been remarked in certain cases that the rule enunciated above is founded on the old feudal law that a devise of rent and profits of real estate carried with it the property in the land : *see* the observations of Lord Cranworth in (1852) 42 E R 1075 ;[3] but the rule having now received statutory recognition in S. 172, Succession Act, it is unnecessary to investigate its origin. The only question which requires consideration is whether the rule is confined to wills or is applicable also to assignments. On the whole, I am inclined to think that it applies to gifts and assignments also, because as Coke put it in his simple way "What is land but profits thereof"? It is true that there is no express provision in the Transfer of Property Act corresponding to S. 172, Succession Act, but that does not dispose of the question, because the Act nowhere provides what exact words are necessary to convey title under a deed of conveyance. In 92 I C 516[8] the rule was held to be applicable to a case other than that of a will and I do not see any reason why it may not be applied to this case, provided that it is clear among other things that the deed in question related to all the incomes derived from the coal lands referred to in the deed. As Mallins V. C., observed in (1872) 14 Eq 456[1]

> there is no distinction whatever between giving the income of the lands and the rents and profits of the land. The income means rents and profits and rents and profits mean the income. They are convertible terms.

I think that on the facts of this case it will not be unreasonable to hold that under the deed of assignment a two annas share in all the incomes which did or could accrue from the properties referred to therein was

1. Mannox v. Greener, (1872) 14 Eq 456 = 27 L T 408.
2. Mayor, Alderman and Burgesses of Southmolton v. Attorney-General at the relation of James Miles, (1854) 10 E R 796.
3. Blann v. Bell, (1852) 42 E R 1075.
4. Humphery v. Humphery, (1851) 61 E R 207.
5. Shookmoy Chandra Das v. Monoharri Dassi, (1885) 11 Cal 684=12 I A 103=4 Sar 639 (P C).
6. Vaithianatha Aiyar v. Theyagaraja Aiyar, (1921) 8 A I R Mad 563=68 I C 631= 41 M L J 20.
7. Durga Devi v. Duni Chand, (1905) 2 A L J 568.
8. C. Venkatachariar v. Panchayappa Chetty, (1926) 13 A I R Mad 250=92 I C 516.

assigned to Bangar and Daga. It appears that Seddon & Co., had granted either sub-leases or prospecting licenses in respect of the bulk of the mauzas acquired by them, but they also had some mauzas in khas possession, especially those in respect of which sub-leases or licenses granted by them had been surrendered. So far as the first two kinds of land are concerned, there can be no doubt that royalty and salami constituted their entire income. It is, however, contended that in regard to the properties which were in khas possession of Seddon & Co., it was open to them to carry on mining operations in them in which case they would yield income other than salamis and royalties. The argument is a plausible one, but on carefully scrutinising the deed of assignment I find it difficult to hold that Seddon & Co. intended to carry on mining operations in any of these properties, because otherwise, there was no meaning in their being included in that deed. The deed deals with a large number of properties some of which had been acquired by Seddon & Co., from landlords other than the plaintiff. The question as to what was the exact number of mauzas which were in khas possession of Seddon & Co., at the date of the assignment has not been investigated by the Court below and there is no direct evidence on the record to show whether or not Seddon & Co., actually intended to carry on mining operations in any of them.

It seems, however, to be clear that the number of properties in their khas possession was negligibly small and the fact that they were included in the deed of assignment shows that they were intended to be dealt with only in such manner as to be capable of yielding income consisting of nothing else but salami and royalty. It was pointed out to us that if we confine our attention to the mauzas in regard to which royalty is claimed in the present suit, it will appear that only two of them, namely Mahal and Shivabardih, were at the date of the assignment in khas possession of Seddon & Co. Seddon & Co., had granted prospecting licenses in respect of these two mauzas also but later on the licenses were surrendered and afterwards defendant 10 as receiver on behalf of Seddon and others surrendered both these mauzas to the plaintiff with the full concurrence of Seddon. It is contended on behalf of defendants 7 and 9 that by the deed of assignment Seddon & Co., did not part with the right of reversion but still retained it. I am however not impressed by this argument. If it is a correct rule of construction that assignment of rents and profits without limitation is sufficient to pass the property which is the source of such rents and profits and if the intention of the document appears to be to pass the property itself, then a deed cast in that form will pass everything including the reversion and no question of reversion remaining in the assignors can arise. It is open to an assignor to frame his document in any form he likes and he may, instead of saying "I convey such and such property," use any other set phraseology which will have the same effect. It was contended on behalf of the appellant that the question of reversion cannot arise in a mining lease, because such a lease is tantamount to a sale of the land or minerals. The better view however seems to be that it is not a mere sale but also partakes of the character of a lease: *see* 59 Cal 1314.[9] In the view however that I have already expressed, it is needless to discuss the matter further. The view which I have expressed is very strongly supported by the manner in which the parties to the deed themselves construed it afterwards. (His Lordship then referred to the evidence on this and proceeded.) It is unnecessary to deal with this question at any length, because it was conceded before us that the deed of assignment cannot be challenged by any of the partners, because all the partners other than Seddon and Rasaraj, be it Kishori, Dakshina or Sasti, entered into the partnership subject to the rights acquired by Bangar and Daga under the contract of July 1920 to which reference has been already made in the statement of fact. In the Court below, as well as in this Court, a large number of arguments were put forward on behalf of defendants 7 to 9 to show that the grounds put forward in paras. 11 (a) of the plaint, that is to say, that Daga and Bangar acquired title to a two annas share in the properties of Seddon & Co., under the compromise decree cannot be accepted. Broadly speaking, these arguments may be divided under three heads: (1) that the decree contains no provision whatsoever giving effect to the deed of assignment, (2) that the construction put upon the decree by the plaintiff is wrong and (3) that the decree is void and did not confer any title upon Daga and Bangar. (His Lordship then dealt with

9. Falakrishna Pal v. Jagannath Marwari, (1932) 19 A I R Cal 775=140 I C 788 = 59 Cal 1314 36 C W N 709=56 C L J 187.

the first two points and proceeded.) The learned Subordinate Judge has accepted almost all the contentions of defendants 7 to 9 against the compromise decree and though I am not disposed to agree with many of his conclusions, I consider it unnecessary to refer to them or give my reasons for differing from them, because being of the view that the deed of assignment had conveyed a 2 annas share in the properties to Bangar and Daga, I consider it unnecessary to deal with the question whether the decree by itself and apart from the deed of assignment would operate to convey such title.

One of the peculiar features of this case is that the Raja has impugned "the surrender" which was brought about by direct negotiations between him and the receiver, and defendants 7 to 9 have impugned the decree which was passed with their consent in their own suit and which they treated as a valid decree up to the stage of execution. In order to impugn these transactions the plaintiff as well as defendants 7 to 9 have come to Court with the common case that Rasaraj, Dakshina and Kishori are still interested in the properties which were in possession of Seddon & Co., at the date of the suit. Seddon and the receiver on the other hand have asserted that these three persons having ceased to be partners long ago are no longer interested in those properties. The account given by Seddon in his written statement is that he purchased the interest of Kishori and Dakshina in the partnership properties on 23rd May 1922 and has paid Rs. 10,000 to them out of the consideration and that Rasaraj retired from the partnership on and from 1st January 1923. The written statement of defendant 10 is silent on the point but in Court he has supported Seddon's statement.

Now, on the evidence as it stands which is somewhat meagre the true position seems to be that Rasaraj, Dakshina and Kishori had retired from the partnership on or about the dates mentioned in Seddon's written statement, but as no formal document has been executed by them giving up their interest in the partnership properties, it has now become a debatable question as to whether in law their interest in the properties has come to an end. However that may be, in the view which I have taken the question is not of much importance. If my interpretation of the deed of assignment is correct, Bangar and Daga acquired a good title to a 2 annas share in the properties in question by virtue of that deed and the title so acquired has been only reaffirmed by the decree.

It appears that the title of Bangar and Daga under the deed of assignment and under the decree is challenged by no one excepting Bangar himself and the sons of Daga. As I have already stated Seddon was a party to the compromise decree in the suit at Asansol and Rasaraj had stated in that suit that he was no longer interested in the partnership properties. In the present suit Seddon accepts the plaintiff's case in toto and the heirs of Dakshina and Kishori have not traversed the statement made in the plaint that Daga and Bangar had acquired a valid title to a two annas share in the properties mentioned in the deed of assignment. Thus, on such materials as are before us, it is difficult to hold that Daga and Bangar have no share in the properties in respect of which royalties are claimed in the suit. The next question to be considered is whether as assignees of a share in the properties, defendants 7 and 9 are liable to pay the royalty claimed in the suit. It has been contended on their behalf that the doctrine of privity of estate on which they are sought to be made liable cannot be invoked in India, but S. 108, T. P. Act, suggests otherwise and the point is concluded by the decision of the Judicial Committee in 20 P L T 147[10] where it has been held that the doctrine of privity of estate is applicable to this country also.

It was also contended on behalf of defendants 7 to 9 that even if the consent decree operated to transfer title, they are not liable to pay royalty, because the estate being in the hands of the receiver they were never in direct possession of it and because the compromise decree in so far as it relates to a two annas interest in the properties is incapable of execution nor can they under that decree obtain khas possession of any part of the property. The argument, however does not take note of the fact that for the application of the doctrine of privity of estate all that is necessary to be found is whether possessory title has passed or not and the question whether possession has been taken is immaterial. The mere fact that Bangar and Daga did not take any effective step to obtain possession from the receiver or to realise their share in the pro-

10. Ramkinkar Banerjee v. Satya Charan, (1939) 26 A I R P C 14 = 179 I C 328=66 I A 50= I L R (1939) 1 Cal 283=20 P L T 147=I L R (1939) Kar 78 (P C).

fits of the estate from him is not sufficient to defeat the landlord's right to realise royalty from them. That actual possession is not necessary in such a case is established by the decision of the Judicial Committee in 20 P L T 147.[10] The next point to be considered is whether defendants 7 and 9 are liable jointly and severally with the other defendants to pay the whole royalty or they are liable to pay it only in proportion to their share in the properties. The law as to the liability of an assignee of a part of a demised premises has been stated thus by Foa in his book on the Law of Landlord and Tenant.

Whether an assignment by the lessee of his whole interest in part of the demised premises (an act by which he is said to "sever" the term) creates a privity of estate between the lessor and assignee in respect of the whole land has been said to be doubtful (1834-40) 1 Bing (N C) 756.[11] But such an assignment will at all events render the assignee liable for rent (1662-97) 2 Lev 231[12] and upon the covenants of the lease which can be apportioned e. g. the covenant to repair (1625-41) Cro Car 221[13] in proportion to the share it conveys to him; and it has now been laid down (in Ireland) as "well-settled law" that the assignee is liable in so far, and in so far only as the covenants affect the lands in his possession, and as regards rent only for an apportioned part of the rent properly chargeable in respect of the lands actually vested in him: (1914) 2 Ir R 411.[14] Where however the share of demised premises is not held by the assignee in severality, as where they become vested in joint tenants or tenants in common, the case is different, because he with the others, holds the whole estate, and privity in respect of it exists accordingly between him and the lessor. Consequently, where a lease became vested by assignment in two tenants in common, it was held that either of them was liable to the lessor for the full amount of damages found to be due for breaches of the covenant to repair (1923) 1 K B 469.[15] *And the same principle probably applies to rent.*

The italicized words in the above passage will show that there is no direct authority on the question even in England. In (1923) 1 K B 469[15] which is the latest case on the subject, Greer J. recognized that the question was one of some difficulty and he also stated that the case had been argued before him on the assumption that

in English law, whatever may be the case in Ireland a tenant-in-common was not liable for the whole rent, but only for a proportionate part.

He was, however, of the opinion that the question was not definitely concluded by any decision of the English Courts and after examining the cases on which the old view was based he observed as follows :

It seems to me on the authorities that it has never been conclusively established that an assignee holding with other tenants under the terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased, though it is only a partial interest; his estate extends over the whole of the land leased; and I see no valid reason why tenants in common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants-in-common has the privity of estate with the landlord in the whole of the land leased.

The learned Judge then pointed out that the case before him was not a case of rent, but was an action to recover damages for breach of covenant to repair the leased property and so he concluded as follows :

However this may be, even if tenants-in common are only liable for the duly apportioned part of the rent, it by no means follows that they are only liable for an apportioned part of the damage for breach of covenant to repair. It seems clear that before the breach the obligation of each of them is of necessity an obligation to repair the whole estate. This in itself is not divisible.

Thus, strictly speaking the above case does not decide that the assignee of a share in a demised premises is liable for the whole rent, but in view of the observations of Greer J. it has been held in several cases in India that such an assignee may be sued for the whole rent : *see* 38 Mad 86;[16] A I R 1927 Mad 931;[17] 53 Cal 197[18] and 11 Lah 427.[19] The English authors are also inclined to take the same view now. Now, if the matter was not covered by authorities and I was free to express my own opinion untrammelled by the decisions to which I have referred, I would be inclined to the view that the assignee of a part of demised premises in a case like the present is liable only for proportionate rent. The doctrine of privity of estate is a somewhat technical doctrine and apart from it one might find it difficult to discriminate on general principles between an assignment by a lessee of his whole interest in part of the demised premises (severance of terms) and an assignment by him of a share only in the whole of the demised premises. The landlord in each case is entitled to ignore the assign-

11. Curtis v. Spitty, (1834-40) 1 Bing (N C) 756.
12. Gamon v. Vernon, (1662-97) 2 Lev 231.
13. Congham v. King, (1625-41) Cro Car 221.
14. Dooner v. Odlum, (1914) 2 Ir R 411.
15. United Dairies Ltd. v. Public Trustee, (1923) 1 K B 469=62 L J K B 326=128 L T 768 = 39 T L R 125 = 67 S J 199.
16. Kunnisow v. Parkum Mulloli Chathu, (1916) 3 A I R Mad 768=17 I C 933=38 Mad 86 = 23 M L J 695.
17. Musafkanni Ravuthar v. Doraisingham, (1927) 14 A I R Mad 931=105 I C 179=54 M L J 30.
18. Jagan Mohan v. Brojendra Kumar, (1925) 12 A I R Cal 1056=90 I C 211=53 Cal 197 = 42 C L J 232=29 C W N 1000 (F B).
19. Moti Lal v. Kartar Singh, (1930) 17 A I R Lah 515=127 I C 1= 11 Lah 427=31 P L R 644 (F B).

ment and sue the assignor alone for the whole rent on the ground of privity of contract. If however, he does not desire to ignore the assignment and wants to make both the assignor and the assignee liable, it is only fair that he should be required to give the assignment which is the basis of the assignee's liability its full effect and realize rent which is a divisible claim in proportion to the shares held by the assignor and the assignee. The question, however, as was observed by Greer J. is a difficult one and as at present advised I am not prepared to dissent from the prevailing view.

There is only one other question which I wish to deal with before I proceed to consider what should be the form of the decree in this case. Defendant 10 has now been replaced by two other receivers who, after the argument for the appellant had been nearly concluded filed an application asking us to hold that the appeal is not properly constituted inasmuch as all the heirs of the deceased plaintiff have not been made parties and that no new decree can be passed in the absence of these heirs. It is common ground that the deceased plaintiff was the owner of an impartible estate and on his death the impartible estate has now devolved on his eldest son, the present appellant. It is stated on behalf of the new receivers that the deceased Raja has left several other heirs and they are necessary parties to the appeal, inasmuch as the royalties for which the suit has been brought were under the law not part of the impartible estate but were the personal property of the deceased plaintiff.

Now, it appears that after the death of the late Raja the present appellant made an application for being substituted for him in this appeal on the allegation that he was the legal representative of the deceased appellant. Notice of this application was served on all the respondents including defendant 10 who has been succeeded by the new receivers as well as defendants 7 to 9, but as none of them objected to the appellant's petition, he was duly substituted in the place of his deceased father. It appears to me therefore that so far as the present proceedings are concerned, the question cannot be re-opened and it must be deemed to have been constructively decided that the appellant is the legal representative of his deceased father and is entitled to prosecute the appeal in this capacity. If the old receiver could not raise the present objection, I do not see how the present receivers can do so. None of the alleged heirs of the Raja has appeared in this Court to oppose the appellant's petition or applied before us to be substituted in place of the deceased Raja nor have we any materials before us which would justify the view that so far as the present appeal is concerned, the present appellant who is admittedly the seniormost member of a Hindu family cannot represent the other members of the family. In these circumstances I am not inclined to entertain the objection at this late stage of the case. The question however as to what will be the rights *inter se* of the present appellants and the other heirs of the Raja is one which need not be decided in this Court, as it is always open to any party who claims to be interested in the royalties to claim his share from the appellant in a duly constituted suit, if necessary.

The only point which remains to be decided is what should be the form of the decree to be passed in this appeal. As it has been held by me that the plaintiff cannot recover royalty for the surrendered villages in this suit, the decision of the Court below must stand so far as the amount decreed is concerned and it must also stand with regard to defendants other than defendants 7 and 9, those defendants not having appealed against the decree of the trial Court. As to defendants 7 and 9 I should have in view of my findings granted a decree against them in the same terms as are to be found in the decree granted by the trial Court against defendants 1 to 6, but in my opinion in the circumstances disclosed in the evidence, it will not be just to pass such a decree against them. It was not disputed before us that defendant 9 and the father of defendant 7, Kedar Nath Daga, had advanced very large sums of money to Seddon & Co. and the money has still remained unpaid. In the deed of assignment there was an express clause that the royalty would be paid to the landlord by Seddon & Co. who were to be in possession of and manage the whole property including the share assigned by them. Under the compromise decree also, defendant 9 or Kedar Nath Daga did not get khas possession of the two annas share in the properties of Seddon & Co. Paras. 4 to 6 of the terms of settlement which have been incorporated in the decree contain provisions as to how the decretal money was to be paid and how the interests of defendant 9 and Daga were to be safeguarded, but it is common ground that no receiver, as contemplated in the

decree, has yet been appointed and the property still continues to be in possession of the receiver appointed in Sasti's suit. Whether technically the possession of the receiver is possession on behalf of all the parties interested or not, there is no doubt that he is the person who is in *de facto* possession of the entire estate. It is also clearly established that the whole property was in the possession of the receiver during the years for which royalty is claimed and defendants 7 and 9 never dealt with the property in any way. It is also not disputed that the royalty has been made the first charge on the demised premises under the lease granted by the plaintiff to Seddon & Co. though it is true that the plaintiff has his option under the law not to enforce the charge.

In these circumstances it seems fair and equitable that the decree passed against defendants 7 and 9 should be subject to this condition that before proceeding against them the appellant should in the first instance try to recover the amount decreed from the receivers who have succeeded defendant 10. The receivers will not be personally liable, but they shall pay the decretal amount out of the assets of Seddon & Co. In case the whole or any part of the amount decreed cannot be realized from the receivers the appellant will be entitled to realize such amount from defendants 7 and 9, but defendant 7 will be liable only to the extent of the assets of his deceased father. I should like to state that the learned advocate for the appellant had no objection to a decree being passed in these terms as against defendants 7 and 9. As the decree of the Court below stands the appellant will be at liberty to proceed against defendants 1 to 6 at once. If however the appellant chooses not to proceed against them, but to proceed against defendants 7 and 9, he must adopt the procedure indicated above and if he does so, these defendants will not be heard to say that the appellant must first proceed against defendants 1 to 6.

The appeal is accordingly allowed in part as against defendants 7 and 9 who are respondents 7 and 9 and it is dismissed as against the other respondents. As the appeal fails against the receiver-respondents, the latter will be entitled to their costs in this appeal, hearing fee being fixed at 50 gold mohurs. There will however be no order as to costs as between the appellant and the other respondents. We make no order for costs as against respondents 7 and 9 because the success is divided. The appellant did not press his appeal as against respondent 8 and there was little or no contest on behalf of the other respondents and so we make no order for costs so far as they are concerned.

Chatterji J. — (After stating the facts, his Lordship proceeded.) Before dealing with the merits of the appeal I should dispose of the preliminary objection of the new receivers. Their contention is that although the estate within which the disputed villages lie is an impartible estate which on the death of the original appellant devolved on his eldest son the present appellant, the royalties for which the suit was brought were under the law not part of the impartible estate but were the personal property of the deceased proprietor and as such devolved after his death on his heirs under the ordinary law of inheritance. The appellant's answer to this is that the application for substitution which was made by him was based on the allegation that he was the legal representative of the deceased appellant and notice of that application having been served on the respondents including the late receiver, substitution was made without any objection, and therefore it was not open to the present receivers who merely stepped into the shoes of the old receiver to challenge the order of substitution which was binding on the latter. In my view this contention of the appellant must be accepted. When in a suit or an appeal any party dies the question as to who is his legal representative must be decided by the Court and its decision must be binding on the parties. O. 22, R. 5, Civil P. C., provides for the decision of such question, and the fact that an order passed under that rule is not appealable shows that the decision is of a summary character and for the purpose of the suit or appeal the person who is substituted in place of the deceased party shall be deemed to be his legal representative. It cannot be disputed that an ex parte order is as much binding on the parties as a contested order. The preliminary objection must therefore be overruled.

Sir Manmatha Nath Mukharji on behalf of the appellant did not challenge the finding of the learned Subordinate Judge with regard to adoption of defendant 8 nor did he advance any argument on the question of limitation. Upon the arguments advanced by the learned advocates on both sides the broad points that emerge for considera-

tion are these: (1) Is the suit bad for want of notice under S. 80, Civil P. C., on the receiver? (2) Are the surrenders of villages mentioned in Schs. 3 and 4 of the plaint void and inoperative? Is the plaintiff entitled to claim any royalty for those villages? (3) Whether the deed of assignment dated 31st March 1921 conveyed merely a two annas share of the salamies and royalties or a two annas share in the leasehold properties. (4) (a) Did the compromise decree in Suit No. 238 of 1922 of the Asansol Court declare the title of Kedar Nath Daga and Mugniram Bangur only to two annas share of royalties and salamis or to two annas share of the leasehold properties? (b) Is the decree void and ineffective? (c) Did the decree have the effect of assigning to Kedar Nath Daga and Mugniram Bangur two annas share of the leasehold properties? (5) Are defendants 7 and 9 liable for the plaintiff's claim by reason of privity of estate? (6) Assuming that defendants 7 and 9 are liable by privity of estate, are they liable for two annas or the entire 16 annas of the claim?

Point (1).—S. 80, Civil P. C., provides:

> No suit shall be instituted against . . . . a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been . . . . delivered to him.

It need not be disputed that a receiver appointed in a suit is a public officer within the meaning of the Section; but the question is whether the present suit is in respect of any act purporting to be done by the receiver in his official capacity. This is a suit for royalty of lands in the possession of the receiver. Non-payment of the royalty cannot be said to be an official act done by the receiver. So far as the surrenders are concerned, they were the result of individual contract between the receiver and the plaintiff and cannot be regarded as the official act of the receiver. S. 80 therefore in my opinion has no application. Besides, the receiver, not having appealed against the decree passed against him, cannot raise the objection which, if valid, would bar the whole suit as against him.

Point (2). — The leases in respect of which royalty is claimed were granted to, (1) Henry Seddon, (2) Rasaraj Biswas, (3) Dakshina Prasad Bhattacharya and (4) Kishori Mohan Sarkar who constituted the firm of Seddon & Co. The partnership was started on 1st August 1915 but without any formal deed. The first deed of partnership (Ex. A) was executed on 3rd November 1920 by Seddon and Rasaraj each of whom was stated therein to have 8 annas share. On 12th November 1920 another deed of partnership (Ex. 4) was executed by Seddon, Rasaraj, Dakshina and Kishori accepting the terms and conditions of the earlier partnership deed (Ex. A). In this second deed (Ex. 4), the shares of the four partners were stated as follows:

Seddon	...	...	8 annas.
Rasaraj	...	...	6 annas.
Dakshina	...	...	1 anna.
Kishori	...	...	1 anna.

It appears that sometime before 25th October 1922, Rasaraj, Dakshina and Kishori wanted to retire from the partnership provided they were paid their dues. On 25th October 1922 Seddon agreed to take three other persons, namely, Sasti Kinkar Banerji, Ram Ratan Mahata, and T. S. Gibson as partners in the firm of Seddon & Co., on condition of Sasti Kinkar agreeing to pay Rasaraj, Dakshina and Kishori the balance of their dues: *vide* letter Ex. A H I. The shares of all these new partners were stated to be as follows:

Seddon	...	...	7 annas, 6 pies.
S. K. Banerji	...	...	6 annas.
Ramratan	...	...	1 anna, 6 pies.
T. S. Gibson	...	...	1 anna.

Though no deed of partnership is forthcoming it is common ground that these four persons did form a new partnership. On 23rd March 1923, Sasti Kinkar Banerji brought a suit (No. 908 of 1923) on the Original Side of the Calcutta High Court against the other three partners, Seddon, Gibson and Ramratan for dissolution of partnership and accounts: *vide* plaint Ex. A-H. In this suit a preliminary decree (Ex. 27) was passed by consent of the parties on 10th April 1923 and by the terms of the decree itself five persons, namely, (1) Kedar Nath Daga, (2) Mugniram Bangur, (3) Satis Chandra Sen, (4) Rai Bahadur Sukh Lal Karnani and (5) Kissen Gopal Dagree were appointed joint receivers of the properties of Seddon & Co. Subsequently, by an order (Ex. 27-a) dated 13th June 1923 made with the consent of both parties, Mr. Satish Chandra Sen alone was appointed receiver with the same powers and under the same conditions as were mentioned in the decree (Ex. 27). By cl. 4 of the decree the receivers were authorized to sell, mortgage or lease out the partnership properties including the properties taken up from S. Banerji or any portion thereof for the payment of liabi-

lities of the firm including the debts of S. Banerji. It is not disputed that the receiver Mr. Satis Chandra Sen (defendant 10) came into possession of the entire properties of Seddon & Co., including the leasehold interests in the villages in question. The royalty payable to the plaintiff for these villages fell into arrears regarding which there was some correspondence between the plaintiff through his manager or legal advisers and the receiver. Eventually there was an agreement (Ex. L) dated 22nd January 1925 between the plaintiff and the receiver by which it was agreed among other things that the plaintiff would accept surrenders of such villages as Messrs. Seddon & Co. would choose by the end of March 1925. It was also stated in that agreement that Seddon & Co. had till that date paid to the plaintiff rupees one lakh on account of advance royalty. In pursuance of this agreement the receiver by his letter (Ex. 7) dated 29th March 1925 surrendered 11 villages. This surrender was accepted by the plaintiff by his manager's letter (Ex. 8) dated 27th June 1925 with regard to the nine villages mentioned in sch. 3 of the plaint.

As regards the other two villages the plaintiff declined to accept the surrender as there were some other cosharers with Seddon & Co., who did not join in the surrender. Again by a letter (Ex. 7-a) dated 27th July 1925 the receiver gave notice of his intention to surrender the six villages mentioned in sch. 4 of the plaint with effect from 31st January 1926, such notice being provided for in the mining leases dated 18th December 1919 relating to those villages. This surrender was accepted by the plaintiff by his manager's letter (Ex. 8-a) dated 8th August 1925. There can therefore be no doubt that the plaintiff willingly accepted surrender of the 15 villages mentioned in schs. 3 and 4 of the plaint. His case in the plaint was that he was induced to enter into the agreement (Ex. L) dated 22nd January 1925 and then to accept the surrenders on account of misrepresentation and suppression of facts made by the receiver. The learned Subordinate Judge after carefully considering the evidence came to the conclusion that there was no misrepresentation or suppression of facts and the plaintiff entered into the agreement and accepted the surrenders with his eyes open. In appeal Sir Manmatha Nath Mukharji frankly conceded that on the evidence on the record it would be difficult to hold that there was any misrepresentation by the receiver. He however argued that in point of law the surrenders were void because, in the first place the surrenders were effected without the sanction of the Court. In the second place, the receiver had no authority to surrender the 2 annas share which belonged to Kedar Nath Daga and Mugniram Bangur by virtue of assignment and did not form the subject-matter of the Suit No. 908 of 1923 of the Calcutta High Court. In the third place, both the contracting parties, namely the plaintiff and the receiver, were not at the time of surrender aware of the fact that 2 annas share of the leasehold properties had been assigned to Kedar Nath Daga and Mugniram Bangur, and that the receiver was appointed in respect of 14 annas share and not the entire 16 annas of the properties, and thus the surrenders were vitiated by mutual mistake.

As regards the first ground, namely that the receiver did not obtain the sanction of the Calcutta High Court for the surrenders, it is not disputed that in fact no such sanction was obtained. It was, however, contended on behalf of the receiver that the powers conferred by the consent decree (Ex. 27) dated 10th April 1923 were wide enough to authorize the surrenders. Clause 4 of the decree authorized the receiver to sell, mortgage or lease out the partnership properties for the payment of liabilities of the firm. It would be unreasonable to hold that the power to sell, mortgage or lease included the power to surrender. It was next contended that by the decree the receiver was entrusted with the winding up of the business and therefore he was clothed with the power to deal with partnership properties in whatever way he thought proper without any reference to the Court. It is impossible to accept this contention because in that case the receiver would be taking upon himself the entire function of the Court itself. An attempt was made to show that the surrenders were effected for the benefit of the estate. But evidence on the point, in my opinion, is neither satisfactory nor sufficient to enable us to come to any definite conclusion one way or the other. The only thing that was pointed out to us is that the surrendered villages were not in the possession of any sub-lessees and the receiver was not deriving any income therefrom whereas he was incurring a recurring liability for the annual royalty. There is however nothing

to show that the receiver made any attempts to lease out the villages or otherwise work the mines. If those villages were really so unprofitable, the plaintiff who was always acting under the advice of his manager or lawyers would not have readily agreed to accept the surrenders. Under these circumstances it must be held that the receiver had no authority express or implied from the Court to effect the surrenders.

The question then arises whether on that ground the plaintiff can impugn the surrenders as void. It is no doubt true on general principles that a receiver cannot effectively deal with the properties in his possession without the sanction of the Court that appointed him. Where he deals with any property without the sanction of the Court his transaction may be impugned by the party affected thereby and he may be held accountable if he has thereby caused any loss to such party. The object of the Court's sanction to any transaction by a receiver is to ensure that the interest of the parties whose properties the receiver is entrusted to deal with are properly protected. It is difficult to see how a third party who has himself with his eyes open entered into a transaction with the receiver can challenge it merely on the ground that it was not sanctioned by the Court. In the present case the plaintiff was the lessor and the receiver was in possession of the leased properties. The plaintiff himself in his evidence admits :

> After Mr. Sen was appointed receiver I used to get my royalty due from Seddon & Co., from Mr. Sen. I used to get the whole sixteen annas of the royalty when they were paid.

He also says that he accepted the surrenders in the belief that the entire sixteen annas was being surrendered. It is not his case that after the surrender he was not in a position to deal with the surrendered villages. His employee, P. W. 3, says: "I did not make any demand of royalty for these nine mouzas after this under the orders of the manager." Then again in answer to the question

> Can you deny that after 1925 you never made any demand prior to this suit in respect of the above nine mouzas beside six others of Sandmara groups?

he said, "No I cannot deny this." The plaintiff's case is that the receiver did not deliver to him actual physical possession of the surrendered villages. But nowhere in the correspondence that passed between him and the receiver subsequent to the surrenders was any complaint made about non-delivery of possession. It is significant that by the letter (Ex. O-4) dated 17th September 1927, the plaintiff proposed to the receiver that the latter might surrender the remaining villages that were held in khas (except one) in which case the plaintiff would forgo the royalties due to him in respect of those villages. P. W. 3 says: "The 9 mouzas given in istafa are in the khas possession of the Raja." The evidence thus leaves no room for doubt that the surrenders were acted upon and the receiver had nothing to do with the surrendered villages after the surrenders. So far as he and the plaintiff are concerned, the surrenders were complete and effective.

As regards the second ground, namely that two annas share of the leasehold properties belonged to Kedar Nath Daga and Mugniram Bangur and was not the subject matter of the Suit (No. 908 of 1923) of the Calcutta High Court, it is enough to state that the receiver did in fact surrender the entire sixteen annas and the plaintiffs also accepted the surrenders in that belief. If Kedar Nath Daga and Mugniram Bangur had two annas share in the leasehold properties their right would no doubt remain unaffected by the surrenders. But so long as the receiver was in possession of the entire sixteen annas—and it cannot be disputed that he was—they could not interfere with his possession. Even after the surrenders they are not said to have interfered with the plaintiff's possession. Different considerations may arise if and when these persons assert their rights to the two annas share in any of the surrendered villages. But in the present suit defendants 7 to 9 accept the surrenders as valid and binding. The plaintiff therefore cannot complain that the surrenders are bad because defendants 7 to 9 have two annas share in the surrendered villages.

As regards the third ground, namely that the surrenders were vitiated by mistake, it should be observed that no such case was made out either in the plaint or at the hearing before the trial Court. Mutual mistake such as would render a contract void within the meaning of S. 20, Contract Act, depends upon facts which must be pleaded and proved. Sir Manmatha Nath Mukharji, however contended that though mutual mistake was not pleaded, the evidence disclosed that both the plaintiff and the receiver were at the time of the surrenders not aware of the existence of the compromise decree in the Asansol Suit (No. 238 of 1922)

or of the fact that two annas share of the leasehold properties had been assigned to Kedar Nath Daga and Mugniram Bangur. Even assuming that that was so, that would not have affected the surrenders because unquestionably the receiver was in possession of the entire sixteen annas and what was in his possession was surrendered to the plaintiff. S. 20, Contract Act, therefore will have no application. For the aforesaid reasons it must be held that the surrenders are not void and inoperative and are binding on the plaintiff and he is not entitled to claim any royalty for the surrendered villages.

Point 3. — According to the appellant the deed of assignment, Ex. 5 conveyed a two annas share in the leasehold properties specified therein. The respondents' contention, on the other hand, is that what was assigned by the deed was merely a two annas share of the salamis and royalties derivable from the leasehold properties. The question has to be decided with reference to the intention of the parties to be gathered from the deed itself. There are three schedules annexed to the deed. Sch. 1 which consists of four parts sets out in parts 1 and 3 respectively the mining leases and the prospecting licences which the assignors (Seddon & Co.) had obtained, and in parts 2 and 4 the villages to which those leases and licenses respectively relate. Sch. 2 which consists of five parts sets out, in part 1 the leases granted by the assignors, in part 2 the villages to which those leases relate, in part 3 the prospecting licences granted by them, in part 4 the villages to which those licences relate, and in part 5 certain villages in respect of which they had agreed to grant mining leases to the persons and firms mentioned therein. Sch. 3 specifies the royalties and salamis payable for the mining leases and prospecting licenses referred to in sch. 2. To understand the full import of the deed it is necessary to reproduce it (omitting the unnecessary portions) as follows :

Whereas by an indenture of even date with these presents and made between the assignors (therein described as mortgagors) of the one part and the assignees (therein described as mortgagees) of the other part a seven-eighths or fourteen annas share of and in the salamies and royalties now due and payable or hereafter to become due and payable to the assignors under or in respect of or by virtue of all or any of the mining leases and prospecting licences specified in parts 1 and 3 and the mining leases of the mouzas described in part 5 of sch. 2 hereunder written after making the deductions therein referred to was mortgaged and charged to the assignees (subject as therein mentioned) as security for the repayment of the principal sum of Rs. 10,00,000 with interest and other sums as therein mentioned and whereas as part of the consideration for the said mortgage it was agreed :

1. That the assignors shall transfer and assign to the assignees for their own use and benefit absolutely a one-eighth or two annas share of all moneys after the date hereof to be received by or to become payable to the assignors as salami in respect of any of the mining leases or prospecting licenses specified in parts 1 and 3 of sch. 2 hereto or the mining leases agreed to be granted of the mouzas described in part 5 of the said sch. 2 and in respect of any mining leases hereafter to be granted by the assignors in pursuance of any of such prospecting licenses after deducting from such salami moneys the following sums namely : (a) A sum equal to fifteen per cent. of the said salami moneys : (b) the sum or sums payable as salami by the assignors to their superior landlords under the leases or licenses specified in parts 1 and 3 of sch. 1 hereto or otherwise.

2. That the assignors shall assign to the assignees for their own use and benefit absolutely a one-eighth or two annas share of and in all royalties reserved by the mining leases specified in part 1 of sch. 2 hereunder written or relating to the mouzas described in part 5 of sch. 2 and by any mining lease hereinafter to be granted by the assignors to any person or persons in pursuance of any prospecting licence specified in part 3 of the said sch. 2 after payment thereout of the royalties payable by the assignors to their superior landlords and to surface owners and occupiers. Now this indenture witnesseth that in pursuance of the said agreement and for the purpose of carrying the same into effect, the assignors do hereby assign, transfer, set over and assure unto the assignees all that one-eighth or two annas share of in and all and singular the salamies and royalties now due and payable or hereafter to become due and payable to the assignors under or in respect of or by virtue of all or any of the mining leases and prospecting licenses specified in parts 1 and 3 and the minlng leases of the mouzas described in part 5 of sch. 2 hereto after deducting therefrom in the case of the salamies and sum equal to 15 per cent. thereof and also the salamies payable to the superior landlords of the assignors and in the case of the royalties and royalties payable to the superior landlords of the assignors and to surface owners and occupiers and which said mining leases and prospecting licenses affect all or part of the mines, veins, seams and beds of coal situate lying and being under the lands set out and described in parts 2, 4 and 5 of sch. 2 hereunder written and which are comprised and in and demised or granted by these verbal pattas and prospecting licenses specified in parts 1 and 2 of sch. 1 hereunder written and all the estate right, title, interest, claim and demand whatsoever of the assignors into, of or upon the said one-eighth or two annas share to have and to hold the said share into the assignees absolutely and the assignors do hereby covenant with the assignees that . . . the assignees shall and may at all times hereafter peaceably and quietly enjoy and receive the said share of the said salamies and royalties hereby assigned or intended so to be without any let, stay, eviction, interruption, claim or demand whatsoever from or by the assignors or any person or persons lawfully or equit-

ably claiming or to claim or under or in trust for them or either of them and that free from all incumbrances whatsoever made or suffered by the assignors or any person or persons lawfully or equitably claiming as aforesaid. And further that the assignors and all persons lawfully or equitably claiming any estate or interest in the said share of the said salamies and royalties hereby assigned or intended so to be or any part thereof from under or in trust for the assignors shall or will from time to time and at all times hereafter at the request and costs of the assignees do or execute or cause to be done and executed such acts, deeds, matters and things whatsoever for further better and more perfectly assuring the said share of the said salamies and royalties hereby assigned or intended so to be and every part thereof unto the assignees in manner aforesaid as shall or may be reasonably required and the assignors hereby further covenant with the assignees that they will from time to time and at all times hereafter upon the request of the assignees in writing deliver or cause to be delivered to the assignees a full detailed account of all salamies and royalties payable in respect of any lease hereinbefore referred to or in respect of any lease or other document hereafter executed in pursuance of any prospecting license or agreement hereinbefore referred to and will verify and prove the correctness of the same in such reasonable manner as the assignees shall require and immediately upon any such lease as aforesaid being hereafter executed will inform the assignees thereof and will at the request and cost of the assignees supply them with a certified copy of the same.

From these provisions it is clear that subject to certain deductions the salamies and royalties were assigned absolutely to the assignees and the assignors reserved to themselves no right to the income of the leasehold properties except only 15 per cent. of the salamies payable in respect of the leases and licenses specified in sch. 2. The royalties which form the recurring income of the leasehold properties are to be enjoyed at all times absolutely and entirely by the assignees subject of course to the payment of the royalties to the superior landlord which form a first charge. The salamies represent the price agreed to be paid once for all to the assignors for the leases and licenses granted by them and might at their option have been reserved to them while assigning their rights. The price so payable formed no part of the recurring income of the properties and the fact that 15 per cent. thereof was reserved to the assignors does not make the assignment any the less operative as an assignment of the entire income. Looking to the terms of the document, it seems to me that it was intended to operate as an absolute assignment of the entire income of the leasehold properties. That being so, the inference is legitimate that the leasehold properties themselves were intended to be assigned.

It is an accepted rule of construction that an absolute grant of the income of an estate passes the estate itself. In (1852) 42 E R 1075[3] it was held that "a devise of the rents and profits of real estate carries with it the property in the land." In (1872) 14 Eq 456[1] where the same principle was laid down, Malins, V. C. said :

> There is no distinction whatever between giving the income of the land and of the rents and profits of the land. The income means rents and profits and the rents and profits mean the income; they are convertible terms.

In 11 Cal 684[5] their Lordships of the Judicial Committee observed :

> If the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it.

In 2 A L J 568[7] it was held that gift of rents and profits is equivalent to gift of property. In 68 I C 631[6] it was held that "A gift of the income of a property without any limitation is a gift of the property itself." No doubt all these cases relate to devises by wills, but I do not understand why on principle there should be a different rule of interpretation with regard to transfers *inter vivos*. In 92 I C 516[8] which was not a case of devise by will, it was held that a grant of the income of certain property without limitation is a grant of the property itself. Mr. Das drew our attention to S. 172, Succession Act, which runs thus :

> Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interest, shall belong to the legatee.

And Illus. (iii) to the Section says "*A* bequeaths to *B* the rents of his lands at *X*. *B* is entitled to the lands." It was urged that this Section specifically provides for the above rule of interpretation with regard to bequests whereas there is no such provision in the Transfer of Property Act. But in the Succession Act there are various provisions including an entire chapter (Chapter 6) regarding the construction of wills, while there are no corresponding provisions in the Transfer of Property Act. Nor does the latter Act prescribe what particular words are necessary to constitute a transfer. S. 8 of the Act to which Mr. Das referred in contrast to S. 172, Succession Act, lays down that

> a transfer of property passes forthwith to the transferee all the interest which the transferor is thus capable of passing in the property and in the legal incidents thereof.

Such incidents are enumerated in the Section and include, "where the property is

land . . . the rents and profits thereof accruing after the transfer," and "where the property is money or other property yielding income the interest or income thereof accruing after the transfer takes effect." With reference to these provisions in the Section it was argued that assignment of land carries with it the rents and profits thereof but not vice versa. The object of these provisions however is to clarify what are the legal incidents of each particular class of property which pass along with the property when it is transferred. The Section is not intended to lay down any rule as to what words are necessary to effect a transfer of any particular kind of property. What property is actually conveyed by a particular deed depends upon its own terms. Of course it may be asked why, if by the deed (Ex. 5) the assignors really intended to convey the leasehold properties and not merely the salamis and royalties, they did not say so in clear terms. But we have to construe the deed as a whole and if the intention to be gathered from it appears to be that the leasehold properties were assigned full effect must be given to it.

It is important to bear in mind that the properties dealt with by the deed of assignment are coal mining leases. The characteristic of such leases is that the corpus is gradually destroyed in the process of extraction of coal which fetches the income. If the income of such property is assigned absolutely and for ever nothing is left to the assignor. The property itself passes to the assignee. As I have already shown, the deed (Ex. 5) purports to assign the income of the leasehold properties in question absolutely and for ever. The deed also contains various clauses providing for quiet enjoyment which are appropriate to an assignment of real property. Then it appears from part III of sch. 2 in the deed that certain prospecting licences are included in it, though they were already surrendered or option had expired. (See items 4, 7, 9-a, 9-b, 14 and 16.) Part IV of the same schedule includes the corresponding villages. The inclusion of these villages would be meaningless if merely the salamis and royalties were intended to be assigned.

On the contrary there are certain passages in the deed which were relied upon by Mr. Das in support of his contention that nothing more than salamis and royalties was assigned. In the first place he relied upon the expression "all moneys" occurring in cl. 1 of the deed quoted above. But it is to be noticed that this expression is used with reference to the salamis only and not to the royalties. As I have already pointed out, the salamis were not recurring income but certain specified amounts payable once for all as part of the consideration for the leases and licences. In the second place Mr. Das relied upon those passages in cls. 1 and 2 of the deed quoted above which provide that the assignors were to grant the leases in pursuance of the prospecting licences or agreements referred to in parts III and V of sch. 2. But the contracts having been already entered into by the assignors, it was by mutual consent provided that they should execute the deeds necessary to complete the contracts. In the next place Mr. Das referred to the concluding portion of the deed quoted above which provides that the assignors would furnish the assignees with a full detailed account of the salamis and royalties payable. The assignment being in respect of two annas share only, it was covenanted that the assignors who had the remaining 14 annas would at the request of the assignees deliver to them a full detailed account.

Though some of the provisions in the document present some difficulty the general tenor to my mind indicates that the intention was to convey the leasehold properties and not merely the salamis and royalties. That this was the intention is also supported by the subsequent conduct of the parties to the deed themselves. In 1922 the assignees brought a suit (No. 238 of 1922) against the assignors in the Court of the Subordinate Judge at Asansole for declaration of their (the assignees') title to the two annas share of the properties mentioned in the deed of assignment and to all salamis, rents, royalties and profits arising and issuing therefrom (*vide* plaint Ex. AF). The title thus claimed was based on the deed of assignment. The suit was compromised and a compromise decree (Ex. 20 (b)) was passed on 3rd July 1923 on the following among other terms :

> That the plaintiffs' title to the two annas share of the properties mentioned in the indenture of assignment dated 31st March 1921 and to all salamis, rents, royalties and profits arising or issuing therefrom be declared.

Some controversy has been raised with regard to this part of the decree but, as I shall show later, there can be no doubt that this term was incorporated in the decree and it clearly means that the plaintiff's title was declared not merely to two annas share of the salamis and royalties but to

two annas share of the leasehold properties. It is hardly conceivable that if by the indenture of assignment merely a two annas share of the salamis and royalties had been conveyed Seddon would by the compromise confess that he had parted with two annas share in the leasehold properties. The fact seems to be that both parties knew that by the indenture of assignment two annas share of the leasehold properties and not merely of the salamis and the royalties had already been conveyed. Then on 8th October 1923 Seddon executed a mortgage (Ex. 1) in favour of Kedar Nath Daga in respect of other properties in which Seddon admitted that two annas share of the properties, meaning with reference to the context the leasehold properties, had been conveyed by the indenture of assignment. This also shows that the parties understood that what was conveyed by the deed of assignment was not merely a two annas share of the salamis and royalties but of the leasehold properties. I am therefore of opinion that the deed of assignment conveyed a two annas share of the leasehold properties and not merely of the salamis and royalties. (His Lordship then dealt with point 4 (a) and held that the decree did declare the plaintiffs' title to the two annas share of the properties mentioned in the indenture of assignment dated 31st March 1921 and proceeded.)

Point 4 (b). — The learned Subordinate Judge, accepting the contention of the respondents, has held that the compromise decree is void because the compromise was opposed to public policy. The argument is that the effect of the compromise was to interfere with the authority of the receiver to deal with the properties covered by the compromise. Defendant 10 was appointed the sole receiver on 13th June 1923 and the compromise decree was passed later on 3rd July 1923. Seddon who entered into the compromise on behalf of Seddon & Co. was a party to the suit in which the receiver was appointed and the receiver was in possession of all the properties of Seddon & Co. It is no doubt true that the appointment of a receiver operates as an injunction upon the parties not to interfere with the rights conferred on him by the Court. If any party deals with any of the properties in the possession of the receiver the transaction will not be binding on the receiver nor can his possession be interfered with. From this it does not follow that the transaction is void as being opposed to public policy. The position here however is quite different. In the first place, the compromise in question did no more than affirm the title already created by the deed of assignment (Ex. 5) in respect of the two annas share in the leasehold properties. In the second place, the compromise was not intended to interfere with the receiver's possession. In this connexion it may be mentioned that when the compromise decree, so far as it related to the mortgage, was executed the receiver was impleaded as a judgment-debtor with previous sanction of the Calcutta High Court: *vide* execution application Ex. 16a. The receiver raised several objections: vide his petition Ex. 17 (c) dated 19th May 1930. This objection was overruled by the order (Ex. 22) dated 3rd February 1931. Against this order an appeal was presented by the receiver to the Calcutta High Court which was dismissed on 3rd March 1933: *vide* Ex. 22 (a). In the circumstances there is no justification for holding that the compromise decree is void.

The learned Subordinate Judge has also held that the compromise decree was passed without jurisdiction because all the necessary parties were not before the Court. The Suit (No. 238 of 1922) was, as already stated, brought against Henry Seddon and Rasaraj Biswas as representing Seddon & Co. But there were two other partners, namely Dakshina and Kishori. Whether they were necessary parties or not is a different question. If they were, and the objection has been taken, the suit would have been dismissed. But so far as the parties to the suit were concerned there was no lack of jurisdiction in the Court to make the decree which, when once it was passed whether rightly or wrongly, was binding on them. Parties left out, if they were not actually represented in the suit, would of course not be bound by the decree.

The next question is whether the compromise decree is ineffective, as held by the learned Subordinate Judge. One of the grounds given by him is that the suit was not against the firm. Mr. Das on behalf of the respondents did not support this part of the decision. In fact the suit was brought against the firm represented by Henry Seddon and Rasaraj Biswas. The main ground is that the compromise, being effected by Seddon only and not by the other three partners, could not be binding on them. Sir Manmatha Nath Mukherji con-

tended that the other three partners Rasaraj, Dakshina and Kishori ceased to have any interest in the partnership. Seddon in his written statement in the present suit alleged that he purchased the interests of Kishori and Dakshina in the partnership properties on 23rd May 1922, and that Rasaraj retired from the partnership from 1st January 1923. Indeed there is some evidence on the record to indicate that these three persons ceased to have any connexion with the partnership. For instance, the receiver in his evidence says :

> So far as I remember there was a document of sale by Dakshina and Kishori to Seddon which was shown.

He also says "Rasaraj had no interest left." The letter (Ex. A H 1) dated 25th October 1922 written by Seddon to S. K. Banarji by which the former agreed to accept the latter with two others, namely Ramratan and T. S. Gibson, as partners in the firm of Seddon & Co. coupled with the fact that in the following March Sasti Kinker Banarji brought the Suit No. 908 of 1923 in the Calcutta High Court for dissolution of the partnership that was composed of himself and Seddon, Gibson and Ramratan, clearly indicates that Rasaraj, Dakshina and Kishori were no longer regarded as having any interest in the firm of Seddon & Co. The difficulty however is created by the fact that the plaintiff in this suit framed his plaint on the basis that Rasaraj, Dakshina and Kishori all along continued to be the partners of Seddon & Co., and defendants 2 to 6 as their successors-in-interest were sought to be made liable for the plaintiff's claim. It is also remarkable that in the course of the cross-examination of the receiver on behalf of the plaintiff the following question was put: "Is it not a fact that Rasaraj's interest to the extent of six annas has not passed to Seddon?" Just below this there is the note by the Court:

> The plaintiff's advocate now contends that this interest has not passed. He further says that this has been his case all along.

It should also be mentioned here that previously the present plaintiff brought a suit (23/22 of 1931/1930) in the Subordinate Judge's Court at Burdwan for royalty for some of the villages to which the present suit relates, impleading the present defendants 2 to 6, and got a decree against them : *vide* judgment Ex. 10 dated 12th April 1932. The reason why defendants 2 to 6 have been impleaded in this suit, as they were in the Burdwan suit, is said to be that as there was no registered document by which Rasaraj, Dakshina and Kishori gave up their interests in the partnership which consisted of immovable properties, their interests in those properties could not be extinguished. A I R 1939 P C 170.[20] Whatever may be the reason, the plaintiff accepts the position that Rasaraj, Dakhshina and Kishori all along continued to be the partners of Seddon & Co.

But the question whether the compromise decree is ineffective on the ground that Rasaraj, Dakshina and Kishori were not parties to the compromise is a question which could be raised only by them, or their successors-in-interest. Each partner is an agent of the others, and how far a transaction entered into by one partner on behalf of the firm binds the other partners is a question which can properly be raised by those other partners. If they by their acts and conduct assent to the transaction the third party who himself enters into the transaction cannot question it. Here the compromise decree in question was obtained by Mugniram Bangar and Kedar Nath Daga. The first petition of compromise (Ex. 20) which was filed on 30th June 1923 shows that Rasaraj in his written statement having pleaded that he had ceased to be a partner of Seddon & Co., his name was expunged from the record of the suit and the compromise was effected between the plaintiffs Mugniram and Kedar Nath on the one hand and defendant 1, Seddon, on the other. So far therefore Rasaraj is concerned, Mugniram and Kedar Nath could not be heard to say that the compromise decree was ineffective. As regards Dakshina and Kishori, it should be remembered that their successors-in-interest, defendants 4 to 6 in the present suit, in their written statements accept the position that Dakshina and Kishori ceased to be partners of Seddon & Co., and that so long as they were partners they never objected rather consented to all transactions that were entered into by Seddon and Rasaraj on behalf of the firm.

Mr. Das in support of his contention that the compromise entered into by Seddon could not bind Rasaraj, Dakshina and Kishori relied on Lindley on Partnership, Edn. 10 p. 345; Halsbury's Laws of England, Vol. 24, p. 426, para. 822; (1885) 10

20. Monghibai v. Cooverji Umersey, (1939) 26 A I R P C 170=182 I C 1=66 I A 210=I L R (1939) Bom 503=I L R (1939) Kar 295 (P C).

A C 680;[21] 22 All 135;[22] A I R 1933 Lah 618[23] and S. 19, cl. 2 (c), Partnership Act (9 of 1932). Though this last mentioned Act is not applicable to the present case because the compromise decree in question was passed in 1923 the law must be taken to be, as stated in Lindley on Partnership at p. 345 that

> In an action against a firm . . . one partner has no authority to bind the firm by consenting to an order for judgment against it.

This statement itself suggests that it will apply where the judgment is called in question by the other partners. Where the other partners have raised no objection it is difficult to understand on what principle the party himself in whose favour the judgment has been given can question its binding effect. In all the decided cases cited above the question was raised by the other partners and at their instance it was held that the compromise effected by another partner without their consent was not binding on them. In (1854) 10 E R 796[2] a judgment having been obtained by consent against R. J. Rialton sued as R. J. Rialton & Co., the plaintiff subsequently asked for leave to amend the judgment by striking out the words "R. J. Rialton sued as" so that the judgment might be against the firm of R. J. Rialton & Co. and as such enforceable against R. J. Cox, a partner in that firm. Cox objected to the amendment which was accordingly refused. In 22 All 135[22] a suit was brought by a firm through its managing partner Udai Ram to recover a debt due to the firm. By a reference to arbitration to which the other partners of the plaintiff firm were not parties the suit was disposed of. All the partners then brought a fresh suit to recover the debt alleging that the firm was not bound by the result of the previous suit. The defendant pleaded the previous decision as a bar, but this plea was overruled on the ground that one partner had no authority to bind the firm by a submission to arbitration. In A I R 1933 Lah 618[23] the question was raised in a proceeding under O. 23, R. 3, Civil P. C., in which a compromise said to have been effected on behalf of a firm by one of its partners was repudiated by another partner and it was held that the compromise in order to be lawful within the meaning of O. 23, R. 3 must be assented to by all the partners. The above stated proposition of law therefore has no application to the present case which has special features of its own. On all these considerations I am not prepared to hold that the compromise decree is ineffective so far as the parties to it are concerned.

Point 4 (c).—In view of my decision on the point (3) this question does not arise. But as it was argued at length on both sides it is better that I should express my opinion on it. The appellant contended that quite irrespective of the deed of assignment (Ex. 5) the decree itself created a valid title to the two annas share of the leasehold properties in favour of Mugniram Bangar and Kedarnath Daga. The respondents, on the other hand, contended that the decree did not and could not create any new title and in any event it could not take effect as an assignment. Mr. Das argued that a decree can never be the root of title. In support of this contention he relied on A I R 1923 Mad 392.[24] In that case the plaintiff who got a decree in the trial Court declaring his title to certain properties made some payment to protect his rights to that property while an appeal from the decree was pending. The appeal was eventually allowed and the decree was set aside. In a subsequent suit brought by the plaintiff to recover the money paid by him, the defence taken was that the payment was voluntary. The plaintiff contended that the decree of the trial Court on the strength of which he made the payment gave him title to his property. This contention was overruled on the ground that the decree could not be the root of the plaintiff's title. This decision was undoubtedly right so far as the facts of the case were concerned. If however it intended to lay down the broad proposition that a decree which is final and conclusive between the parties can never be the root of title I must with all respect express my dissent from the decision. Decree, as defined in S. 2, cl. 2, Civil P. C., means

> the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

No doubt the parties to a suit set up their respective rights and the Court has to adjudicate on those rights, but once the

21. Henry Munster v. Richard Cobden Cox, (1885) 10 A C 680=55 L J Q B 108=53 L T 474 = 34 W R 461.
22. Ram Bharose v. Kallu Mal, (1900) 22 All 135 =1900 A W N 12.
23. Ram Niwas v. Diwan Chand, (1933) 20 A I R Lah 618=144 I C 1.
24. Gopal Iyenger v. Mummachi Reddier, (1923) 10 A I R Mad 392=74 I C 416.

Court makes an adjudication it not only sets at rest the controversy between the parties but creates in favour of the successful party a new title though in many cases it may be in affirmance of a pre-existing title. It is therefore a fallacy to say that a decree cannot be the root of title.

The question however whether a decree operates as an assignment of certain property is quite different. It depends upon the nature of the decree. In this particular case the decree which was passed on compromise merely declared the plaintiffs' title which was based on the assignment of 31st March 1921. Upon the terms of the compromise petition it is impossible to hold that one party was assigning to the other two annas share of the leasehold properties. I am therefore of opinion that the decree could not operate as an assignment of two annas share of the leasehold properties. It had the effect merely of confirming the title that was already created by the deed of assignment of 31st March 1921.

Point 5.—Mugniram Bangar and Kedarnath Daga, as I have already held, were assignees of two annas share of the leasehold properties. Now the question is whether defendants 7 and 9 as assignees are liable for royalties by reason of privity of estate. Mr. Das on behalf of the respondents contended that the doctrine of privity of estate does not apply under the Indian law. He argued that a lease is made transferable under S. 108, cl. (j), T. P. Act, but there is nothing in that Section to make the transferee liable for the burdens of the lease. Cl. (j) however provides that:

> The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

This itself suggests that the transferee will be subject to the liabilities though the lessee shall not necessarily cease to be so subject. In other words, the lessee will still remain liable by privity of contract, whereas the transferee will be liable by reason of the transfer. The matter is concluded by the decision of the Judicial Committee in 20 P L T 147[10] in which their Lordships held that:

> By English law and by Indian law an assignee of a lease is liable by privity of estate for all the burdens of the lease, burdens which are imposed upon him by the mere assignment whether he enters into possession or not.

Their Lordships further observed that

> the assignor having no longer any interest cannot be liable by privity of estate though he still remains liable by contract if he was party to the original lease.

I accordingly hold that defendants 7 and 9 are liable for the plaintiff's claim by privity of estate.

Point 6.—Sir Manmatha Nath Mukherji on behalf of the appellant contended that defendants 7 and 9 are liable jointly and severally with the other defendants to pay the entire royalty claimed. Mr. Das, on the other hand, argued that they are liable only to the extent of their share in the leasehold properties. Sir M. N. Mukherji in support of his contention relied on (1864) 34 L J Ch 82;[25] (1923) 1 K B 469;[15] 53 Cal 197;[18] A I R 1927 Mad 931[17] and 11 Lah 427.[19] Mr. Das, on the other hand, relied upon (1802) 102 E R 490;[26] (1835) 83 E R 532,[27] (1818) 36 E R 412[28] and (1826) 108 E R 179,[29] Halsbury's Laws of England, Vol. XX, para. 436; Foa on Landlord and Tenant, Edn. 6, p. 469 and Woodfall on Landlord and Tenant pp. 331 and 521. The question is one of some difficulty, and it appears from an examination of the English cases cited on both sides that there is no definite decision on the precise point even in England. However, the latest of those cases is that in (1923) 1 K B 469.[15] Greer J. who decided that case referred to and explained the earlier cases and though the case before him was for damages for breach of a covenant to repair he observed as follows:

> It seems to me on the authorities that it has never been conclusively established that an assignee holding with other tenants under the terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased, though it is only a partial interest; his estate extends over the whole of the land leased; and I see no valid reason why tenants-in-common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants-in-common has the privity of estate with the landlord in the whole of the land leased.

The view thus expressed by Greer J. has been followed by High Courts in India in the cases in 53 Cal 197,[18] A I R 1927 Mad 931[17] and 11 Lah 427.[19] The position however is different where the assignee holds the assigned share of the leasehold property in physical severalty. In such cases he has no interest in the remaining part of the property and has therefore no privity of

25. Norval v. Pascoe, (1864) 34 L J Ch 82=4 N R 390=10 Jur (N S) 792=10 L T 809=12 W R 973.
26. Stevenson v. Lambard, (1802) 102 E R 490.
27. Gamon v. Vernon, (1835) 83 E R 532.
28. Ex parte Smyth, (1818) 36 E R 412.
29. Merceron v. Dowson, (1826) 108 E R 179.

estate with the landlord in the whole of the property. He cannot be liable for the entire rent. This difference has been pointed out by Greer J. in (1923) 1 K B 469[15] and on this ground he distinguished the earlier cases such as (1802) 102 E R 490[26] and (1835) 83 E R 532.[17] This also distinguishes the statements in Halsbury, Foa and Woodfall to the effect that

an assignee of part of the land cannot be charged in an action of debt with the whole rent, but only for a proportionate part thereof.

I am inclined to adopt the reasoning of Greer J. stated above and hold that defendants 7 and 9 are liable jointly and severally with the other defendants for the plaintiff's entire claim. Upon the above findings the appellant is entitled to judgment against all the respondents except respondent 8 for the amount decreed by the Court below. But for the reasons given by my learned brother the decree against respondents 7 and 9 (defendants 7 and 9) should be subject to the conditions set forth in his judgment. I accordingly agree that the appeal should be allowed in part as against respondents 7 and 9 and dismissed against the other respondents.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 541

HARRIES C. J. AND VARMA J.

Emperor

v.

Jate Uraon — Accused.

Death Reference No. 3 of 1940 and Criminal Appeal No. 16 of 1940, Decided on 29th February 1940, from decision of Judicial Commissioner of Chota Nagpur, Ranchi, D/- 24th January 1940.

(a) Penal Code (1860), S. 300, Exception 1—Accused seeing his wife in arms of another and in anger of moment killing her—Provocation is both grave and sudden and reduces crime to culpable homicide not amounting to murder.

If a person sees his wife in the arms of another and in the anger of the moment kills either his wife or her paramour, he is not guilty of murder. The provocation would be both grave and sudden and would reduce the crime to culpable homicide not amounting to murder. [P 544 C 2]

(b) Criminal Trial—Confession—Court is not bound to accept whole confession — It can accept part of it found to be true and reject rest as false *(Obiter)*.

The Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept such portion as it finds to be true and reject the false portion: *A I R 1938 Pat 258 (S B), Rel. on.* [P 545 C 2]

Advocate-General — *for the Crown.*

Hareshwar Prasad Sinha— *for Accused.*

Harries C. J.—This is a reference made by the learned Judicial Commissioner of Chota Nagpur under S. 374, Criminal P. C., for confirmation of a death sentence passed upon one Jate Uraon. There is also an appeal by Jate Uraon against his conviction for murder and the sentence of death passed upon him. It will be convenient to dispose of the reference and the appeal in this judgment. Jate Uraon is a man of about 44 years of age and was tried by the learned Judicial Commissioner of Chota Nagpur upon a charge of murdering his wife Teju on 5th July 1939. The learned Judicial Commissioner came to the conclusion that the evidence established that Jate Uraon had murdered his wife, and as the learned Judge could find no extenuating circumstances he sentenced Jate Uraon to death.

The case, as presented in the Sessions Court, for the prosecution is a somewhat surprising and unusual one. It is said that in the early morning of 5th July 1939 the appellant, Jate Uraon, for no apparent reason, attempted to assault two men named Bhinsaria Uraon and Manrakhan Chik. These men made good their escape, whereupon Jate is said to have attacked Bahura Uraon (P. W. 1). Again the prosecution can offer no explanation or reason for this attack. It is said that after chasing the two men who managed to escape Jate Uraon went to the house of Bahura Uraon and attacked the latter with an axe injuring him on the thigh. Bahura's wife came to her husband's rescue, and there was a scuffle and Jate was disarmed. Shortly afterwards Bahura together with a witness Manga Uraon (P. W. 2), who is said to have witnessed the assault, went to Sibu, chaukidar and reported that Jate had caused the injury on Bahura. A search was made for Jate who was found, and eventually Bahura, Sibu, chaukidar, Karma Uraon, a brother of Jate, and Sania Uraon, (P. W. 21) proceeded to the thana which was four miles away. On the way it is said that Jate refused to accompany the chaukidar and the others and went off; but it is surprising that no attempt whatsoever appears to have been made to detain Jate and to bring him to the thana. At 9 A. M. on 5th July, Bahura made a first information report. The contents of this report are important and I think it advisable to set out the report in extenso :

My name is Bahura Uraon. My father's name is Mangli Uraon. I am resident of Dewaki, thana Ghaghra. Today on Wednesday, date not known, having come to you with Karma Uraon and Sibu chaukidar at 9 o'clock I beg to report that Jate Uraon has gone mad since (last) night. He had pursued the two persons, Bhinsaria Uraon and Manrakhan to assault them, but they fled away. Mt. Tejni, Jate Uraon's wife, stopped him, and they fled away. Then he caught hold of a balwa and came to me and wanted to assault me also with the balwa. I caught hold of his balwa, and a scuffle took place, and I got slight injury in the right thigh at his hands. I was bringing him to the thana but he ran away while on his way after he had covered half the distance. This is my statement. Investigation may be made.

The suggestion in this report is that immediately after the appellant had chased Bhinsaria Uraon and Manrakhan, he caught hold of an axe and attacked the informant Bahura. Bahura does not suggest that the attack took place in the latter's house, and there is no reference to Bahura's wife intervening or to Manga (P. W. 2) arriving at the scene. What is said is that the wife of the appellant intervened when Bhinsaria and Manrakhan were attacked and that immediately afterwards Bahura was attacked. After this report had been recorded, the Sub-Inspector Sheonarain Prasad (P. W. 22) set off for the village of Dewaki. On the way he met the appellant Jate, who made a statement to him, and in consequence of which Jate was arrested. Shortly afterwards, some villagers came along and told the Sub-Inspector that Jate had killed his wife. Jate was arrested at 10.5 A. M. and the Sub-Inspector recorded the information concerning the death of Jate's wife at 10.30 A. M. Jate was produced before a Magistrate on 10th July 1939, as he desired to make a confession. The Magistrate cautioned him and told him that he was not bound to make a statement and that any statement he may make might be used as evidence against him at his trial. He asked him if he desired to make a statement of his own free will, and Jate answered that he was making the statement of his own accord. Jate's confession to the Magistrate is in these terms :

A few days ago, I went to drink handi at night. When I returned home in the morning, I saw my wife Teju sleeping with Bahura Uraon. They were in compromising position. I was enraged. I took down a balwa which was hanging and I first gave a blow to Bahura in the right leg. He took to his heels. He also snatched my balwa and ran away. Then I picked up a ploughshare and struck my wife twice on the neck. She died on the spot. Had not Bahura fled away, I would have killed him also. Then I at once went to the thana alone and reported all the matter to the Sub-Inspector of Police. This is my statement. Teju was my brother's wife. I had married her later on, in Sagai form. She is older than I. She had a daughter by me.

In the Court of the committing Magistrate the appellant admitted making this confession and again repeated that he had found his wife sleeping with Bahura and that he had assaulted Bahura and killed his wife in consequence of what he had seen. In the Court of Session the appellant repeated this version and throughout his statements have been entirely consistent. There can be no doubt whatsoever that Teju met her death by violence. There were very severe injuries on the skull and on the face and the neck and the cause of death, according to the Assistant Surgeon who conducted the post mortem examination, was shock and brain concussion caused by the injuries which he described in his report. The appellant admits that he caused these injuries; but it is contended on his behalf that the case cannot be one of murder because the assault on Teju was committed as the result of grave and sudden provocation. The prosecution alleged however that this was not a case where there was any provocation either grave or sudden. As I have stated, it was alleged that Jate for no apparent reason, first attacked two men who made good their escape. One of those men Manrakhan Chik (P. W. 10) was called as a witness. According to him, he had come out of his house at sunrise to make water when Jate came up to him with a balwa in his hand and said. "Who are you? I will cut you." He makes no mention of Bhinsaria, and this latter person was not called as a witness. The first information report suggests that the two men were attacked together, but Manrakhan's version is that he was alone when he was attacked. Manrakhan stated that Jate did not appear to be drunk and he could not say what was the matter with him. Manrakhan says that some time afterwards there was an outcry from Bahura's house, and on going there he found that Bahura had a cut on his thigh. As I have stated the prosecution can offer no explanation whatsoever for this attack on Manrakhan and Bhinsaria if such ever took place.

The evidence is that shortly afterwards Jate went into Bahura's house and there attacked him. Bahura (P. W. 1) says that he was sleeping in his house with his wife, child and mother. Jate came with an axe and forced the door open shouting "Where are you" Bahura said "What do you want?"

On hearing Bahura's voice Jate struck with the axe which caused an injury on Bahura's thigh. Bahura tried to get away, but Jate followed him into the inner room where they grappled. Bahura's wife also intervened and Manga rushed from his own house and joined in the scuffle. Jate was disarmed and fled from the house. Again no reason whatsoever has been suggested for this attack upon Bahura. Bahura said that he had no feud with Jate nor with his brother Karma and that he used to visit Jate's house on occasions. It is to be observed that in the first information report Bahura said that Jate had gone mad since the night previous; but in evidence he said :

> I cannot say whether Jate's mind was really affected at that time. I said in my first information report that he was mad, because he was behaving like a mad man, viz., in trying to assault people.

The evidence of Bahura is supported by the evidence of Manga Uraon (P. W. 2) and Charia (P. W. 3), Bahura's wife. In my view it is impossible to accept this version of the attack on Bahura. If the evidence is to be accepted, Jate, for no reason whatsoever, went into a house of a friendly neighbour and attacked him with an axe. That in itself is a difficult story to believe ; but it is impossible to believe the present version when it is compared with the version given by Bahura in the first information report. In the first information report the suggestion is that immediately after the attack on Bhinsaria and Manrakhan, Bahura was attacked. No mention is made in that report of the attack having taken place in Bahura's place. Further, no mention is made of intervention by Bahura's wife or by Manga, P. W. No. 2.

Bahura and Manga went to Sibu chaukidar and they are alleged to have told the latter what had occurred. A search was made for Jate and when he was found the chaukidar and the others accompanied by Jate went towards the thana. According to the prosecution, Mt. Teju was alive at that time, and if that fact was satisfactorily established there could be no question that Jate's confession is false. Karma (P. W. 6), a brother of Jate, gave evidence, and he stated that on the early morning of the day of the murder Teju came to his house and told him that Jate had an axe in his hand and was talking angrily. Teju asked him to intervene but he refused to do so owing to fear. About an hour later the witness said that he was informed by Sibu chaukidar that Jate had wounded Bahura with a balwa. He says that he went to see Bahura and then met Jate in the village. He mentions how they all went to the thana accompanied by Jate, but the latter left them before reaching the thana saying that he would not go with them. This witness said that when they left the village to go to the thana, Teju was still alive because he had seen her in the morning. The witness does not say that he saw Teju immediately before he left for the thana. Even if this witness's evidence is accepted in its entirety, it does not establish that Teju was alive when the chaukidar and others left for the thana. All it would establish is that an hour previously Teju was alive. The learned Advocate-General had asked us to accept this witness's evidence and to hold that it establishes that Teju was alive when Jate and the chaukidar set off for the thana. I however find it difficult to believe this witness because according to the police diary he made no mention of seeing Teju in the early morning when he was interrogated by the police. In the interests of the accused we have carefully scrutinized the statement which he made. There is no reference whatsoever in it to having seen Teju on the morning on which she undoubtedly was killed. The learned Advocate-General has very rightly pointed out that Karma is a witness who is apparently not hostile to his brother Jate. In cross-examination he tried to make out that Jate had been mad previously and that he had killed Teju and struck Bahura because he was mad. The witness admitted in cross-examination that he had not mentioned to anyone that Teju came to him early in the morning; but he said that he told the Daroga about it at the police station. As I have said it is clear that he did not tell the Sub-Inspector because there is no reference whatsoever to it in his statement. For these reasons I find it impossible to accept Karma's evidence that Teju was alive when the party left for the thana.

The learned Advocate-General has also invited us to accept the evidence of Sibu Dusadh (P. W. 5), the village chaukidar. According to him, Bahura told him of the assault and that he searched for Jate. He went to Jate's house and there found Teju pounding mahua seeds but Jate was not there. As he was going away from his house, he met Jate on the road and told him to accompany him to the thana. Jate did so, and if this evidence be accepted Teju was alive when Jate and the chaukidar set off for the thana. This is a most

important fact; but it is clear from the police diary that when Sibu was interrogated by the police he made no reference whatsoever to the fact that he had seen Teju alive at her house shortly before he met Jate and persuaded him to accompany the party to the thana. The learned Advocate-General has pointed out that Sibu does not appear hostile to Jate, but if he had seen Teju alive immediately before Jate left, he would, in my view, have undoubtedly mentioned the fact to the police.

The suggestion now made on behalf of the prosecution is that Teju was alive when Jate and the chaukidar left the village for the thana and that she was murdered later on after Jate had left the chaukidar and returned to his village. In those circumstances, it is said that whatever happened previously, such could be no justification for killing his wife. Even if he had seen his wife in the embraces of Bahura, the killing of his wife some hours afterwards could not have been said to be the result of sudden provocation, though it might be said to be the result of grave provocation. It is therefore very important in this case to ascertain whether there was or was not a lapse of time between the attack on Bahura and the attack on Teju. If Sibu's evidence be accepted, there was such a lapse of time, but having regard to the fact that he never mentioned having seen Teju alive to the police I cannot accept his evidence.

The prosecution also called Teju's son Hari Uraon (P. W. 11). According to him, he returned to the house about kalwa time (which is said to be about 10 A. M.) from the fields and found the door of the house fastened on the inside. He says he heard his mother crying "Come and save me, Jate is killing me." He tried to push open the door, but he failed to do so and then went weeping to the house of his cousin Sukru Uraon and told him that his mother had been killed. Sukru, who is said to be a lame man, declined to go to Teju's assistance. When this witness was examined by the police when the investigation commenced, he made an entirely different statement. That statement was to the effect that when he came home he found that his mother had been killed. In short he admitted that he had seen and heard nothing at all, yet in the Court of Session he stated that he had actually heard his mother crying for help. In my view the evidence of Hari cannot possibly be accepted, and the learned Advocate-General has very properly not invited the Court to accept the evidence of this witness. A number of witnesses were called with a view to establishing what Hari did and said after he is supposed to have heard his mother cry for help; but if Hari's evidence be rejected obviously the evidence of these witnesses must also be rejected. There was also the evidence of a number of witnesses who stated what they had been told by other witnesses. I cannot understand the relevancy of this evidence as most of it is hearsay and not admissible. Even if it was admissible, it establishes little or nothing.

The prosecution also tendered in evidence the confession of the accused, and that is undoubtedly evidence against him. That confession, however, if accepted, establishes not murder but the lesser crime of culpable homicide not amounting to murder. It is clear that if a person sees his wife in the arms of another and in the anger of the moment kills either his wife or her paramour he is not guilty of murder. The provocation would be both grave and sudden and would, in my view, reduce the crime to culpable homicide not amounting to murder. Such is Jate's version; but it is said that such portion of the confession as suggests grave and sudden provocation is clearly false by reason of the evidence for the prosecution which suggests that Teju was alive after Bahura had been assaulted and was alive when Jate accompanied the chaukidar to the thana. Jate left the chaukidar some time afterwards, and it is said that Teju must have been murdered when Jate returned to the village. In those circumstances, it is urged that the provocation, even if it existed, could not be described as sudden. A man who thinks over what he has seen for some hours might still act under grave provocation, but such could not be described as sudden. I have, however, given my reasons for finding it impossible to accept the evidence of the prosecution that Teju was alive when Jate left with the chaukidar for the thana. Karma's evidence, even if accepted, does not establish it, and I am not satisfied with Sibu's evidence when I find that he made no mention of this important fact when first seen by the police. The learned Advocate-General has frankly admitted that the case, as presented by the prosecution is difficult to sustain. It is a version of a series of attacks for no apparent reason. An attempt was made by some of the witnesses

to show that Jate was drunk; but the Sub-Inspector makes it clear that when he arrested him at 10 A. M. he was not under the influence of drink. Sibu makes contradictory statements concerning his condition. He said :

> When I was trying to take him to the Police Station he appeared to be the worse for drink. He was talking correctly, but his eyes were small and blood-shot. I did not notice any smell of drink about him. It was about 7 A. M. when we started for the Police Station with Jate.

If no smell of drink was noticeable, it is fairly clear that early that morning Jate was not so drunk as to attack everybody at sight. Yet that is what is suggested he did. An attempt was also made to show that Jate was mad; but the Sub-Inspector stated that when he arrested him he showed no signs of madness. Jate was kept under observation for some time in jail, but the medical evidence is to the effect that he was perfectly sane. If Jate was neither mad nor drunk, then his actions, as described by the prosecution, cannot possibly be accepted. Why should a sober and sane man first attack two people and chase them away, then go into the house of a friendly neighbour and attack him and later kill his wife with a ploughshare? That, however, is the case which the prosecution in the Sessions Court asked the Court to accept. In my view, the admitted facts of this case establish beyond all doubt that Jate on the morning in question was moved by some substantial motive, and the learned Advocate-General admits that this is probably true. The question is what was the motive which impelled Jate to attack Bahura and his wife. Jate says that he found them in bed together and I see no reason for rejecting his statement. Jate has been consistent throughout. He has frankly admitted that he attacked Bahura and killed his wife and also stated in his confession that he would have killed Bahura if he could only have caught him. There is a ring of truth about his confession, and it appears to me that he must have found his wife in a compromising position to cause him to attack Bahura and when the latter escaped, to kill his wife. The version given by Jate explains what happened subsequently. The case for the prosecution is inexplicable. No man whether he be an aboriginal or not, would career about the village attacking persons unless something had moved him. Of course if he was drunk or mad, he might act in that way, but drunkenness and madness must be eliminated from this case. Jate was clearly enraged at something and acted upon an impulse caused by what he had seen. I am satisfied that Jate's version of what occurred is the true one and that he acted under grave and sudden provocation.

It was argued on behalf of the appellant that as a matter of law a Court is bound either to accept the confession as a whole or to reject it. I am not accepting Jate's confession as a whole because I am bound to in law. I am accepting it as a whole because I believe it to be substantially true. In my view, a Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept such portion as it finds to be true and reject the false portion. The law upon this subject has been clearly laid down by this Court in the case in 19 P L T 476,[1] in which a Full Bench held that if an accused person makes a confession the whole of that confession must be placed before the Court and is receivable in evidence. But there is no rule of law which compels belief in the whole of the statement. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entirely entitled to disregard the statements which it may hold in circumstances not to be true. The point of law does not arise in this case, but I merely mention it because I wish to make it clear why I accept Jate's statement as a whole, that is, that he saw his wife in a compromising position and lost control of himself and first attacked Bahura and then killed his wife. It appears to me that the only consistent version in this case is the version given by Jate throughout, namely in his confession and in both Courts. Accepting that version, I hold that he acted under grave and sudden provocation and that causing Teju's death was not murder but culpable homicide not amounting to murder.

The crime however is a serious one, and taking everything into consideration I think sentence of five years' rigorous imprisonment would meet the ends of justice. The result therefore is that I would discharge this reference, set aside the conviction under S. 302 and the sentence of death and convict the appellant of an offence under Section 304, I. P. C., and sentence him to a term of five years' rigorous imprisonment.

Varma J. — I entirely agree.

G.N./R.K. *Reference discharged.*

1. Emperor v. Itwa Munda, (1938) 25 A I R Pat 258=175 I C 300=19 P L T 476 = 39 Cr L J 554 (SB).

A. I. R. 1940 Patna 546

AGARWALA AND ROWLAND JJ.

Ram Sarup Sah and others —
Plaintiffs — Appellants.

v.

Mukhi Singh and others — *Defendants* — Respondents.

Appeal No. 973 of 1938, Decided on 2nd February 1940, from appellate decree of Sub-Judge, Chapra, D/- 28th July 1938.

(a) Bihar Money-lenders Act (3 of 1938), S. 11 — Conditions necessary to attract operation of S. 11 to Appellate Court satisfied — Appellate Court must give effect to S. 11 notwithstanding anything to contrary in any other law.

Section 11 enjoins a duty on the Court, in the class of cases to which it refers to restrict the amount of interest awarded to a sum not in excess of the principal advanced. The only conditions necessary to attract the operation of that Section to an Appellate Court are that there shall be a suit by a money-lender, that the suit shall be in respect of a loan and that the appeal shall arise out of such a suit. When these conditions are satisfied, the duty of an Appellate Court is plain that it must give effect to the Section notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement. [P 547 C 1]

(b) Bihar Money-lenders Act (3 of 1938), S. 7 —Rule of damdupat does not apply to period subsequent to institution of suit.

The rule of damdupat introduced by S. 7 of the Act in respect to a claim for interest for the period preceding the institution of the suit does not apply to the period subsequent to the institution of the suit. [P 547 C 2]

(c) Bihar Money-lenders Act (3 of 1938), S. 8 —Lower Appellate Court failing to exercise discretion under S. 8 — High Court can pass order in respect of interest subsequent to date of suit.

Where the Court of Appeal below has failed to exercise its statutory discretion under S. 8, it is open to the High Court to pass an order in respect of interest subsequent to the date of the institution of the suit. [P 547 C 2]

S. K. Husnain and Harnarayan Prasad — *for Appellants.*

Rajeshwari Prasad and G. K. Mukharji — *for Respondents.*

Agarwala J.—This is an appeal by the plaintiffs from a decision of the Subordinate Judge of Chapra modifying a decision of the Munsif. The facts were as follows : Defendants first party executed a mortgage in favour of the plaintiffs on 21st July 1923, to secure redemption of a loan of Rs. 500. The rate of interest prescribed by the bond was 2 per cent. per mensem with six-monthly rests. At the date of the institution of the suit, on 20th January 1936, the amount outstanding for principal and interest was Rs. 8492-2-6. The plaintiff abandoned his claim as to Rs. 4992-2-6 and sued for a recovery of the remaining Rs. 3500. Defendants 4 to 29 were subsequent transferees or mortgagees of the hypothecated property. Defendants 8, 9 and 15 claimed priority over the plaintiff's mortgage. In 1917, there had been a zarpeshgi bond to defendants 8 and 9 for Rs. 175 and in 1922 another zarpeshgi in favour of the same defendants for Rs. 200. On 7th April 1924, defendants 8 and 9 advanced Rs. 768 to redeem a previous mortgage in favour of one Rambharosa and Ramkalar, the brothers of the present plaintiff. On 27th May 1925, there was a mortgage to defendants 8 and 9 for Rs. 1200 to pay off all these previous encumbrances. The claim of defendant 15 was that on 4th July 1925, he had advanced Rs. 800 on a mortgage to pay off a previous mortgage of 7th April 1923. The first Court disallowed the claim of defendant 15 to priority and as to the claim of defendants 8 and 9 allowed it only to the extent of Rs. 375, that is to say, in respect of the previous zarpeshgis of 1917 and 1922. Against the decision of the first Court an appeal was preferred by defendants 8, 9 and 15, defendants 8 and 9 challenging the decision of the trial Court with respect to the sum of Rs. 768 and defendant 15 with respect to Rs. 800.

The appeal was dismissed so far as the claims of defendants 8, 9 and 15 to priority were concerned, but the Appellate Court gave effect to S. 11, Money-lenders Act, 1938, which prohibits a Court, in a suit brought by a money-lender, in respect of a loan, to pass a decree for the amount of interest for the period preceding the institution of the suit which, together with any amount already realized as interest through the Court or otherwise, is greater than the amount of the loan advanced, that is to say, the plaintiff's claim was reduced to Rs. 500 principal and Rs. 500 interest. The Appellate Court in its judgment made no provision for interest after the date of the institution of the suit up to the date of grace nor for interest subsequent to the date of grace, although the trial Court had awarded interest at the bond rate up to the date of grace and interest at 6 per cent. per annum for the later period. The order of the Appellate Court with regard to costs was that the judgment and decree of the lower Court were modified and the "plaintiff's suit decreed modifiedly with costs corresponding to success." The decree that

has been drawn up in pursuance of the Appellate Court's judgment has awarded to defendants 8, 9 and 15 the costs of the appeal based on the amount of reduction in the decretal amount.

In second appeal it is contended on behalf of the plaintiffs-appellants that as there had been no appeal by any of the parties concerned with respect to the amount decreed by the first Court as principal and interest, it was not open to the Appellate Court to reduce that amount. Even if the matter were to be decided solely with reference to the provisions of O. 41, R. 33, Civil P. C., I should not be prepared to hold that the power of the Appellate Court to modify the decree with regard to the amount decreed by the trial Court was barred. But, in the present case, the matter is put beyond controversy by the provisions of S. 11, Money-lenders Act. That Section enjoins a duty on the Court, in the class of cases to which it refers to restrict the amount of interest awarded to a sum not in excess of the principal advanced. The only conditions necessary to attract the operation of that Section to an Appellate Court are that there shall be a suit by a money-lender, that the suit shall be in respect of a loan and that the appeal shall arise out of such a suit. When these conditions are satisfied the duty of an Appellate Court is plain that it must give effect to the Section

"notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement,

which is the opening phrase of the Section.

I would therefore overrule the first objection of the learned advocate for the plaintiffs-appellants.

With regard to interest from the date of the institution of the suit to the date of grace, the learned advocate for the plaintiffs-appellants contends that he should be awarded interest at the bond rate as decreed by the trial Court. S. 8, Money-lenders Act, empowers either the original Court or the Court of Appeal or revision to re-open a transaction between a money-lender and his debtor, to take an account between the parties and to relieve the debtor of all liability in respect of any interest in excess of nine per cent. simple per annum in the case of a secured loan and 12 per cent. simple per annum in the case of an unsecured loan. The learned advocate for the respondents contends that this Court should not interfere with the decision of the Court below with regard to the interest subsequent to the date of the institution of the suit, inasmuch as that would be interfering with the discretion conferred on the Court by S. 8. There is no indication in the judgment of the Court below however that it has exercised any discretion with regard to interest subsequent to the date of the institution of the suit. What does appear from the judgment of the Appellate Court is that it proceeded on the assumption that the rule of damdupat introduced by S. 7 of the Act in respect to a claim for interest for the period preceding the institution of the suit applies also to the period subsequent to the institution of the suit. The language of S. 7 itself however is clearly against this view. The language of S. 7, Money-lenders Act, differs completely from that of S. 6 of the Sonthal Parganas Regulation, III of 1872, which prohibits a Court in the Sonthal Parganas from decreeing interest on any loan or debt in excess of the one-fourth of the principal sum if the period be not more than one year or in excess of the principal of the original debt or loan in other cases. In the regulation there are no words of limitation as there are in S. 7, Money-lenders Act, restricting the rule to the period preceding the institution of the suit. The Court of Appeal below having failed to exercise its statutory discretion in the matter it is open to us to pass an order in respect to interest subsequent to the date of the institution of the suit.

It was suggested by the learned advocate for the respondent that this was not a case in which we should exercise this discretion in view of the absence of circumstances justifying re-opening of the transaction between the mortgagee and the mortgagor. The terms of the bond however themselves invite such interference. It is a secured loan and it may be assumed that the mortgagee was satisfied that the security which he accepted was sufficient to ensure re-payment of the debt. In spite of this security, the interest which he demanded was 2 per cent. per mensem with six-monthly rests which is considerably in excess of the commercial rate even for unsecured loans. In these circumstances, in my opinion, we are justified in exercising the discretion conferred upon the Court by S. 8 and I would therefore direct that in the decree, that is to be prepared the rate of interest for the period from the date of the institution of the suit till the expiry of the period of grace shall be 12 per cent. simple per annum and

after the date of grace at 6 per cent. per annum simple on the amount due at the date of grace.

The last point raised by the plaintiffs-appellants is with regard to the decree for costs. With regard to this the order will be that the plaintiffs will have their costs throughout on the amount decreed and the defendants will bear their own costs. The decree of the Appellate Court is set aside and a decree will now be prepared in accordance with Rr. 2 and 4 of O. 34, with interest at the rate stated above. Period of grace three months from today.

Rowland J. — I agree.

D.S./R.K. *Decree set aside.*

A. I. R. 1940 Patna 548

MEREDITH J.

Biswanath Dubey — Petitioner.

v.

Gharbigan Chamar — Opposite Party.

Criminal Revn. No. 21 of 1940, Decided on 31st January 1940, against order of Sess. Judge, Shahabad, Arrah, D/- 20th November 1939.

Penal Code (1860), S. 215 — Object — Essential ingredients of S. 215 stated — Complainant's bullock disappearing — Accused offering to recover bullock if paid certain sum — On complainant not accepting offer accused doing nothing—Conviction under S. 215 cannot be sustained — S. 215 has nothing to do with illegal gratification.

Section 215 aims primarily at professional trackers and other persons who, being usually in league with thieves or well aware of their proceedings, obtain money for recovery of stolen property without making any effort to bring the offenders to justice. The Section has three essential ingredients, first, taking or agreeing or consenting to take any gratification under pretence or on account of helping any person to recover any moveable property; secondly, that the owner of such property must have been deprived of it by an offence punishable under the Penal Code; and thirdly, that the person in question, having taken or agreed to take the gratification, must not have used all means in his power to cause the offender to be apprehended and convicted of the offence. The Section has however nothing to do with any illegal gratification. [P 548 C 2; P 549 C 1]

The complainant's bullock somehow disappeared; probably it had strayed. The accused offered to recover the bullock if paid a certain amount but the complainant refused to accept the offer and the accused did nothing :

Held that the conviction of the accused could not be sustained as the second essential ingredient of S. 215 stated above was not present: *A I R 1932 Pat 241, Rel. on.* [P 549 C 2]

Tarkeshwar Nath — *for Petitioner.*

Order. — The petitioner Biswanath Dubey was convicted under S. 215/511, Penal Code, and sentenced to undergo three months' rigorous imprisonment and to pay a fine of Rs. 50, in default to undergo a further month's rigorous imprisonment. Out of the fine, Rs. 30 was directed to be paid to the complainant, a village chaukidar, by way of compensation. S. 215, Penal Code, runs as follows :

> Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

And what the petitioner has been convicted for is an attempt to commit this offence. After his conviction he appealed to the learned Sessions Judge of Shahabad who dismissed his appeal. The facts of the case are that on 20th January 1939, the bullock of the complainant chaukidar disappeared; evidently his first impression was that it had strayed, because he took no steps to lodge any information until 27th January, a week later. Having failed to find it, he lodged a saneha at the police station; nothing more happened until 23rd February, when, as has been found by the Courts below, and as must now be accepted, the petitioner came to the chaukidar and offered to recover the bullock if paid Rs. 25. The complainant refused to accept these terms and, it is said, a panchayati was called, but still the petitioner, though admitting his previous offer, did nothing. On 8th March the petitioner filed a petition before the Subdivisional Officer to the effect that the chaukidar was harassing him with regard to the recovery of his bullock; and finally, on 10th March the chaukidar filed the complaint which has led to the petitioner's conviction.

I am of opinion that this conviction cannot possibly be sustained. S. 215, which is a Section rarely used, aims primarily at professional trackers and other persons who, being usually in league with thieves or well aware of their proceedings, obtain money for recovery of stolen property without making any effort to bring the offenders to justice. The Section has three essential ingredients: first, taking or agreeing or consenting to take any gratification under pretence or on account of helping any person to recover any moveable property; secondly that the owner of such property must have

been deprived of it by an offence punishable under the Penal Code; and thirdly that the person in question, having taken or agreed to take the gratification, must not have used all means in his power to cause the offender to be apprehended and convicted of the offence. It is a peculiar Section inasmuch as once it is shown that the person charged has taken or agreed to take money, which in itself is in no way wrong or illegal if the intention is honest, then the completion of the offence follows not necessarily from any further overt act but merely from an omission, namely as the Section puts it, the failure to use all means in his power to cause the offender to be apprehended and convicted. I doubt the Courts below have fully appreciated this feature of the Section. The Magistrate at least appears to have considered that the offence had something to do with taking an illegal gratification (an expression which he has used twice over). Suffice it to say, the Section has nothing to do with any illegal gratification. Gratification may be taken, but it is in no way illegal if the bargain is honestly carried out: it is merely payment for work done.

Where an offence is of this peculiar nature, I find it somewhat difficult to understand exactly what will constitute an attempt to commit it; a question upon which there appear to have been differences of judicial opinion in the past. I do not propose to go into that difficult question. It is unnecessary to do so, because the second ingredient, which I have spoken of, is not present and the conviction must be set aside on that ground. It is nowhere expressly found by the Courts below that the complainant's bullock was actually stolen, that is to say, that he was deprived of it by an offence punishable under the Penal Code. That this is an essential ingredient in the offence has been laid down by this Court in 11 Pat 392.[1] That was really a stronger case than the present one. There the money had actually been taken, and, though there was no direct evidence of theft, the Courts below had at least considered all the circumstances and come to a finding by inference that there had been a theft. In the present case however, the necessity of such an express finding does not seem to have been appreciated. There is no finding and no examination of the evidence, if any, on which such a finding could be based. As I have already indicated, the circumstances, on the contrary, appear to show that the bullock might have strayed. There is no assertion that it was tied up, or shut up in any enclosure which was opened, and, in short, there appears to have been nothing upon which an express finding, that this was a case of theft, could be based. There does not appear to be any assertion that the petitioner himself ever stated that he actually knew that the bullock had been stolen, and who had stolen it. In the absence of this finding and of evidence to support such a finding, the conviction cannot stand. The conviction of the petitioner and his sentence, and the order for payment of fine and compensation, are therefore set aside, and he will be acquitted. He must now be discharged from his bail.

G.N./R.K. *Conviction set aside.*

1. Bageshwari Ahir v. Emperor, (1932) 19 A I R Pat 241 = 139 I C 76 = 33 Cr L J 709 = 13 P L T 732=11 Pat 392.

A. I. R. 1940 Patna 549

HARRIES C. J. AND WORT J.

Commissioners of Arrah Municipality — *Defendants* — Appellants.

v.

Inder Chand—*Plaintiff*—Respondent.

Appeal No. 133 of 1938, Decided on 7th February 1940, from appellate decree of Sub-Judge, Arrah, D/- 22nd Dec. 1937.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 82 (2) — It is ultra vires of Commissioners to impose fees on platforms erected over Municipal drains without previous sanction of Local Government.

It is ultra vires of the Municipal Commissioners to fix without the previous sanction of the Local Government a scale of fees for licenses with regard to platforms erected over Municipal drains.

[P 551 C 1, 2; P 552 C 1]

(b) Bihar and Orissa Municipal Act (7 of 1922), S. 82 (2) — Resolution imposing fee under S. 82 (2) should fix date of its operation. *(Obiter).*

The Commissioners in passing a resolution under S. 82 (2) fixing the scale of the fees should also fix a date of its coming into operation. [P 552 C 1]

(c) Bihar and Orissa Municipal Act (7 of 1922), S. 82 (2)—Fee imposed under S. 82 (2) found ultra vires of Commissioners — Plaintiff cannot restrain Commissioners from taking proceedings against him.

Where a fee imposed on the plaintiff under S. 82 (2) is found to be ultra vires of the Commissioners, the plaintiff is not in any circumstances entitled to claim a relief restraining the Commissioners from taking proceedings against him.

[P 552 C 1]

Baldeva Sahay, Mahabir Prasad, Harinandan Singh and Tarkeswar Nath — *for Appellants.*

Dr. D. N. Mitter, D. N. Varma and S. Sundar Sinha—*for Respondent.*

Wort J.—This appeal comes before this Court after remand. The case was remanded for the purpose of deciding a question of fact relating to a drain in Arrah. The Municipal Commissioners, who are the appellants, were the defendants in the trial Court in a case in which the plaintiff claimed the following reliefs:

That on the facts and circumstances stated it be declared that the imposition of a fee by the defendants for taking license for plaintiff's keeping platform is illegal and ultra vires and the defendants have no right to realize the same from the plaintiff and that the said levy of platform-tax is illegal, ultra vires and beyond the power of defendants and the defendants are not entitled either in law or in equity to do the same and demand the same from the plaintiff.

The second relief claimed was:

That the defendants be restrained from realizing platform-fee or taking proceedings against the plaintiff under the Municipal Act or by-laws of the Municipality for not taking a license or compelling the plaintiff to remove his platform (if any) during the pendency of the suit.

The plaintiff further claimed a refund of the amount paid with interest. Several questions were raised in the Courts below, and in the lower Appellate Court the plaintiff succeeded. The learned Judge in the Appellate Court came to the conclusion, contrary to the contention of the Commissioners, that the drain was not a Municipal drain and that therefore the Municipal Commissioners had no jurisdiction over it. He also decided two questions of law in favour of the plaintiff which will be indicated by the points to which I shall refer in the judgment. This Court, being in doubt as regards the findings of fact, remanded the case to the Subordinate Judge for the determination of the question whether the drain was the Municipal drain, or whether it was within the limits of the District Board Road. The contention of the plaintiff was that the District Board Road was 38 feet 8 inches in breadth and that the drain in question came within those limits. The learned Judge in the Court below, after remand, has come to the conclusion that the drain is beyond the limits of the District Board Road. At the instigation of the parties, a Commissioner was appointed and he came to the following conclusion. "His report," says the learned Judge,

shows that the road in front of the plaintiff's house was 44 feet 4 inches wide from the south-east corner of the plaintiff's house, 44 feet 4 inches wide from the southern stairs of the plaintiff's house, and 44 feet 5 inches wide from the north-east corner of the plaintiff's house . . . From the measurements made by the Commissioner it will appear that at 20 places, where the plaintiff wanted the widths of the road to be measured, it varied from 24 feet to 38 feet 6 inches, the average coming to 29 feet 10 inches.

The learned Judge has come to the conclusion accordingly, and it will be seen therefore that the drain is beyond the limits of the District Board road, and on that conclusion it seems to be abundantly clear that, contrary to the plaintiff's contention, the drain is that of the Municipal Commissioners and not of the District Board. However, that matter does not dispose of the case. Dr. Mitter on behalf of the respondent raises several questions of law. The first is on the construction of S. 82, Bihar and Orissa Municipal Act, 1922. S. 82 provides that :

The Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notice shall have been given, subject to the provisions of this Act and with the sanction of the Local Government, impose within the limits of the Municipality the following taxes and fees, or any of them.

Then a list of cls. (a) to (l) of the matters with regard to which fees are chargeable under sub-s. (1). It is with regard to sub-s. (2) that the question arises. Sub-s. (2) runs thus :

The Commissioners may from time to time, at a meeting convened as aforesaid, and in accordance with a scale of fees to be approved by the Local Government, charge a fee in respect of the issue and renewal of any license which may be granted by the Commissioners under this Act and in respect of which no fee is leviable under sub-s. (1).

Shortly it is contended that the tax which the Commissioners here purported to impose by their Resolution of 18th January 1935, comes within the mischief of that sub-section. S. 180, which is the warrant to the Commissioners to impose the tax, is as follows :

No platform shall be erected, re-erected or extended upon or over any public road or drain without the previous sanction of the Commissioners.

Pausing there, I may observe that one of the contentions of the plaintiff-respondent in the Courts below was that the previous sanction had been granted by the Commissioners in 1935, that a fee had been paid, and that therefore the tax which the Commissioners sought to impose was illegal. But that point apparently was given up, and certainly was not argued in this Court. Sub-s. (2) of S. 180 of the Act provides :

The owner of every platform, except platforms which are used for giving such access to the houses as the Commissioners may consider necessary, shall, if the Commissioners at a meeting so direct, take out a license for keeping the platform.

Sub-s. (3), provides that such license shall remain in force for one year. Sub-s. (4), provides that :

For every such license there shall be paid a fee to be fixed by the Commissioners at a rate of not less than two annas nor more than eight annas for each square foot or the superficial area of the platform except such portion thereof as is used for giving such access to a house, etc.

Sub-s. (5) is a penalty clause making a person who contravenes the provisions of the section liable to a fine not exceeding fifty rupees. At first it was thought that in this case the Commissioners had acted *ad hoc* in fixing fee for the license with regard to this particular platform. But that view of the matter is clearly wrong when the Resolution of 18th January 1935 is looked into. It was passed at a meeting of the Commissioners at which the Chairman, the Vice-Chairman, and four other members were present and the resolution which was passed unanimously on that occasion was that "two annas six pies per square foot per year be levied on the platform abutting on the Municipal drains" in a certain area described in the Resolution. It was further resolved that

fees on the platform on Municipal roads, lanes, drains or lands within the rest of the area be levied at the rate of two annas per square foot per year.

It seems to me quite clear therefore that whether the Commissioners were entitled under S. 180 of the Act to act *ad hoc* as I have described it, they certainly did not purport to do so by the Resolution of 18th January 1935. What they were apparently doing was that they were fixing a scale of fees for the issue and renewal of any license which might be granted by the Commissioners under this Act and in respect of which no fee was leviable under sub-s. (1) (of S. 82).

To repeat myself, it is clear that the Commissioners were fixing a scale of fees for licenses with regard to platforms erected over Municipal drains. Now, it is contended by Dr. Mitter therefore that unless they have the previous sanction of the Government the tax so charged was ultra vires of the Commissioners. It is admitted that the consent of the Local Government was not obtained. The words of the sub-section I shall repeat :

The Commissioners may, from time to time, at a meeting convened as aforesaid, and in accordance with a scale of fees to be approved by the Local Government charge a fee in respect of the issue and renewal of any license which may be granted by the Commissioners.

I used the words "previous sanction of the Local Government," and although the expression may be to some extent inaccurate, it is quite clear that if the sub-section applies the imposition of the tax without the consent of the Local Government would be illegal : and that is the question which arises for determination in this appeal. It was contended, as I have already stated that the Commissioners could act in each case and fix a fee according to circumstances of each case, and that as the Legislature has fixed the limits within which the tax should be imposed, no consent of the Local Government was necessary. Sub-s. (2) of S. 82 speaks of the issue and renewal of fees for licenses charged under, under sub-s. (1). Instances of this are to be found in three Sections. S. 256 of the Act, provides that "the Commissioners may, from time to time, grant licenses to persons applying for the same." It is true that the Section does not appear on the face of it to warrant the Commissioners charging any license fee, the Act merely referring to a license to be granted by the Commissioners and the power of the Commissioners to prescribe a scale of the rates for the sale of such articles referred to in the Section. But I assume that authority is given to the Commissioners that fees would be chargeable for the grant of that license. S. 259 of the Act, gives power to the Commissioners to license premises used for trades described in the various sub-clauses of the Section, and sub-s. (3) of the same Section provides :

The Commissioners at a meeting may, subject to a maximum to be fixed by the Local Government, levy a fee in respect of any such license and the renewal thereof, and may impose such conditions upon the grant of any such license as they may think necessary.

Section 261 provides power to Commissioners to license premises occupied by cartman, livery stable keeper or keepers of vehicles, and sub-s. (2) gives them power to license places for such purpose and may levy a fee not exceeding one rupee on the issue and renewal of any such license. It is to be noted that there is a distinction between sub-s. (2) of S. 261 and sub-s. (3) of S. 259 of the Act. Sub-s. (2) of the latter makes no reference to the consent of the Local Government, whereas under sub-s. (3) of S. 259 the Commissioners at a meeting may, subject to a maximum to be fixed by the Local Government levy a fee. I apprehend therefore that although the consent of the Local Government is to be obtained under sub-s. (3) of S. 259 it is not the consent referred to in sub-s. (2) of Sec. 82. But the same cannot be said in my judgment with regard to S. 261 (2) which provides that :

The Commissioners may license places for such purpose, and may levy a fee not exceeding one

rupee on the issue and renewal of any such license. Such license shall be renewed in the first and seventh months of each year.

The language of S. 261 and S. 180 (2) is not materially different, and it seems to me that it would be difficult, if not impossible, to contend that the license fee chargeable under S. 261 would not be subject to the consent of the Local Government under sub-s. (2) of S. 81. And if that argument is well-founded, it seems equally impossible to exempt from the provisions of sub-s. (2) the license fees to be imposed under S. 180 of the Act, the Section with which we are dealing in this case. It is clear, as I pointed out at the commencement of my observations, that the Commissioners purported to fix a scale of fees and that would seem in any event to come specifically within the mischief of sub-s. (2) of S. 82. I do not pretend to say that the matter is without difficulty, but in my judgment it was necessary in this case to have the approval of the Local Government to the scale of fees chargeable under the Resolution of 18th January 1935.

Another question of law arose, and that is that the Resolution fixed no time for which license fees would come into operation. In the circumstances of the case it is unnecessary to come to a conclusion with regard to that matter, but I may add that in passing a Resolution of this kind the Commissioners would be well-advised to fix such a date. The remaining point is whether the plaintiff is in the circumstances entitled to the relief which he claimed in the suit. In the second item he asked for an injunction restraining the Commissioners from taking proceedings against the plaintiff; that, it is clear, is a relief to which the plaintiff is not in any circumstances entitled; but, in my judgment, he was entitled to a declaration that the imposition of the fee for the plaintiff's keeping the platform was ultra vires the Commissioners and that the plaintiff was entitled to a refund of the fees which, as I understand, were paid into the Court of the Munsif. The appeal of the Commissioners is dismissed and the judgment of the Court below set aside, the plaintiff being entitled to a decree for the relief indicated in this judgment.

Harries C. J. — I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 552

FAZL ALI AND MEREDITH JJ.

Dwarka Prasad — Appellant.

v.

Traders Co-operative Bank Ltd., Bankipur — Respondent.

Second Appeal No. 169 of 1939, Decided on 8th March 1940.

(a) Bihar and Orissa Co-operative Societies Act (6 of 1935), Ss. 63 and 48—Award under S. 48 against person continuing to be member — No question of limitation for execution of award arises by reason of S. 63.

Where an award is made against a person who continues to be a member of the Co-operative Society at the time of its execution, no question of limitation arises by virtue of S. 63. [P 554 C 2]

(b) Bihar and Orissa Co-operative Societies Act (6 of 1935), Ss. 48 and 51 — Word "dispute" in S. 48 — Meaning — "Debt" in S. 48 includes decretal debt—Registrar under S. 48 can deal with dispute between parties as to decretal debt—Where previous award has been made and there is still dispute as to judgment-debtor's ability to pay or manner of enforcement of payment, Registrar is competent to deal with matter and pass second award—S. 51 has no application — Nor does S. 11, Civil P. C., apply to disputes under Act.

The expression "dispute" has been used in S. 48 in a very special sense. Under this Section, a claim by a registered society for any debt or demand due to it from a member or a past member is a dispute even in case such debt or demand is admitted, and the only point at issue is the ability to pay or the manner of enforcement of payment. The word "debt" includes decretal debt, and there is nothing to prevent the Registrar from dealing under S. 48 with a dispute between the parties as to a decretal debt. Even where a previous award has been given, if there is still a dispute as to the judgment-debtor's ability to pay, or the manner of enforcement of payment, the Registrar is competent to deal with the matter and to pass a second award in respect of the same subject-matter. S. 51 has no application in such a case. S. 11, Civil P. C., does not apply to a dispute arising under the Act. But a second award can be obtained only if there is an outstanding claim or debt due. Where the debt has been completely extinguished, the Registrar will have no power to make a second award : *A I R 1936 Lah 901, Expl.* [P 554 C 2; P 555 C 1]

Mahabir Prasad and Kanhaiyaji — *for Appellant.*

Janak Kishore — *for Respondent.*

Meredith J. — This is a second appeal relating to an order passed in regard to an objection petition under S. 47, Civil P. C. The facts of the case are that the Traders Co-operative Bank Ltd., Patna, had lent Rs. 1420 to one Dwarka Prasad, the present appellant. In 1931 the Bank obtained an award against the appellant and his sureties for this debt. The award was made on 3rd June 1931, by the Assistant Registrar, Co-operative Societies, under R. 12 (4) of the Rules framed by the Local Government under S. 43 of the former Act 2 of

1912. The award was for Rs. 1420 as principal, Rs. 73-15-0 as interest and Rupees 73-15-0 as penal interest, and provided that future interest at the rate of Rs. 10-8-0 per cent. per annum together with all costs up to the date of realization should be payable. In regard to this award Execution Case No. 2205 of 1932 was filed in the Court of the Second Munsif at Patna, but it was dismissed on 30th June 1933, apparently for default of the decree-holder.

There is nothing before us to show what happened between the parties from June 1933 until January 1938, when, on 3rd January 1938, a second award was passed by the Assistant Registrar, this time under the new Co-operative Societies Act (6 of 1935). This award was for Rs. 2215-2-0 on account of principal and interest. On 19th January 1938 an execution case was started upon this award in the Court of the Munsif at Patna, and on 10th February 1938, the appellant filed a petition of objection under S. 47, Civil P. C., taking the ground that the second award was a complete nullity and could not be executed as the Assistant Registrar had no jurisdiction to make two awards for one and the same debt. This objection succeeded before the learned Munsif; but on appeal the learned Additional District Judge, Patna, set aside the Munsif's order and dismissed the petition of objection. Having regard to the provisions of S. 57 (3) of the Act of 1935, it is evident that the appellant cannot possibly succeed in his objection unless he can show that the award of the Assistant Registrar was wholly without jurisdiction. S. 57 (3) is in the following terms :

> No order of the Local Government, District Judge, Registrar, a person appointed to assist the Registrar, liquidator or an arbitrator or arbitrators, purporting to be one, which under any provision of this Act is declared to be final, shall be liable to be challenged, set aside, modified, revised, or declared void in any Court, upon merits or upon any ground whatsoever except want of jurisdiction.

The award, or rather the order, of the Assistant Registrar, with which we are concerned in the present case, is an order under S. 48 of the Act; and cl. (9) of that Section provides that :

> Save as expressly provided in this Section, a decision of the Registrar under this Section, and subject to the orders of the Registrar on appeal or review, a decision given in a dispute transferred or referred under cl. (b) or cl. (c) of sub-s. (2), shall be final.

The order is therefore one to which S. 57 (3) is applicable. It may be mentioned that the appellant has made the appeal to the Registrar, which is referred to in cl. (a) of S. 48, and and we understand that since the decision of the Courts below this appeal has been dismissed by the Registrar. The question now for decision is whether the order of the Registrar, passed on 3rd January 1938, was without jurisdiction. As I have said, it is an order under S. 48. S. 48 (1) provides :

> If any dispute touching the business of a registered society (other than a dispute regarding disciplinary action taken by the society or its managing committee against a paid servant of the society) arises—(a) . . . . (b) between a member, past member, persons claiming through a member, past member or deceased member or sureties of members, past members or deceased members, whether such sureties are members or non-members, and the society, its managing committee or any officer, agent, or servant of the society ; or (c) . . . (d) . . . . such dispute shall be referred to the Registrar.

Then in Expl. (1) it is provided that :

> A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member or from sureties of members, past members or deceased members, whether such sureties are members or non-members, shall be a dispute touching the business of the society within the meaning of this sub-section even in case such debt or demand is admitted and the only point at issue is the ability to pay or the manner of enforcement of payment.

The appellant is still a member of the society in question. S. 51 of the Act provides that :

> Orders passed under Ss. 44, 48 and 50 shall, in addition to any other method of enforcement provided under this Act, on application, be enforced as follows : When passed by the Registrar, a liquidator or by an arbitrator or arbitrators, by any Civil Court having local jurisdiction in the same manner as a decree of such Court.

There is a second clause to this Section, with which we are not here concerned. The argument for the appellant is that once the Registrar had made the award, the debt merged in the decree, and limitation began to run under the Limitation Act as in the case of a decree. It is argued therefore that before the date of the second award, the first award and the claim which had merged in it had become time-barred, and so no longer enforceable. Therefore there was no dispute in existence at the time the second award was made, and the Assistant Registrar had no jurisdiction to pass an order under S. 48. This argument, in my view, ignores the provisions of S. 63 of the Act, which are as follows :

> Notwithstanding any of the provisions of the Limitation Act, 1908, the period of limitation for debt including interest due to a registered society by a member thereof shall be computed from the date on which such member dies or ceases to be a member of the society.

Having regard to the terms of this provision, it seems to me that it cannot be said that the debt could have become barred by limitation. It is to my mind doubtful, having regard to this Section, whether even the first award itself could be said to have become unenforceable. But even if that be assumed to be so, it cannot be said that the claim no longer existed. It will be recalled that S. 51 uses the words "in addition to any other method of enforcement provided under this Act;" and S. 52 shows that the award is not enforceable merely as a decree, but is something more : for S. 52 provides inter alia that any sum payable by any person or by any registered society, in accordance with an order, decision or award passed or made under S. 48, shall be recoverable as a public demand, in any area, in which the Bihar and Orissa Public Demands Recovery Act, 1914, is in force, or as an arrear of land revenue throughout the whole of the Province of Bihar and Orissa, and the Registrar or other person authorzied by him in this behalf, shall be deemed to be the person to whom such public demand is due or to whom such arrear of land revenue is payable. I have spoken as if the first award is one in regard to which it could be said that it became time-barred if the ordinary provisions with regard to limitation are applicable ; but, actually, there is nothing to show that ; and, in view of the fact that we do not know what happened between the parties between 1933 and 1938, that cannot be assumed. For all we know payments may have been made in the interval, or there may have been acknowledgments. That something occurred is suggested by the fact that the second award is for a smaller amount than what would have been due upon the first, after making the full allowance for the interest provided.

However that may be, and whether it is to be held that the original award was enforceable or not, there can, in my view, be no doubt, having regard to the provisions of S. 63, that the claim still subsisted. If the claim subsisted and was not acknowledged, there was clearly a 'dispute,' having regard to Expl. 1 to S. 48, which I have quoted, and which gives a special and extended meaning to the word 'dispute.' Once it is held that there was a dispute subsisting in 1938, I do not think it can be said that the Registrar or the Assistant Registrar had no jurisdiction to pass an order under S. 48. There is nothing in the Act anywhere providing that the Registrar shall not have jurisdiction to make two awards with reference to the same dispute, and it seems to me that cases may conceivably arise when it would be advisable for the Registrar to make a second award ; as for example, where uncertified payments have been made which the Registrar might be entitled to take into account, though the Civil Court could not. There is nothing in my view to prevent the Registrar in such circumstances giving a second award even if the dispute be substantially the same dispute. In a case like the present however the dispute inevitably will not be exactly the same. Fresh questions will have arisen between the parties, as they evidently did in this case, and there must be fresh questions requiring the Registrar's decision, or we would not find his award being for a lesser sum than would have been due upon the old award. Having regard to these circumstances, this, in my opinion, cannot possibly be considered a case where the award of the Registrar was a nullity as being wholly without jurisdiction. The appeal must therefore fail and I would dismiss it with costs.

Fazl Ali J.—I agree. It is to be remembered that this case must be decided with reference to some of the peculiar provisions of the Bihar and Orissa Co-operative Societies Act. S. 63 of this Act provides that notwithstanding any of the provisions of the Limitation Act, the period of limitation for a debt, including interest, due to a registered society by a member thereof shall be computed from the date on which such member dies or ceases to be a member of the society. As the appellant is still a member of the society there is no question of limitation in this case. The next provision, which may be referred to, is S. 48 of the Act, which authorizes the Registrar to make an award in cases of disputes. As Expl. (1) of this Section shows, the expression 'dispute' has been used in this Section in a very special sense. Under this Section, a claim by a registered society for any debt or demand due to it from a member or a past member shall be a dispute even in case such debt or demand is admitted, and the only point at issue is the ability to pay or the manner of enforcement of payment. Thus, there might be a dispute under this Act even where the claim is admitted. As the word 'debt' must include decretal debt, it appears to me that there is nothing to prevent the Registrar from dealing under

S. 48 with a dispute between the parties as to a decretal debt. The Explanation shows that he may deal with the matter even where the only point at issue is the ability to pay or the manner of enforcing payment. Therefore, even where a previous award has been given, if there is still a dispute as to the judgment-debtor's ability to pay, or the manner of enforcement of payment, the Registrar is competent to deal with the matter. The parties before us are agreed that though certain provisions of the Civil Procedure Code have been made applicable under special Sections, there is no Section of the Act which makes S. 11, Civil P. C., applicable to a dispute arising under this Act. Therefore, in my opinion, it cannot be said that if the Registrar has already made an award in respect of a debt, he can in no case make a second or a subsequent award in respect of the same debt.

Reference was made in the course of the argument to S. 51 of the Act. But S. 51 merely states that orders passed by the Registrar under S. 48 shall be enforced in the same manner as a decree of such Court. This Section does not help the appellant, because there is no question in this case as to the manner of enforcement of the award. In fact, the respondent is trying to enforce the award as a decree of the Court. The real question is whether a second award may be obtained in circumstances like those of the present case in respect of the same subject-matter. That is not enforcement of an award but a different matter. As I have already stated, if S. 11, Civil P. C., is not applicable, the Act does not bar a subsequent award. It is however to be remembered that a second award can be obtained only if there is an outstanding claim or debt due. Therefore, where the debt has been completely extinguished, I doubt whether the Registrar will have power to make a second award. This, in my opinion, is sufficient to explain the decision in A I R 1936 Lah 901,[1] which is relied on by the appellant. In that case there was a previous adjudication that the debt had become time-barred. The points raised on behalf of the appellant completely fail and the appeal must be dismissed with costs.

G.N./R.K. *Appeal dismissed.*

1. Anjuman Dehi v. Kehar Singh, (1936) 23 A I R Lah 901=168 I C 49=38 P L R 1113=I L R (1937) Lah 92.

A. I. R. 1940 Patna 555

AGARWALA J.

Bachu Narain Singh and others

v.

Mohammad Umrao and others.

Appeal No. 625 of 1938, Decided on 30th August 1939.

(a) Landlord and Tenant—Landlord protesting against tenant holding over after expiry of lease—Subsequent rent suit does not amount to consent by landlord to tenant holding over — Landlord cannot recover rent after expiry of lease.

Where there is nothing to indicate that the landlord has declined to consent to the tenant holding over after the expiry of the lease, the institution of a suit for rent may well be deemed to be an expression of assent to his holding over. But when the landlord, according to his own admission, has for four or five years protested against the tenant holding over, the institution of a suit by him for rent does not amount to a consent to tenant's holding over from the expiry of the period of the thika. It is inconsistent with the landlord's conduct and can merely be evidence that after a period of years the landlord himself changed his mind with regard to what he wanted to do. In such a case the landlord is not entitled to recover rent from the tenants after the expiry of the term of lease: *A I R 1935 Pat 271, Ref.* [P 556 C 2]

(b) Landlord and Tenant—Rent suit without alternative claim for damages — Suit dismissed as persons holding over after expiry of lease were found not to be tenants—Landlord cannot recover damages for use and occupation of land —But where facts alleged by landlord can support claim for damages for use and occupation he can be allowed to amend plaint by adding alternative claim for damages even in second appeal.

Where the case for rent pleaded by the plaintiff is based on the relationship of landlord and tenant without alternative claim for damages for use and occupation and it is that case which the defendants had to meet all through, the plaintiff cannot recover damages when his suit is dismissed on the ground that the defendants holding over after the expiry of the lease were not tenants. But where the facts alleged by the plaintiff in the rent suit are such as would support a claim to recover damages for use and occupation, the plaint can be allowed to be amended even in second appeal so as to include an alternative claim for damages: *17 C W N 311, Ref.* [P 557 C 1]

Mahabir Prasad and G. P. Singh — *for Appellants.*

Naimul Huq, J. N. Sahai and Ahmad Reza — *for Respondents.*

Judgment. — This is an appeal by the defendants against a decision of the Additional Subordinate Judge of Patna, reversing a decision of the Munsif of Barh. The appeal arises out of a suit for rent for the years 1339 to 1341 at the rate of Rs. 250 per annum. In 1924, the defendants obtained from the proprietor a thika of the land in respect of which the rent is claimed for a period of seven years expiring in 1337

Fasli. In 1935, the proprietor granted a mukarrari to the plaintiff. The plaintiff alleges that at that time the defendants were holding over after the expiry of the term of their thika and claims rent at the thika rate. The defendants pleaded that on the expiry of the thika in 1337 the proprietor re-let the land to them at Rs. 6 per bigha or Rs. 108 per annum and that they have paid the proprietor at this rate up to and including 1341. They denied that they had any knowledge of the mukarrari granted to the plaintiff or that the relationship of landlord and tenant existed between themselves. The Court below has not accepted the defendants' plea that there was a resettlement with them by the proprietor on a reduced rent on the expiry of the original thika but held that the defendants were liable either for rent at the rates stipulated in the thika or for damages for use and occupation, the damages being calculated at the rate of rent reserved by the thika. In this appeal it is contended on behalf of the appellants that S. 79, Bengal Land Registration Act, 1876, indemnifies them against the claim made by the plaintiff. That Section is as follows:

> The receipt of any proprietor, manager or mortgagee whose name and the extent of whose interest is registered under this Act shall afford full indemnity to any person paying rent to such proprietor, manager or mortgagee.

There is no dispute that the proprietor of a land is in fact registered under the Registration Act and the defendants produced at the trial receipts in respect of the years in suit which they alleged had been granted to them by the proprietor. But the rent receipts were at the rate of Rs. 108 which the defendants said was the rate settled after the expiry of the original thika. Now, it has been held by the Courts below that there was no re-settlement after the expiry of the thika, and it follows therefore that the receipts at the rate of Rs. 108 cannot be genuine documents. I agree therefore with the finding of the Courts below that the defendants are not entitled to credit for the amounts which they claim to have paid to the proprietor since the expiry of the term of the thika. This view of the matter disposes of the argument based by the learned advocate for the appellants on Ss. 67 and 72, Tenancy Act, and S. 79, Registration Act, for, in each case it is necessary for the appellants to prove that they had in fact paid rent to the proprietor subsequent to the expiry of the term of thika. The Court below, as I have already said, held that the plaintiff was entitled to recover damages for use and occupation even if he were not entitled to the rent. With regard to that it is contended on behalf of the appellants that they cannot be said to have been holding over after the expiry of the term of thika, because the plaintiff did not consent to their doing so. It appears from the evidence of the plaintiff himself that from 1937, when the thika expired, he objected to the defendants remaining in possession of the land as tenants.

On behalf of the plaintiff it is contended that in 1342 they served a notice on the defendants requiring them to quit the land or to pay rent at Rs. 250 a year and it is said that this was an acceptance by the plaintiff of the defendants as their tenants. It was also contended on behalf of the respondents that the institution of the suit itself amounted to an assent to the defendants' holding over. Reference is made to the decision of James J. in this Court in 155 I C 367.[1] Where there is nothing to indicate that the landlord has declined to consent to the tenant holding over after the expiry of the lease, the institution of a suit for rent may well be deemed to be an expression of assent to his holding over. But when the landlord, according to his own admission, has for four or five years protested against the defendant holding over and then has instituted a suit for rent, I do not consider that to amount to a consent to his holding over from the expiry of the period of the thika. It is inconsistent with the landlord's conduct and can merely be evidence that after a period of years the landlord himself changed his mind with regard to what he wanted to do. I would therefore hold that in the present case the plaintiff is not entitled to recover rent from the defendants.

The next question is whether the decree of the Court below awarding damages for use and occupation should be upheld. On behalf of the appellants reference is made to a decision of the Calcutta High Court in 17 C W N 311[2] where a Division Bench held that in a suit for rent, where no alternative claim is made for compensation for use and occupation, no amount can be decreed on that footing. The Court however pointed out that in a proper case the plaintiff might be allowed to amend his plaint

1. Ramsundar Tewari v. Dulhin Gataso Kuer, (1935) 22 A I R Pat 271=155 I C 367.
2. Bhukhi Koeri v. Ram Khelawan Prosad, (1912) 17 C W N 311=17 I C 646.

but that such an amendment should be allowed only where a claim has been omitted by mistake or inadvertence or for similar reasons, and not deliberately. If the facts alleged by the plaintiff in the present case were such as would support a claim to recover damages for use and occupation, I would have no hesitation, even at this stage of litigation, in allowing the plaint to be amended so as to include an alternative claim for damages; but the case which the plaintiff pleaded was based on the relationship of landlord and tenant and it was that case which the defendants had to meet all through this litigation. In these circumstances I do not think it would be justifiable in second appeal to direct the plaintiff to change the ground of his claim. I would therefore set aside the decision of the Court of Appeal below and dismiss the plaintiff's suit. In view of the defence set up by the appellants in respect of the alleged re-settlement after the expiry of the original thika, I would direct each party to bear its own costs in this appeal.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 557

AGARWALA AND ROWLAND JJ.

Firm Pirthi Raj Ganesh Das — Appellant.

v.

Balmakund Marwari — Respondent.

Appeal No. 207 of 1939, Decided on 1st April 1940, from original order of Special Sub-Judge, Ranchi, D/- 19th April 1939.

Civil P. C. (1908), O. 21, R. 53 (4) — Transferee Court can attach decree passed in favour of judgment-debtor under R. 53 (4).

No doubt, where the Code confers certain powers on the Court which specifically passes the decree, it does not necessarily follow that those same powers are exercisable by the Court to which the decree has been sent. These are, generally speaking, cases in which the powers which are brought into play are not powers being exercised "in executing such decree" within the meaning of S. 42; but the steps contemplated by O. 21, R. 53 (4), are things to be done in executing the decree and therefore in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree even without the addition, in the Rule, of words specifically permitting the Court to which a decree has been sent to do a particular thing. [P 559 C 1]

N. N. Sen — *for Appellant.*

S. A. Khan, K. Husnain and G. C. Das — *for Respondent.*

Agarwala J.—This is an appeal by the decree-holder from a decision of the Subordinate Judge of Ranchi holding that he has no power to attach a decree for partition obtained by the judgment-debtor against whom it is sought to proceed in execution. The relevant facts are that the appellant obtained a decree in the Original Side of the Calcutta High Court against the firm Ganpat Rai Balabux. This decree was transferred for execution to the Court of the Subordinate Judge of Ranchi. An application for execution at Ranchi having proved infructuous, the decree-holder applied to the Calcutta High Court under O. 21, R. 50, for leave to proceed against the respondent Balmakund Marwari as a partner in the debtor-firm. Execution was then taken out against Balmakund Marwari and resulted in the decree being satisfied in part. A further application was then taken out in which it was sought to attach a partition decree which had been obtained by Balmakund Marwari in 1936. A writ of attachment was issued and Balmakund entered appearance. By a petition he objected to the execution proceedings on the ground that he had already transferred his interest in the partition decree to one Kanhaya Lal for consideration. The date on which he is alleged to have done this was 5th February 1939, a few days after service of writ of attachment.

This objection was heard by the Court below on 19th April 1939, when the Court found against Balmakund on the question of the transfer of the partition decree; but the Court gave effect to another objection which was raised at the hearing by the judgment-debtor, namely that under O. 21, R. 53 (4), it is only the Court which passed the decree and not the Court to which a decree has been transferred for execution that has jurisdiction to attach a decree passed in favour of a judgment-debtor. R. 53 of O. 21, prescribes the method by which decrees may be attached. Sub-rr. (1) and (2) refer to the method of attaching a decree for payment of money or for sale in enforcement of a mortgage or charge. Sub-r. (4) refers to decrees of the nature other than those mentioned in sub-r. (1). It prescribes that in such cases

> the attachment shall be made by a notice by the Court which passed the decree sought to be executed to the holder of the decree sought to be attached.

It is contended on behalf of the respondent in this appeal, as it was in the Court below, that the words "the Court which passed the decree" do not in this sub-rule include the Court to which the decree has been sent for execution. Reference was made

to the provisions of Rr. 16 and 50 where the phrase "Court which passed the decree" occur and to decisions interpreting that phrase. R. 16 refers to applications for execution by a transferee of the decree and provides that the transferee may apply for execution of the decree to the Court which passed it. In 11 Pat 94,[1] it was held that an application for execution by a transferee of a decree can be entertained only by the Court which actually passed the decree. Since then the rule in this Court has been amended by empowering the Court to which the decree has been transferred to entertain an application by a transferee for execution of the decree.

16 Lah 63[2] is also a case in which it was held that an application under O. 21, R. 16, is not entertainable by a Court to which a decree has been sent for execution. In that case however, it was held that the judgment-debtor had waived the irregularity in the exercise of its jurisdiction by the Court to which the decree had been transferred. R. 50 of O. 21, provides for execution of the decree passed against a firm and against a person who has been individually served as a partner with summons and has failed to appear. By sub-r. (2) it is provided that where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-r. (1), cls. (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave to proceed against such a person. In 11 Pat 580,[3] it was held that an application under sub-r. (2) was entertainable only by the Court which actually passed the decree and not by the Court to which the decree has been transferred for execution. This rule has also been amended by this Court and by the amendment the Court to which the decree has been transferred for execution has been empowered to entertain an application under sub-r. (2) of R. 50 of O. 21.

In 32 C W N 790,[4] it was held by the Privy Council that it is only the Court which passed the decree and not the Court to which it has been sent for execution that may entertain an application for execution against the legal representative of the deceased judgment-debtor under S. 50, Civil P.C. In that case their Lordships held that where substitution has been made by the Court to which the decree has been sent for execution, the irregularity may be waived by acquiescence and that when it has been so waived the party acquiescing cannot subsequently question the jurisdiction of the executing Court. In my view, none of these cases are of material assistance in the present appeal. S. 42 of the Code provides:

> A Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. . . .

Section 51 specifies the various ways in which a decree may be executed; cl. (b) empowers a Court to execute a decree by attachment and sale or by sale without attachment of any property: and cl. (e) empowers a Court to execute a decree in such other manner as the nature of the relief granted may require. Cls. (a), (c) and (d) have no application to the facts of the present case. They refer to execution by delivery of properties specifically decreed, to execution by arrest and detention in prison and to execution by appointment of a receiver. Cl. (e) appears to refer to those special methods of execution which are provided for in certain rules of O. 21, for example, a decree for specific moveable property (R. 31), a decree for restitution of conjugal rights or for an injunction (R. 32), a decree for execution of document or endorsement of negotiable instrument (R. 34), an application for execution by attachment of a decree (R. 53) and execution of an order for payment of coin or currency notes (R. 56). In my view, the method of execution by attachment and sale of a decree in favour of the judgment-debtor is one of the methods of attachment which fall within cl. (e) of S. 51. Also, it seems to me that the attachment and sale of a decree in favour of a judgment-debtor falls within the method of attachment prescribed by cl. (b) of S. 51. Whichever of these clauses of S. 51 applies to a decree in favour of the judgment-debtor, he is clearly liable to be proceeded against in execution in the manner prescribed by the Code. The words of S. 42 that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself appear to me to mean that the Court to

1. Prithvi Chand v. Satya Kinkar Das, (1932) 19 A I R Pat 168=137 I C 472=13 P L T 402=11 Pat 94.
2. Moti Ram Dewan Chand v. Dhanna Singh Haveli Ram, (1934) 21 AIR Lah 648=154 I C 928=16 Lah 63=37 P L R 437.
3. Kalu Ram v. Firm Sheonandan Rai Jokhi Ram, (1932) 19 A I R Pat 323=141 I C 61=11 Pat 580=13 P L T 751.
4. Jang Bahadur v. Bank of Upper India Ltd., (1928) 15 A I R P C 162=109 I C 417=55 IA 227=3 Luck 314=32 C W N 790 (P C).

which the decree has been sent for execution is empowered to execute it in any of the ways prescribed by S. 51 that is applicable to that particular kind of decree, and, that as by O. 21, R. 53, the method of attaching a partition decree is the method prescribed by sub-r. (4) of R. 53, the executing Court is, by reason of S. 42, empowered to effect the attachment.

To take the view contended for by the respondent would lead to an absurdity in a case where the only property of the judgment-debtor is a decree. In such a case, if the argument of the learned advocate for the respondent is valid, the executing Court to which the decree has been sent for execution would not be able to execute the decree at all, although it is solely for the purpose of executing it that the decree is transmitted to it by the Court which passed it. Such a result cannot be favoured in construing the Civil Procedure Code. In my view, the Court below has taken a wrong view of the law and I would, therefore, allow the appeal and set aside the order of the Court below and direct that the attachment be restored and the execution proceed. The appellant is entitled to his costs in this Court and in the Court below.

Rowland J.—I agree. S. 38 of the Code says that the decree may be executed either by the Court which passed it or by the Court to which it is sent for execution, and then we have S. 42 which says that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. It has however been held in numerous cases that where the Code confers certain powers on the Court which specifically passes the decree, it does not necessarily follow that those same powers are exercisable by the Court to which the decree has been sent. These are generally speaking cases in which the powers which are brought into play are not powers being exercised "in executing such decree" within the meaning of S. 42, but I have no doubt that the steps contemplated by O. 21, R. 53 (4), are things to be done in executing the decree and therefore in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree even without the addition in the rule of words specifically permitting the Court to which a decree has been sent to do a particular thing. There was therefore, in my view, no irregularity in making the attachment. There was no illegality to condone and as my learned brother has said none of the decisions cited to us are directly in point.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 559

DHAVLE J.

Bindeshwari Singh and others

v.

Raghunandan Mahto and others.

Criminal Revn. No. 124 of 1940, Decided on 29th March 1940.

Criminal P. C. (1898), Ss. 144 and 145 — After local inquiry proceedings under S. 144 decided against petitioner— District Magistrate directing procedure under S. 145 in event of dispute coming before Magistrate again—After a year fresh proceedings started under S. 144 between same parties — Magistrate again passing order under S. 144 against petitioner on ground that opposite party had been found in possession in prior proceedings under S. 144 and that there was no bona fide dispute — Order held was not proper.

In the proceedings under S. 144, the Magistrate after directing local enquiry passed an order against the petitioner holding that possession was with the opposite party. The matter was taken up in revision to the District Magistrate who directed that in the event of the dispute coming up before the Magistrate again he should proceed under S. 145. A year after, fresh proceedings were started under S. 144 and the Magistrate again passed an order against the petitioner on the ground that in the previous proceedings the opposite party had been found to be in possession, that the petitioner could not have come into possession since then and that there was no bona fide dispute:

Held that the order was not passed properly and therefore must be set aside, even though it was time expired :*A I R 1939 Pat 512, Rel. on; A I R 1925 Pat 514 and A I R 1929 Pat 415, Disting.*

[P 560 C 2]

Raj Kishore — *for Petitioners.*

C. P. Sinha — *for Opposite Party.*

Order. — This is an application in revision against an order of the District Magistrate of Patna refusing to interfere with an order of the Sub-Divisional Magistrate of Bihar passed against the petitioners under S. 144, Criminal P. C. The petitioners' case is that they took a settlement of a one-third share of the opposite party in Khata No. 301 which had been brought to sale in execution of a rent decree obtained by the landlords. The auction-purchaser from whom the petitioners took their settlement took out dakhal-dehani on 19th May 1936. There was then a proceeding under S. 144 of the Criminal P. C., which ended adversely to the auction-purchaser, the Magistrate holding that his proper remedy was a partition suit. There was accordingly a partition suit in 1937, and this ended in the usual decree with a dakhal-dehani on 8th May 1938.

The petitioners claim to have taken settlement from the auction-purchaser, after the second dakhal-dehani, on 12th July 1938. In December 1938 there was a proceeding under S. 144 between the petitioners and the tenants, the opposite party, and this ended in favour of the opposite party because as the Magistrate said in his order of 4th January 1939, a Sub-Deputy Magistrate who had been sent to make the local inquiry came to the conclusion that possession was with the old tenants. The matter was taken up in revision to the District Magistrate who declined to interfere on the ground that the period of two months had expired. He observed, however, that

> it is desirable to determine the question of actual possession in a proceeding under S. 145, Criminal P. C., if again a dispute arises and breach of the peace is apprehended.

Notwithstanding this, fresh proceedings were started in November last under S. 144 and these were concluded on 15th December, when the Sub-Divisional Magistrate made the rule under that Section absolute against the petitioners and discharged it as against the opposite party; and he did this on the ground that in the previous proceeding under S. 144 the opposite party had been found to be in possession, that the petitioners could not have come into possession since and that

> it only appears that since the learned District Magistrate observed in appeal that it may be desirable to decide the matter under S. 145, Criminal P. C., that the first party (the petitioners in this Court) have started fresh attempts to falsely claim actual possession in the lands.

This order was taken up in revision to the District Magistrate, who referred to the previous order of the District Magistrate regarding this being a proper case in which proceedings under S. 145 should have been started; but as the crop growing on the land had already been cut and removed, and the order passed by the Sub-Divisional Magistrate expired on the day of the order of the District Magistrate, he declined to interfere. The learned advocate for the petitioners has contended that this was a case which should have been dealt with by the Sub-Divisional Magistrate not under S. 144, but under S. 145, Criminal P. C., and in support of this contention he has referred to 20 P L T 374,[1] a somewhat similar case in which I had occasion to observe that :

> To repeat such an order on the ground of maintaining the status quo is to compel the unsuccessful party to resort to the Civil Court even though the Criminal Court may have done nothing to look into the rights of the parties and further, indirectly to prolong the effect of the original order beyond the period of two months fixed in subs. (6) of the Section. Such a use of the Section is altogether unwarrantable.

The learned advocate for the opposite party has endeavoured to support the orders of the lower Courts by citing 6 P L T 746[2] and 10 P L T 542.[3] In the former of these cases the learned Judges declined to interfere with an order under S. 144 on the ground that as it had spent its force, it was not necessary to set it aside and that the observation of the Magistrate as regards the possession of one of the parties was simply an incidental observation. In 10 P L T 542[3] it was held that S. 144 was properly applied in a case where a Magistrate of experience found on the materials before him that there was no bona fide dispute as to actual possession.

The learned advocate has contended that in the present case the learned Magistrate properly arrived at the conclusion that there was no bona fide dispute, but the Magistrate's conclusion really rests on the report of the local enquiry that was made by the Sub-Deputy Magistrate in the proceeding a year ago. Reliance on that proceeding brings about the evil to which I referred pointedly in 20 P L T 374.[1] It might have been unnecessary to interfere with the order of the Magistrate as it is time expired if the Magistrate had not fallen into the error — I will use no stronger word—of resorting to S. 144 notwithstanding the very proper direction of the District Magistrate a year ago that it was a proper case in which proceedings under S. 145, Criminal P. C., should have been started. An order which has been deliberately passed under S. 144 when the Magistrate knew and had been told that he should proceed under S. 145, if necessary, cannot be left alone merely because it is time expired, for it is impossible to encourage the Magistrate to use his powers in that way. The result is that this rule must be made absolute. The order of the Sub-divisional Magistrate, though it is time expired, must be regarded as an order that was not passed properly.

G.N./R.K. *Rule made absolute.*

1. Chrestien v. Carter, (1939) 26 A I R Pat 512=184 I C 240=40 Cr L J 895=20 P L T 374.

2. Munni Lal Sao v. Gatti Ahir, (1925) 12 A I R Pat 514=88 I C 845 = 26 Cr L J 1229 = 6 P L T 746.

3. Lachman Das v. Ram Chhabila, (1929) 16 A I R Pat 415=115 I C 683 = 30 Cr L J 510 =10 P L T 542.

A. I. R. 1940 Patna 561

HARRIES C. J. AND AGARWALA J.

Gaya Prasad Singh — Defendant — Appellant.

v.

Jagadish Chandra Deo Dhabaldeb — Plaintiff — Respondent.

Appeal No. 220 of 1936, Decided on 4th April 1940, from appellate decree of Judicial Commissioner of Singhbhum, D/- 3rd September 1935.

Chota Nagpur Tenancy Act (6 of 1908), S. 233 — Erection and maintenance of huts on occupancy holding is continuing misuse—Period of two years can be calculated from any day during which misuser continued.

Where the wrong is one which is capable of being corrected and is not corrected, it is wrong which continues. [P 561 C 2]

The erection and maintenance of huts intended for the habitation of workmen on an occupancy holding is a misuse of that holding which continues as long as the huts remain standing. It is only when the huts are removed that it can be said that misuser no longer exists. Such act therefore amounts to continuing wrong. A period of two years can therefore be calculated from any day during which the misuser or breach complained of continued. [P 562 C 2; P 563 C 2]

P. R. Das, A. K. Roy and S. S. Rakshit — *for Appellant.*

Dr. D. N. Mitter and G. C. Mukharji — *for Respondent.*

Agarwala J. — This appeal arises out of a suit by a landlord to eject an occupancy raiyat on the ground that the tenant has used the land comprised in his agricultural holding in a manner not authorized by S. 21, Chota Nagpur Tenancy Act. The manner in which the tenant is found to have offended is by the erection of huts on agricultural land. The facts were that the land was settled with the defendants in 1924. In April 1932, the plaintiff came to know that the defendants had begun to construct huts in two of the plots, namely Nos. 63 and 64. A notice to quit was served upon them on 30th April of that year, and on 3rd July 1933, the present suit was instituted. The litigation has had a chequered career, having been up to this Court once before when it was necessary to remit an issue as to whether the defendants had constructed any huts on the land in 1932 according to the averment made in the plaint. It has now been found as a fact that the huts erected on plots Nos. 63 and 64 were constructed before 1930, but that in 1932 the defendants commenced the construction of other huts which were, however, pulled down when objection was raised by the municipality. The Court below has also found that the defendants have erected more huts while this litigation was pending. We are not concerned with the rights of the parties in respect of those huts.

The question of law which arises in the present appeal is whether the suit is barred by limitation. On behalf of the defendant-appellant, it is contended that as the finding now is that all the huts with which we are concerned in this appeal were erected more than two years prior to the institution of the suit, the suit is barred by the provisions of S. 233, Chota Nagpur Tenancy Act. That Section provides, for suits for the ejectment of an occupancy raiyat for using his land in a manner not sanctioned by S. 22, a period of two years from the date of misuse of the land. On behalf of the respondent, on the other hand, it is contended that the misuse is a continuing wrong and that the suit is within time until within two years from the date when the misuse ceases. By S. 230, Chota Nagpur Tenancy Act, the provisions of the Limitation Act of 1908, so far as they are not inconsistent with the provisions of the Tenancy Act, are made applicable to all suits under the Act. S. 3, Limitation Act, provides that subject to the provisions contained in Ss. 4 to 25, every suit instituted after the period of limitation prescribed therefor by Sch. 1 shall be dismissed. S. 3 thus brings into operation S. 23 of that Act. The provisions of that Section are as follows :

> In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be continues.

There is little difficulty in holding that the misuse on the land complained of in the present case constitutes a continuing wrong to the landlord plaintiff. Whatever difficulty there may be in defining precisely the meaning of "continuing wrong" I think there can be little doubt that where the wrong is one which is capable of being corrected and is not corrected, it is wrong which continues : as for instance where an obstruction to a watercourse is caused the wrong to the persons entitled to the use of the water continues until the obstruction is removed, whereas in the case of a single act of trespass, such as walking into another person's house or on his land the wrong ceases when the trespasser leaves the premises, and the trespass in such a case does not constitute a continuing wrong. The

difficulty in the case arises by reason of the language of S. 233, Chota Nagpur Tenancy Act. It will be observed that the two years' period of limitation prescribed is to run from "the date of the misuse." It has been contended that the language in this Section indicates that a particular date has to be found and that it negatives the idea that the Legislature viewed misuse under that Section as of a continuing nature.

There is a good deal of difficulty in reconciling some of the Articles of Sch. 1, Limitation Act, with the provisions of Ss. 3 and 23 of the Act, but so far as the present question is concerned, a decision of the Privy Council in 6 Cal 394[1] is of assistance. That was a case of an obstruction to a waterway. Under the Limitation Act which was then in force, the appropriate Article was 31 which is in the same terms as Art. 37 of the present Act, 1908, except that the period was then two years and is now three years. The period of limitation there prescribed commenced to run from the "date of the obstruction." In the case which went to the Privy Council the Calcutta High Court had held that "date of the obstruction" in Article 31 of the old Act meant the date on which the obstruction became effective. The Privy Council overruled that conclusion, holding that as the obstruction was a continuing wrong there was a fresh *terminus a quo* from every moment that the wrong continued. There is no material difference in the language of S. 233, Chota Nagpur Tenancy Act, and Art. 31 of the old Limitation Act, and Art. 37 of the present Limitation Act, so far as this point is concerned. We must therefore hold that the present suit was instituted within the period of limitation prescribed by the Chota Nagpur Tenancy Act.

The next question is with regard to the appropriate order to be passed in these circumstances. S. 69, Chota Nagpur Tenancy Act, provides that a decree for the ejectment of an occupancy raiyat on the ground that he has misused the land comprised in his holding shall declare the amount of compensation reasonably payable to the plaintiff for the misuse and also where the misuse is, in the opinion of the Court, capable of remedy, shall fix a period during which it shall be open to the defendant to pay the amount of compensation fixed by the Court to the plaintiff and to remedy the wrong occasioned by the misuse. Dr. Mitter on behalf of the respondent does not press for the assessment of compensation in this case. We fix six months from this date during which the defendants must remove the huts constructed on holdings Nos. 63 and 64. If within that period the huts are not removed, then the defendants will be ejected in due course of law. The plaintiff is entitled to his costs throughout.

Harries C. J.—I agree. In this case the substantial defence to the claim was that the suit was barred by the period of limitation prescribed in S. 233, Chota Nagpur Tenancy Act. That Section is as follows :

> Suits for ejectment of an occupancy raiyat or a non-occupancy raiyat on any of the grounds mentioned in S. 22 or in cls. (b) and (c) of S. 41 shall be instituted within two years from the date of the misuse or breach complained of.

The misuse in the present case was the erection of huts on the holding. It has been found as pointed out by Agarwala J. that the huts complained of in this suit were erected more than two years previous to the institution of the suit. It is true that huts have been erected since the suit was instituted, but the Court is not concerned with those huts in the present litigation as they do not provide a cause of action previous to the institution of this suit. Everything turns on the meaning of the phrase "date of the misuse or breach complained of." Mr. Das contended that the date of the misuse or breach was the date upon which these huts were erected, and they were erected between 1924 and 1930. According to Mr. Das, the moment a hut is erected there is a misuse or breach which occurs once and for all. Dr. Mitter, on the other hand, has urged on behalf of the plaintiff-respondent that the erection and maintenance of huts on an occupancy holding is a continuing misuse of that holding or a continuing breach of the conditions upon which the tenant holds such holding. It appears to me that the erection and maintenance of huts intended for the habitation of workmen on an occupancy holding is a misuse of that holding which continues as long as the huts remain standing. It is only when the huts are removed that it can be said that misuser no longer exists. In my judgment the acts complained of in this case amount to continuing wrongs and the question arises what effect that has upon limitation.

As pointed out by Agarwala J., continuing wrongs are dealt with in S. 23, Limitation Act, and that Section governs the

1. Rajrup Koer v. Abul Hossein, (1881) 6 Cal 394 =7 I A 240 = 4 Sar 199 = 3 Suther 816 = 7 C L R 529 (P C).

Articles in Sch. 1 of the Act. No difficulty would arise if the period of limitation in this case was prescribed in the Limitation Act. Mr. Das has argued that S. 23, Limitation Act, cannot govern or affect the provisions of S. 233, Chota Nagpur Tenancy Act. It has already been pointed out that the provisions of the Limitation Act, in so far as they are not inconsistent with the Chota Nagpur Tenancy Act, are applied to that latter Act by S. 230. It is clear that any provision of the Limitation Act inconsistent with the provision of the Chota Nagpur Tenancy Act can have no application. For example, suits of the nature of the present suit brought in Bengal or Bihar would be governed by Art. 32, Limitation Act, which provides a period of two years from the date when the misuse or perversion first became known to the person injured thereby. Clearly that Article can have no application to tenancies in Chota Nagpur because it is wholly inconsistent with S. 233, Chota Nagpur Tenancy Act, which prescribes a different period of limitation. In my view however, there is nothing in the Chota Nagpur Tenancy Act inconsistent with S. 23, Limitation Act. S. 23 defines the period of time in which suits can be brought where the wrong complained of is a continuing one, and in my judgment S. 23, Limitation Act, is applicable to the facts of the present case as the Chota Nagpur Tenancy Act is silent as to when time begins to run in the case of continuing wrongs. Once it is held that the misuser or the breach complained of in this case is in the nature of a continuing wrong, the plaintiff, in my judgment, could maintain the present action as long as the misuser continued and within two years after it ceased.

Mr. Das strenuously argued that the phrase "the date of the misuse or breach complained of" suggested that time began to run from the moment misuser had taken place or the moment a condition was broken. The meaning of such a phrase has been dealt with by their Lordships of the Privy Council in 6 Cal 394.[1] In that case their Lordships were considering the period of limitation applicable to suits brought for compensation for obstruction of waterways. The period of limitation then applicable was two years from the date of the obstruction. Their Lordships held that time did not run from the moment the waterway was obstructed, because obstructing a waterway was a continuing wrong. The cause of action was renewed day after day as long as that obstruction causing such interference was allowed to continue. I can draw no distinction from the phrase "date of misuse" and the phrase "date of obstruction" where both user and obstruction are continuing wrongs. It appears to me that this Court is bound to hold that the "date of misuse or breach complained of" in S. 233, Chota Nagpur Tenancy Act, does not mean the actual commencement of the misuser. A period of two years can be calculated from any day during which the misuser or breach complained of continued. For the reasons which I have given, I am satisfied that the suit in this case was within time, and I entirely agree with the order proposed by Agarwala J. in his judgment.

D.S./R.K. *Order accordingly.*

A. I. R. 1940 Patna 563

VARMA J.

Smt. Snehlata Devi — Petitioner.

v.

Babu Janardan Prasad Singh and others — Opposite Party.

Civil Revn. No. 181 of 1939, Decided on 18th December 1939, against order of Addl. Sub-Judge, Bhagalpur, D/- 4th February 1939.

Civil P. C. (1908), O. 5, R. 17 — Condition that defendant refused to sign acknowledgment not satisfied — Stage for affixing copy on outer door does not arrive.

Where the condition that the defendant refused to sign the acknowledgment is not satisfied, then the stage for the serving officer to "affix a copy of the summons on the outer door or some other conspicuous part of the house" does not arrive: *30 Bom 623, Rel. on.* [P 564 C 2]

Murari Prasad and S. P. Srivastava — *for Petitioner.*

B. P. Sinha and Brahmadeva Narayan — *for Opposite Party.*

Order. — The petitioner in this case has moved this Court against an order passed under O. 9, R. 13, Civil P. C., passed by the lower Appellate Court refusing to set aside an ex parte decree passed by the learned Munsif. One Janardan Prasad Singh and others brought a suit to enforce a simple mortgage bond executed by Shaligram Prasad Singh who and his sons Babu Raghubir Prasad Singh and Ganesh Prasad were impleaded as defendants first party. Srimati Snehlata Devi, the present petitioner, was the purchaser of a portion of the mortgaged property and figured in the suit as defendant second party, and it was she who made an application under O. 9, R. 13. Her allegation was that although her husband's vil-

lage is Koriapatti, she resides mostly with her mother's sister, who happens to be the widow of a zamindar of Shakarpura, Bahadurpur, and on the date that the summons is said to have been served by the peon she was not at Koriapatti. The learned Munsif in dealing with this petition examined a number of witnesses, and the peon, who is said to have served the summonses, was examined on commission on the ground that he was ill. The Commissioner's report was taken in, and the peon's evidence was used for the purpose of coming to the finding that the summonses were properly served. The Courts below have referred to the fact that the other defendants appeared in the suit, although later on they did not contest it, and that is a point to be taken in favour of the plaintiffs opposite party because there was no object in their suppressing summonses against this lady. They have also commented upon the fact that this lady herself has not come forward to give evidence in the case nor has her husband been examined on the point.

Now, Mr. Murari Prasad, appearing on behalf of the petitioner, although he has referred to a number of facts has really urged two points. The first point is that the provisions of O. 26, R. 8, Civil P. C., not having been observed by the Court which was dealing with this application, under O. 9, R. 13 the evidence of the peon should not have been taken into account, and for this he relies upon the decisions in 37 C W N 1045,[1] 47 C L J 467[2] and 44 C L J 288.[3] Now, looking at O. 26, R. 8, I am afraid this contention raised by Mr. Murari Prasad cannot stand. The rule provides :

> Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is 'a person in the service of the Crown' who cannot, in the opinion of the Court, attend without detriment to the public service. . .

In this case the commission was issued on the ground that the peon was sick. Therefore the present case comes within the exception referred to in cl. (a), and this point must fail. The other point that was urged by Mr. Murari Prasad is that on the evidence of the peon himself no proper service under O. 5, R. 17 can be held to have been made in the circumstances of the case. The peon's report has been summarized by the lower Appellate Court. It was to the effect that summons was sent to the applicant through a maid-servant. That maid-servant, I find, has not been examined in this case, and we do not know how the peon complied with that part of the Rule which says that

> where the defendant or his agent or such other person as aforesaid refused to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon annexed thereto . . . .

The only person through whom the peon could know that the summonses were not accepted by the lady was the maid-servant and her evidence is not available. There is nothing from which it can be held that the defendant refused to sign the acknowledgment and if that condition is not satisfied then the stage for the serving officer to "affix a copy of the summons on the outer door or some other conspicuous part of the house" had not arrived. In this view of the matter I am supported by the decision in 30 Bom 623.[4] Although it was a decision in a civil appeal the principle laid down in it is quite clear. In the present case the trial Court itself remarked that "the evidence about service is no doubt meagre, but the circumstances no doubt are in its favour."

I am satisfied that the petitioner has made out a case for setting aside the ex parte decree on account of a material irregularity which has crept in by accepting the peon's house service as a substitute for personal service. I therefore set aside the ex parte decree and direct that the suit be restored to its original number and be proceeded with from the stage at which the ex parte decree was passed. In the result the application is allowed but without costs.

D.S./R.K. *Application allowed.*

1. Jnanada Sundari Roy v. Pramada Sundari Roy, (1934) 21 A I R Cal 116=148 I C 1203=60 Cal 1331=59 C L J 413=37 C W N 1045.
2. Krista Kishore v. Pancharam Maity, (1928) 15 A I R Cal 341=111 I C 430=47 C L J 467.
3. Mahim Chandra v. Naba Chandra, (1927) 14 A I R Cal 43=98 I C 852=44 C L J 288.
4. Sakharam Bhaskar v. Padmakar Mahadeo, (1906) 30 Bom 623=8 Bom L R 757.

A. I. R. 1940 Patna 565

HARRIES C. J. AND DHAVLE J.

Gopal Bux Rai — Judgment-debtor — Petitioner.

v.

Babu Shyambehari Singh — Decree-holder — Opposite party.

Civil Revn. No. 342 of 1939, Decided on 19th January 1940, from order of Deputy Magistrate Sub-Judge, D/- 21st June 1939.

(a) Chota Nagpur Encumbered Estates Act (6 of 1876), S. 2-B — Order prohibiting sales also prohibits confirmation of sales held before passing of order.

The words of S. 69, Civil P. C., make it clear that the property does not actually vest in the purchaser at the time of the sale; but once the sale is confirmed, it is deemed to have vested in him as and from that date. Confirmation of a sale is an integral part of the transaction of sale and without confirmation the purchaser acquires no title. Consequently an order prohibiting sale also prohibits confirmation of sale which had already taken place but which had not been confirmed before the prohibitory order was passed. [P 566 C 1]

(b) Chota Nagpur Encumbered Estates Act (6 of 1876), S. 2 — Undivided interest in joint family property cannot be protected.

An undivided interest in joint family property cannot be made the subject-matter of protection under the Encumbered Estates Act : *A I R 1939 Pat 451, Rel. on.* [P 566 C 2]

B. C. De and L. K. Chaudhuri — *for Petitioner.*

S. N. Dutt and Harians Kumar — *for Opposite Party (Firm Kedarnath Suraj Mal.)*

Harries C. J.—This is a petition by one Gopal Bux Rai praying for revision of an order refusing to vacate a previous order confirming a sale. The petitioner Gopal Bux Rai is the owner of an estate known as the Deogan Estate. The property in question in these proceedings formed part of what was known as the Imli Estate which was a khorposh estate under the Deogan Estate. The opposite party brought a suit (No. 15 of 1936) against Gopal Bux Rai and Jugeshwar Bux Rai and other members of his family, and in due course obtained a mortgage decree. The mortgaged property was put up to sale and purchased by the decree-holder opposite party. Later, Jugeshwar Bux Rai brought a suit to set aside the sale and recover the property and in that suit the present petitioner Gopal Bux Rai was made defendant 2. He filed a written statement in which he pleaded that he had no interest whatsoever in the properties which had been sold.

On 10th February 1939, the present petitioner applied to the Commissioner of Chota Nagpur for protection under the Encumbered Estates Act, and on 5th April 1939, the Commissioner passed an order under S. 2-B of the Act prohibiting the sale of the immovable property of Babu Gopal Bux Rai of Deogan in Palamau or any portion thereof in execution of any decree or order of any Civil or Revenue Court pending the issue of the final order on his petition for protection. On 6th April 1939, this order was communicated to the Deputy Commissioner of Palamau. It appears that the sale in execution of the opposite party's mortgage decree had not been confirmed when the Commissioner's order was communicated to the Deputy Commissioner. On 2nd May 1939, the Deputy Magistrate Subordinate Judge confirmed the sale in favour of the opposite party. On 15th June 1939, the petitioner filed a petition before the Deputy Magistrate Subordinate Judge stating that as the Commissioner had stayed further proceedings in all Courts he prayed that delivery of possession in favour of the opposite party be stayed and he apparently also asked that the order confirming the sale be vacated. On 21st June 1939, the Deputy Magistrate Subordinate Judge by an order of that date declined to vacate his order confirming the sale or to stay dakhaldehani as prayed for. Against these orders the present petition has been preferred.

It has been contended by Mr. B. C. De on behalf of the petitioner that the Deputy Magistrate Subordinate Judge had no jurisdiction to confirm the sale in question. He has argued that the order of the Commissioner dated 5th May 1939 prohibited all sales and accordingly prevented any step being taken to complete a sale. He has urged that confirmation of a sale is an essential and integral part of the sale itself and that no sale is complete unless it is confirmed. He has argued therefore that when an order prohibits sales it prohibits all steps necessary to make a sale effective. Mr. Dutt who appears for the opposite party has contended that an order prohibiting sales only prohibits the actual sale of property by auction. According to him, the sale is complete the moment the property has been purchased. Confirmation of the sale is no part of the sale itself, and therefore an order prohibiting the sale would not prohibit the confirmation of a sale which had actually taken place. Mr. Dutt has relied upon certain authorities which tend to show that the judgment-debtor has no interest in the property the moment a

sale takes place. However, one thing is clear and that is, that the purchaser at an auction sale does not acquire a good title to the property until the sale is confirmed. When it is confirmed, the auction-purchaser is deemed to be the owner of the property as and from the date of the actual sale. The property is deemed to have vested in him at the date of the sale. The words of S. 69, Civil P. C. make it clear that the property does not actually vest in the purchaser at the time of the sale; but once the sale is confirmed, it is deemed to have vested in him as and from that date. Without confirmation the purchaser acquires no title and it appears to me that confirmation of a sale is an integral part of the transaction of sale. That being so, an order prohibiting sale would prohibit confirmations of sales which had already taken place but which had not been confirmed before the prohibitory order was passed. That being so, the learned Deputy Magistrate Subordinate Judge would have had no jurisdiction to confirm the sale if the property was property covered by the prohibiting order of the Commissioner.

Mr. Dutt has argued that the property in this case was not property which was the subject-matter of the Commissioner's order. It is to be observed that the petitioner petitioned the Commissioner for protection describing himself as the owner of the Deogan Estate. He did not in his petition mention that he held any interest whatsoever in the Imli Estate in which the property now in question lies. In his petition he states that his estate, namely the Deogan Estate, had been previously managed under the Encumbered Estates Act, and this is true. Further, the Imli Estate was not taken over under the Encumbered Estates Act as part of the Deogan Estate on that occasion, and it would appear that the Imli Estate had been taken over at some other period as a separate estate. From the petition it is tolerably clear that the present petitioner was asking for protection of the Deogan Estate and in the list of properties which he filed with the petition he does not mention any khorposh interest in the villages of the Imli Estate. He mentions tauzi No. 88, Deogan Mahal consisting of about 400 villages, and it is said by Mr. B. C. De that this includes the khorposh interest in the villages in question. That would include the proprietary interest of the Deogan Estate in these villages; but it is not an apt way of describing the khorposh interest known as the Imli Estate. It would also appear that at this time the petitioner did not claim any interest in the Imli Estate. He certainly did not when proceedings were taken by Jugeshwar Bux Rai to set aside the sale of these properties which had taken place as a result of the decree passed in Suit No. 15 of 1936 at the instance of the opposite party.

Upon a fair reading of the petition to the Commissioner, I am satisfied that what Gopal Bux Rai asked for was protection of the Deogan Estate. The order of the Commissioner must be read with the petition and that being so it would appear that the order only prohibited all sales of properties forming part of the Deogan Estate. Mr. B. C. De has urged that the order is wide enough to cover all properties; but to say the least of it, the matter is not free from doubt. Mr. Dutt has also argued that the order of the Commissioner could not refer to Gopal Bux Rai's interest in the villages forming part of the Imli Estate. His interest was an undivided interest of a member of a joint Hindu family, and that being so, Mr. Dutt contends that his interest was such as could not be protected under the provisions of the Encumbered Estates Act. This contention receives support from a recent case of this Court, namely 20 P L T 619.[1] Manohar Lall J. who delivered the principal judgment in the case was of opinion that the holder of an undivided interest in property was not a holder of immovable property within the meaning of the Encumbered Estates Act. At p. 623 he observed:

> In my opinion the word 'holder' is expressly used to mean a land-holder who has a title to the property in question as owner in possession. It is a compendious way of describing the proprietors or the owners of the estate which is going to be assumed charge of. It comprises every sort of proprietor irrespective of his personal law, whether he is a Christian or a Muhammadan or is governed by the Dayabhag or Mitakshara School of Hindu law. In each case therefore it will have to be decided whether the owner who had made over charge of the estate has placed only his share of the estate in charge of the authorities or whether he, as representing the entire owners, has induced the authorities to take over the whole of the estate of the joint family or of the other co-owners also under their superintendence. As was pointed out by their Lordships of the Judicial Committee in the case referred to above, it is impossible to hold that an undivided interest in a joint Mitakshara Hindu family can be dealt with or was intended to be transferred to the Court of Wards. Just as their Lordships decided in that case it must be decided

1. Rameshwar Dayal Singh v. Ram Das Sahu, (1939) 26 A I R Pat 451 = 184 I C 597 = 20 P L T 619=18 Pat 434.

in the present case after construing the two notifications in the light of the circumstances that the entire Namudag Estate belonging to the joint Hindu family of which Nageshwar was the karta along with Parmeshwar and Chandrika, was intended to be taken possession of by the authorities with the express request of the karta and with the implied consent of the other members including Parmeshwar and Chandrika in the interest and for the benefit of the entire joint Hindu family.

In that case application had been made by certain members of a joint Hindu family and it was contended that the application was for protection of their interest and their interest only. Their Lordships held that the application must be treated as an application for protection of the whole of the family property, because applications for protection of undivided interests could not be entertained as had been held by their Lordships of the Privy Council in reference to applications for protection by Court of Wards. It appears to me that there is considerable substance in Mr. Dutt's contention that an undivided interest in joint family property cannot be made the subject-matter of protection under the Encumbered Estates Act. The interest of Gopal Bux Rai in these Imli villages was, in my view, an undivided interest of a member of a joint family. It was contended by Mr. De that the family had disrupted because certain creditors had attached and sold Gopal Bux Rai's undivided interest in certain of these villages. In my view that would not cause a disruption of the family and it was Gopal Bux Rai's own case that he was joint with the other members of the family.

Lastly, Mr. Dutt has pointed out that Gopal Bux Rai certainly has no interest in four annas in Sakhan Pirhi which had been attached and purchased by one Badri who had brought a partition suit and had his share partitioned. It is also said that a creditor Ganauri Singh had obtained a money decree against Gopal Bux Rai and had purchased in execution four annas of Imli and four annas of Kumbwa. Mr. De is not in a position to deny this, though he does not admit it. If such be the case, it would appear that Gopal Bux Rai has very little, if any, interest left in these villages. However, it has not been proved in these proceedings that Ganauri Singh had purchased the interest alleged in these villages; but I do not think it is necessary that the case should be sent back for any findings upon this question. In my judgment Mr. De has failed to establish that the properties in dispute in this case were the subject-matter of the Commissioner's order and further I am satisfied that the properties, being undivided shares in joint family property, could not properly be made the subject-matter of such an order. That being so, there was nothing to prevent the learned Deputy Magistrate Subordinate Judge confirming the sale. I therefore hold that the order confirming the sale was right and made with jurisdiction though not for the reasons given by the learned Deputy Magistrate Subordinate Judge. I am not satisfied that there is any real ground for interference with the order confirming the sale and with the order refusing to vacate the order confirming the sale and accordingly I would dismiss this petition and discharge the rule. The opposite party is entitled to his costs in this Court. I would assess the hearing fee at five gold mohurs. The stay order passed on 7th August 1939, regarding the surplus money in deposit in Court, is discharged.

Dhavle J. — I agree.

G.N./R.K. *Petition dismissed.*

A. I. R. 1940 Patna 567

AGARWALA AND MEREDITH JJ.

Bigan Singh — Appellant.

v.

Sayid Shah Zaffer Hussain and others — Respondents.

Appeal No. 95 of 1939, Decided on 1st November 1939.

Bihar Tenancy Act (8 of 1934), as amended in 1938, S. 163 (5) — Execution application made before coming into force of amending Act but remaining pending at time of its coming into force — Sale proclamation issued after coming into force of amending Act—S. 163 (5) applies.

The amending Act does not affect rights which have vested or obligations which have been defined before the amending Act came into operation; but no person has a vested right in the procedure of a Court and consequently an Act which merely regulates procedure governs all proceedings that are pending at the time when the Act comes into operation, provided that existing orders are not deprived of their finality and that the application of the provisions of the Act does not work injustice. The amending statute of 1938 being a remedial one should be construed as widely as possible to give effect to the intention of the Legislature in as many cases as possible in so far as this can be done without injustice to the parties. [P 568 C 1, 2; P 569 C 2]

Hence where an execution application is made before coming into force of the amending Act of 1938 but is pending on that date and the sale proclamation is issued after that date, S. 163 (5) applies and the Court must issue notice to the judgment-debtor before issuing the sale proclamation and decide whether the whole or only a part of the property should be put up for sale and what the value of the whole or part was. [P 568 C 1; P 571 C 2]

Lalnarayan Sinha — *for Appellant.*
Ahmad Raza and Anwar Ahmad — *for Respondents.*

Agarwala J. — This is an appeal by the judgment-debtor from a decision of the Subordinate Judge of Gaya confirming a decision of the Munsif of Aurangabad. The respondent obtained a decree for rent against the appellant and on 9th February 1938, applied to execute the decree. On 7th March the executing Court directed the issue of a writ of attachment and a sale proclamation, fixing the 5th May as the date of sale. The writ and the sale proclamation were not actually issued until 28th March. On the date fixed for the sale, namely the 15th *(sic)* May, the judgment-debtor objected to the sale being held on the ground that the Court had not valued the property to be sold as required by S. 163 (5), Bihar Tenancy Act. This sub-s. (5) was introduced into the Tenancy Act by an amending Act which came into operation on 10th March 1938.

The question for decision is whether, in view of the provisions introduced by the amending Act, it was necessary for the Court to issue notice to the judgment-debtor before issuing the sale proclamation and to decide whether the whole or only a part of the property should be put up for sale and what the value of the whole or part was. On behalf of the appellant it is contended that the amending Act being one regulating the procedure of the Court governs all proceedings that were pending when the Act came into operation: while, on behalf of the respondent, it is urged that in the absence of express provision in the Act it was only such steps as remained to be taken after the Act came into operation that are governed by its provisions. We have been referred to a large number of cases in which the effect of an amendment of the law on pending proceedings has been the subject-matter of consideration. The general principle which emerges from these cases is that the amending Act does not affect rights which have vested or obligations which have been defined before the amending Act comes into operation but that no person has a vested right in the procedure of a Court ((1876) 3 Ch D 62[1]) and consequently, an Act which merely regulates procedure governs all proceedings that are pending at the time when the Act comes into operation (Per Wilde J. in (1860) 6 H & N 227[2]) provided that existing orders are not deprived of their finality (54 I A 421[3]) and that the application of the provisions of the Act does not work injustice.

Before the amendment of 1938, the holder of a decree for rent was entitled to put the judgment-debtor's property up for sale and in consequence of an amendment of O. 21, R. 66, Civil P. C., made by this Court in the exercise of its rule-making powers under S. 122 of the Code, it was not necessary for the Court to determine the value of the property to be sold. All that the Court was required to do was to insert in the sale proclamation the value put on the property by the judgment-debtor and the decree-holder respectively. There is no doubt that frequently cultivators' holdings were sold for an inadequate price at Court sales and that the object of the amending Act of 1938 was to remedy this state of affairs. The amendment in the Tenancy Act effected by the Act of 1938 has two objects in view (1) to prevent the sale of the judgment-debtor's property for an inadequate price and (2) to prevent the sale of more of the judgment-debtor's property than is sufficient to discharge the decretal debt. To achieve these objects the amending Act requires that the judgment-debtor shall be heard on the question of valuation before the issue of the sale proclamation and that the Court shall determine the value of the property sought to be sold and whether the sale of a part of it will suffice to discharge the decretal dues. It further prohibits the sale of the judgment-debtor's property or the part of it which the Court considers should be sufficient to satisfy the decree for less than the amount determined by the Court.

As the Tenancy Act was originally amended in 1938 no provision was made to meet the possibility of there being no bidder for the property at the value fixed by the Court. The result was that if no one bid up to the price fixed by the Court the holding could not be sold although, of course, the decree-holder was at liberty to enforce his decree against other property of the judgment-debtor. The Act has since been amended in 1939 by the addition of two provisos. The effect of these is that if the highest amount bid for the holding or

1. Republic of Costa Rica v. Erlanger, (1876) 3 Ch D 62=45 L J Ch 743.

2. Wright v. Hale, (1860) 6 H & N 227=30 L J Ex 40=6 Jur (N S) 1212=3 L T 444=9 W R 157.

3. Delhi Cloth & General Mills Co. v. Income-tax Commissioner of Delhi, (1927) 14 A I R P C 242=106 I C 156=54 I A 421=9 Lah 284 (PC).

portion of the holding to be sold is less than the price specified for the same in the sale proclamation the Court may now sell the holding or portion of it for such highest amount if the decree-holder consents in writing to forgo so much of the amount of the decree as is equal to the difference between the highest amount bid and the price specified for the holding or portion of it in the sale proclamation. The provisions of the Act with which we are concerned are Ss. 158-AA, 158-B (2), 163 (5) and 163-A. S. 158-AA provides as follows :

> A decree for arrears of rent may be executed by the attachment and sale of the property of the judgment-debtor, both moveable and immovable :
>
> Provided that the moveable property of the judgment-debtor shall not without his consent in writing be so attached or sold unless the decree cannot be satisfied by the attachment and sale of the holding for arrears of the rent of which the decree was passed.

The relevant portion of S. 158-B (2) is as follows :

> When the application mentioned in S. 158-AA is made and the decree-holder wants to proceed against the tenure or holding or portion of the tenure or holding in respect of which the decree was obtained, the Court executing the decree shall, before proceeding to sell the tenure or the holding, or a part of the holding, give to the parties to the decree notice of the application and of the date on which the sale proclamation shall be drawn up, and may, notwithstanding anything contained in the Code of Civil Procedure, 1908, simultaneously issue attachment.

In parenthesis it may be observed that S. 158-AA does not refer to any application. The words "the application mentioned in S. 158-AA" which occur in S. 158-B(1) *(sic)* however, obviously refer to an application to execute the decree by attachment and sale of the judgment-debtor's property. The relevant portions of S. 163 are as follows :

> (1) When a tenure or a holding or a part of a holding is ordered to be sold in execution of a decree for the arrears of the rent of such tenure or holding, the Court shall cause a proclamation of the intended sale to be made :
>
> * * * * *
>
> (5) Before issuing the sale proclamation the Court executing the decree shall hear the parties and estimate the value of the holding or of that portion of the holding the proceeds of the sale of which it considers will be sufficient to satisfy the decree.

Section 163-A, before the amendment of 1939, was as follows :

> Notwithstanding anything contained in the Code of Civil Procedure, 1908, a holding or portion of a holding advertised for sale shall not be sold for a price lower than that specified in the sale proclamation.

It is contended on behalf of the appellant that as the amending Act of 1938 had come into operation before the sale was actually held, S. 163-A bars the sale except for a price not lower than that specified in the sale proclamation and that this necessarily implies that the Court should first hear the parties under S. 155-B (5), estimate the value of the holding and determine whether it is necessary to sell the whole or only part of it. On behalf of the respondent, on the other hand, it is contended that the stage at which this is required to be done had already passed before the amending Act came into force and that the Court is not required to recommence the execution proceeding. Reliance is placed on S. 158B (2) which, it is contended, means that notice to the parties regarding the drawing up of the sale proclamation is required to be given when the application for execution is made and that as that stage had passed before the amending Act came into operation and as the order for the issue of the sale proclamation had also been made before that date, the execution proceeding was not affected by the amendment. As I have already stated above, the object of the amendment was to remedy a defect in the procedure of the executing Court which experience showed frequently resulted in the sale of agricultural holdings and tenures below their market price. The amending statute being a remedial one should be construed as widely as possible to give effect to the intention of the Legislature in as many cases as possible in so far as this can be done without injustice to the parties.

The question whether and to what extent proceedings which commenced before an amendment of the law are affected by any change in the law was considered by a Full Bench of eight Judges in 22 Cal 767[4] in which it was observed that the rule against retrospective operation is intended to apply not so much to the law creating a new right as to the law creating a new obligation or interfering with a vested right. The facts of that case were as follows: A decree was obtained on 8th February 1894. An application for execution was made on 26th July. A writ of attachment was issued on 3rd August and served on the 5th. Sale proclamation was issued on 11th August and served on the 14th. The sale took place on 20th September. In the meanwhile, on 2nd March 1894, S. 310A had been added to the Code of Civil Procedure. This section entitled the judgment-debtor

4. Jogodanund Singh v. Amrita Lal, (1895) 22 Cal 767 (F B).

to have the sale set aside on depositing the amount due to the decree-holder and compensation to the auction-purchaser. Relying on this section the judgment-debtor, on 27th September, before the sale had been confirmed, applied to set aside the sale on depositing the decretal dues and compensation. The executing Court refused to set aside the sale on the ground that the new section was not a mere matter of procedure and therefore had no retrospective effect. The Full Bench held that S. 310A applied to the execution proceedings and that the Court was, therefore, bound, upon the application of the judgment-debtor, to set aside the sale.

The Full Bench considered a former Full Bench decision in 14 Cal 636.[5] In that case the question was whether S. 174, Bengal Tenancy Act, was applicable to a sale held after that Act had come into operation when execution had been applied for and the sale proclamation issued under the Bengal Act 8 of 1869. The former Full Bench had answered that question in the negative holding that S. 174, Bengal Tenancy Act could not have any retrospective operation as it conferred upon the judgment-debtors a new right which they did not possess under the old Act, and as the proceedings had commenced before the new Act came into operation. The later Full Bench pointed out that the reasoning in the judgment in 14 Cal 636[5]

> consists of two distinct independent parts : first, that since the law which creates a new right ought not to have retrospective effect and since S. 174, Bengal Tenancy Act creates a new right in favour of the judgment-debtors, therefore S. 174, ought not to have retrospective effect, that is, effect in cases in which the decree by which the applicant became a judgment-debtor was made before that Section became law. Secondly, that since proceedings commenced under any law ought not to be affected by any change in that law, and since the proceedings in question were commenced under the old rent-law, therefore they ought not to be affected by S. 174.

The later Full Bench disagreed with both these reasonings. With regard to the first it pointed out that the vested right of the decree-holder to obtain satisfaction of his decree was left unaffected by S. 174 except in so far as it was to his advantage, for, whereas under the former law the auction-sale might not have resulted in satisfaction of the decretal dues in full S. 174 ensured that they would be paid in full before the sale was set aside. With regard to the rights of the auction-purchaser it was held that although the application of S. 174 might deprive him of the fruits of a favourable bargain yet, as the sale took place after the new law came into operation, he must be taken to have made his bid with full knowledge of the law and it could not be said that any right vested in him was affected by it. The later Full Bench also held that S. 174 did not create any new substantive right in the judgment-debtor but merely embodied a rule of procedure which barred the auction-purchaser's right to have the sale confirmed provided the deposit required by the Section was made. It was also denied that the effect of applying S. 174 to a sale which took place after that Section had been enacted was to give it a retrospective effect. It was observed :

> In setting aside, under S. 174, a sale held after that Section had become law, the direct effect of the Section would be prospective only, though the sale might depend upon a decree and execution proceedings of dates antecedent to that of its becoming law.

Reference was made to the observation of Lord Denman in (1848) 12 Q B 121[6] at p. 127 in which his Lordship, speaking of a statute which is in its direct operation prospective, said :

> It is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing.

With regard to the contenion that S. 174 ought not to be applied to proceedings commenced before the enactment of the Section because it contains no express words to indicate that it was to have retrospective effect the Full Bench stated :

> But though there may not be any express words to that effect, still it may be shown by the general scope and purpose of the enactment that it is intended to have retrospective effect : *see* (1869) 4 Ch A 735[7] at p 740. And if we look to these, there can remain very little doubt as to what the Legislature intended in the present instance. Under the old law, if a tenure or holding was sold in execution of a decree for rent, and the sale was for inadequate value, the tenant could get the sale set aside only if he could prove that the inadequacy of price was due to some irregularity in publishing or conducting the sale; and, if there was no such irregularity, but the sale nevertheless resulted in loss, however great the loss might be, the tenant was obliged to bear it as a necessary evil. It was this evil which S. 174, Ben. Ten. Act was intended to remedy, and it is difficult to imagine that the Legislature intended to limit the remedy to those cases in which the sales were held in execution of decrees made subsequently to the passing of the Act, and to allow the evil to continue for years to come, during which decrees made under the old

5. Lal Mohun Mukerjee v. Jogendra Chander, (1887) 14 Cal 636 (F B).

6. Queen v. The Inhabitants of St. Mary Whitechapel, (1848) 12 Q B 121.

7. Pardo v. Bingham, (1869) 4 Ch A 735 = 20 L T 464 = 17 W R 419.

Act might go on being enforced by the sale of tenures or holdings, when the application of the new law to sales in execution of decrees passed under the old law could not possibly have resulted in any hardship or injustice. As a remedial provision, it ought to be liberally construed so as to apply to every sale of a tenure or holding in execution of a decree for arrears of rent, held after the passing of the Act, irrespective of the date of the decree.

Those observations apply with equal cogency to the present case where we are dealing with a remedial measure the object of which is to prevent the sale of a cultivator's holding for an inadequate price and the sale of more of his holding than should suffice to satisfy his obligations if the property is sold for an adequate price. It ought therefore to be liberally construed to achieve this object in as many cases as possible. For this reason I would reject the contention that because S. 158-B (2) contemplates that notice of the date on which the sale proclamation is to be drawn up should be given when the application for execution is made the remedial provisions of the amending Act should not be applied in cases where the application for execution is made before the amending Act came into operation. S. 158-B (2) is merely one of a group of Sections by which the Legislature has sought to remedy an evil and it must be construed in relation to the other Sections in the group including S. 163-A. That Section expressly prohibits the sale of a holding for a price lower than that specified in the sale proclamation. It was suggested that as the sale proclamation in the present instance contained the value put upon the property by the decree-holder all that the Section prohibits in the present case is the sale of the property below that value. If S. 163-A applies at all to the present case, as in my opinion it does, for the sale has not yet taken place, it would be defeating the salutary provisions of the amendment to adopt this suggestion. S. 163-A must be read with the group of sections of which it is a part and which includes Ss. 158-B (2) and 163 (5) which require the Court to hear the parties in the matter of the value of the property to be sold and to estimate the value of it or of that part of it which the Court considers will be sufficient to satisfy the decree.

This construction of the provisions of the amending Act does not result in giving retrospective effect to the statute merely because, in the words of Lord Denman cited above, "A part of the requisites for its action is drawn from a time antecedent to its passing." Nor can this view result in any injustice to the parties concerned. The vested right of the decree-holder is to have his dues satisfied out of the property of the judgment-debtor in so far as that is possible. It never was his right to have the property of the judgment-debtor sold for an inadequate price. The law always contemplated that the price realized at a public auction should approximate to the real market value of the subject-matter of the sale. All that the amendment seeks to achieve is to ensure that it shall do so. Furthermore, the sale proclamation had not been issued when the amending Act of 1938 came into operation so there was no question of giving retrospective effect to S. 158-B (2) or S. 163 (5). Before this proclamation was issued, the law had been amended and the Court was required to hear the parties as to the value of the holding sought to be sold. I would therefore set aside the order of the Court below and direct that the Court do proceed to estimate the value of the holding and decide whether it is necessary to sell the whole or only a part of it, after hearing the parties.

Meredith J.—I agree.

D.S./R.K. *Order set aside.*

A. I. R. 1940 Patna 571

AGARWALA J.

Maharaja Bahadur Ram Ranbijaya Prasad Singh — Appellant.

v.

Kesho Prasad Singh and another — Respondents.

Misc. Appeals Nos. 46, 47 of 1939 and 379 of 1938, Decided on 18th January 1940, from orders of Sub-Judge, Arrah, D/- 10th and 22nd December 1938, respectively.

(a) Civil P. C. (1908), S. 48 —Application to proceed against properties other than those mentioned in first application is fresh application.

An application by which it is sought to proceed against properties other than those mentioned in the first execution petition is a fresh application within the meaning of S. 48 and no such application is entertainable after 12 years from the date of the decree sought to be executed : *A I R 1929 Pat 407; A I R 1931 All 134; A I R 1924 Cal 131; A I R 1927 Mad 347; A I R 1928 Lah 808 and A I R 1929 P C 209, Rel. on; A I R 1926 Lah 544, Expl.*

[P 572 C 2]

(b) Civil P. C. (1908), S. 48—Application to proceed against person other than one against whom it was originally sought to execute decree is fresh application.

An application at a late stage to proceed against a person other than the person against whom it was originally sought to execute the decree, is a fresh application within the meaning of S. 48 and

is barred after 12 years from the date of the decree: *A I R 1931 Bom 425 and A I R 1932 Pat 222, Disting.* [P 573 C 1]

S. M. Mullick and B. P. Sinha (in 46 and 47) and Nirsu N. Sinha and B. N. Rai (in 379) — *for Appellants.*

Nirsu N. Sinha and B. N. Rai (in 46 and 47) and S. M. Mullick and B. P. Sinha (in 379) — *for Respondents.*

Judgment. — These three miscellaneous appeals arise in the following circumstances. On 30th September 1924, the Maharaja of Dumraon obtained a decree for costs against a large number of persons including Ram Sarup Singh and Parmanand Singh. The decree amounted to Rs. 2632-4-0. An appeal against the decree was dismissed for default by this Court on 6th January 1926. After several infructuous attempts to execute the decree, the decree-holder presented an application for execution which was numbered as Execution Case No. 96 of 1937. The petition of execution stated that the person against whom execution was sought was Kesho Prasad Singh. Kesho Prasad Singh is one of the two sons left by the judgment-debtor Ram Sarup Singh who died before this application for execution was presented. Kesho Prasad Singh objected to the execution on the ground that some of the judgment-debtors had applied to the proper authority in the United Provinces under the United Provinces Encumbered Estates Act of 1934 for apportionment of their liability for the decree for costs. This objection was overruled and has given rise to Miscellaneous Appeal No. 379 of 1938 on behalf of Kesho Prasad Singh.

In 1937 the decree-holder applied for the attachment of a sum of Rs. 2000 odd which was in deposit in this Court to the credit of Kesho Prasad Singh and his brother Madho Prasad Singh. As Madho Prasad Singh was not a party to the execution proceedings, the executing Court held that the decree-holder was entitled only to attach half the amount. On 9th May 1938, the decree-holder then applied to bring Madho Prasad Singh on to the record of the execution case. This, it will be noticed, was more than 12 years from the date of the dismissal of the appeal by this Court. The application to bring Madho Prasad Singh on to the record of the case was dismissed on the ground that it was a fresh application within the meaning of S. 48, Civil P. C., presented more than 12 years after the date of the decree sought to be executed. The order disallowing the application, to bring Madho Prasad Singh on to the record has given rise to Miscellaneous Appeal No. 46 of 1939 at the instance of the decree-holder. On 27th July 1938, the decree-holder applied to amend his execution petition by adding to it a prayer for the attachment and sale of certain immovable properties belonging to Kesho Prasad Singh. This application was also disallowed on the ground that it was a fresh application made more than 12 years after the date of the decree sought to be executed and was, therefore, barred by S. 48. This has given rise to Miscellaneous Appeal No. 47 of 1939 at the instance of the decree-holder.

I will deal with the question which arises in respect of Miscellaneous Appeal No. 47 first. There is a decision of this Court, and there are decisions of at least four other High Courts and of the Privy Council, that an application by which it is sought to proceed against the properties other than those mentioned in the first execution petition is a fresh application within the meaning of S. 48 and that no such application is entertainable after 12 years from the date of the decree sought to be executed. The decision of this Court is 8 Pat 462.[1] The decree under execution in that case was a money decree passed on 8th February 1915. After various applications for execution the last application was made on 14th January 1927, praying for the attachment and sale of certain moveable properties belonging to the judgment-debtor. As no moveable properties belonging to the judgment-debtor were found the decree-holder, on 1st August 1927, made an application to be permitted to proceed against certain immovable properties of which he gave a list. He prayed that the original application for execution might be amended in accordance with the terms of the application of 1st August 1927. It was held that this was a fresh application within the meaning of S. 48 and was not entertainable as it was made more than 12 years from the date of the decree of 18th February 1915.

The decision of the other High Courts will be found in 53 All 419,[2] 50 Cal 743,[3]

1. Jagannath Das v. Chamu Raghunath, (1929) 16 A I R Pat 407=119 I C 411=8 Pat 462 = 11 P L T 215.
2. Bandhu Singh v. Kayastha Trading Bank Ltd., Gorakhpur, (1931) 18 A I R All 134 = 129 I C 716=53 All 419=1931 A L J 894.
3. Hayatunnessa Chowdhurani v. Achia Khatun, (1924) 11 AIR Cal 131=74 IC 1017=50 Cal 743.

52 M L J 137[4] and A I R 1928 Lah 808.[5] The Privy Council decision is A I R 1929 P C 209.[6] Mr. Mullick on behalf of the decree-holder referred to the decision of a single Judge of the Lahore High Court in A I R 1926 Lah 544.[7] In that case a money decree had been passed on 4th March 1913. The last application for execution was dated 17th March 1924, praying for the arrest of the judgment-debtor. On 9th November 1925, the Judge of the Small Cause Court who was executing the decree dismissed the petition on the ground that the judgment-debtor had not been arrested and that it was useless in his opinion to take any further proceedings. Against that order of dismissal, the decree-holder applied to the Lahore High Court. The learned Judge of the High Court setting aside the order of the Small Cause Court Judge said :

> Under all the circumstances the lower Court should have allowed the decree-holder to exhaust all lawful means of realizing his decree before finally dismissing the application for execution.

As I understand the judgment of the learned Judge, what was meant was that the executing Court should not have been hasty to dismiss the pending application for the arrest of the judgment-debtor merely because the decree-holder had not been able to find him but should have allowed the application to remain pending so that the decree-holder would have had a further opportunity of ascertaining the whereabouts of the judgment-debtor. I would dismiss Miscellaneous Appeal No. 47 with costs. With regard to Miscellaneous Appeal No. 46, there does not seem to be any difference in principle between an attempt to proceed at a late stage in the execution proceedings against properties which it was not sought to proceed against in the original application and an attempt at a late stage to proceed against a person other than the person against whom it was originally sought to execute the decree. Reference was made by Mr. Mullick on behalf of the decree-holder to a decision of the Bombay High Court in A I R 1931 Bom 425.[8] There an application had been presented within time against the judgment-debtor. On the death of the latter, more than 12 years after the date of the decree, it was sought to continue the proceedings against the legal representative of the deceased. It was held that it was not a fresh application within the meaning of S. 48. That case is distinguishable from cases of the kind before us. Here the original judgment-debtor died before the expiry of 12 years from the decree. The decree-holder chose to initiate execution proceedings against Kesho Prasad only. Now he seeks to proceed against Madho Prasad. His present application cannot be viewed as merely ancillary to the original application.

The decision in 11 Pat 546[9] is also distinguishable. There, the substantial question was whether an application for amendment of a petition for execution was entertainable. The application was within 12 years from the date of the decree and not, as in the present case, beyond the period of 12 years. As there appears to be no difference in principle between the application to implead Madho Prasad Singh and the application to proceed against the immovable properties of Kesho Prasad Singh, I would dismiss also Miscellaneous Appeal No. 46 with costs. In Miscellaneous Appeal No. 379 of 1938 we have been asked to take steps to protect the appellant judgment-debtor from the possibility that as a result of the proceedings in the United Provinces under the Encumbered Estates Act, 1934, the decree-holder may succeed in realizing more than he is justly entitled to under the decree for costs. Before us there are no materials indicating that the decree-holder has either realized more than he is entitled to or that he intends to do so. The proceedings in the United Provinces are beyond our jurisdiction and we are not in a position to stay them. This appeal must also fail and be dismissed with costs.

D.S./R.K. *Appeals dismissed.*

4. Syamaladoss v. Subbayya, (1927) 14 A I R Mad 347=100 I C 20=52 M L J 137.
5. Ram Rattan v. Datar Kaur, (1928) 15 A I R Lah 808=120 I C 622.
6. Maharaj Bahadur Singh v. A. H. Forbes, (1929) 16 A I R P C 209=118 I C 268 (P C).
7. Jai Chand v. Chiragh Din, (1926) 13 A I R Lah 544=95 I C 956.
8. Shankar Balchand v. Hira Lal Balchand (1931) 18 A I R Bom 425=134 I C 730=33 Bom L R 858.
9. Sheogobind Ram v. Mt. Kishunbansi Kuer, (1932) 19 A I R Pat 222=138 I C 91=11 Pat 546=13 P L T 318.

A. I. R. 1940 Patna 573

AGARWALA AND ROWLAND JJ.

Brahmdeo Narayan — Plaintiff — Appellant.

v.

Brajballabh Prasad and others — Defendants — Respondents.

Appeal No. 997 of 1938, Decided on 26th January 1940.

(a) Evidence Act (1872), S. 92, Proviso 1 — Suit for unpaid consideration of sale deed executed by plaintiff — Defendant can challenge deed as illegal for being in consideration of his withdrawal of criminal prosecution against plaintiff.

In a suit for the recovery of the unpaid portion of the consideration of a sale deed executed by the plaintiff the defendant can under S. 92, Proviso 1 challenge the validity of the document on ground of illegality of transaction and show that the sale deed was executed in consideration of his withdrawal of a pending criminal prosecution against the plaintiff : *1 Smith's LC (Edn. 13) 406; (1808) 9 East 408 and A I R 1930 P C 100, Rel. on.* [P 575 C 1]

(b) Contract Act (1872), S. 23 — Sale deed executed by vendor in consideration of withdrawal of pending criminal prosecution against him by vendee—Vendee in possession—Vendor can recover neither consideration money nor land — Fact that agreement of sale was sanctioned by Judge or that vendee obtained possession after withdrawal of prosecution is immaterial.

Where the vendor executes a sale deed in consideration of the withdrawal of a pending criminal prosecution against him by the vendee who obtains possession of the land sold, the transaction is void and the vendor can recover neither the consideration money nor the land : *1 Smith's L C (Edn. 13) 406, Rel. on; (1778) 2 Cowp 791 and A I R 1916 Cal 74, Ref.* [P 575 C 2]

The fact that the agreement of sale was sanctioned by the presiding Judge in the criminal trial does not affect its illegality : *(1844) 6 Q B 308, Rel. on.* [P 576 C 1, 2]

Nor can the fact that the vendee succeeded in obtaining possession only after the acquittal of the vendor as a result of the withdrawal of prosecution and the sale deed had been subsequently compulsorily registered improve the vendor's position. [P 576 C 2]

Hareshwar Pd. Sinha and Rati K. Choudhury — *for Appellant.*

B. K. Saran — *for Respondents.*

Agarwala J. —This is an appeal by the plaintiff from a decision of the Additional District Judge of Patna reversing a decision of the Subordinate Judge. The appeal arises out of a suit for recovery of the unpaid portion of the consideration of a sale deed executed by the plaintiff in favour of defendant 1 or alternatively for recovery of the subject-matter of the sale deed. There is also a prayer for the refund of Rs. 800 deposited by the plaintiff with defendant 3 in circumstances which will appear presently, and also for one month's salary alleged to be due to the plaintiff from defendant 1. Defendant 1 is the owner of an estate in the Gaya District and the plaintiff was his Tahsildar. In March 1935 defendant 1 initiated a prosecution against the plaintiff on a charge under S. 408, I. P. C., alleging that he had misappropriated a sum of Rs. 1535-1-9 out of the rents which he had collected from the tenants of defendant 1. The case of defendant 1 is that in order to induce him to withdraw from this prosecution the plaintiff agreed to repay the money misappropriated and to convey 40 bighas of land which is the subject-matter of the sale deed. The plaintiff in fact deposited Rs. 800 with a person whom both parties trusted and executed a handnote for Rs. 750 in favour of a relative of defendant 1. This handnote was executed on 22nd July 1935, the same date as that on which the sale deed was executed. It is necessary to state a few particulars with regard to the 40 bighas of land which is the subject-matter of the sale deed. It is alleged in the pleadings that while the estate of defendant 1 was under the management of the Court of Wards a decree for rent was obtained in respect of 63 bighas of land. The plaintiff, as Tahsildar of the estate, bid for this property at the sale in execution of the rent decree but instead of purchasing it on behalf of the estate he purchased it in his own name. Thereafter he reimbursed himself for the price of the property by selling 23 bighas of the land for the price which he had paid for the whole of 63 bighas. When called upon to convey to defendant 1 the remaining 40 bighas he declined to do so. This area of land therefore, although it was not in any way directly concerned with the charge of criminal misappropriation, was a matter of contention between the parties at the time when the prosecution was pending.

On 23rd July 1935 a petition was filed in the Court of the Magistrate before whom the prosecution was pending stating that the parties had compromised and asking the permission of the Court to terminate the proceeding. Although the charge was under S. 408, I. P. C., which was not a compoundable offence, the Magistrate permitted the dispute to be compromised and passed an order of acquittal on 26th July 1935. In order to be able to do this the Magistrate was constrained to hold that the charge disclosed against the present plaintiff was one under S. 403, I. P. C., and not under S. 408, the former offence being an offence compoundable with the permission of the Court. It is difficult to appreciate how the Magistrate came to take this view. The charge was that the plaintiff as Tahsildar of defendant 1 had misappropriated moneys which he had collected from the tenants of

defendant 1. Those facts, if proved, constituted an offence under S. 408. However that may be, the plaintiff was acquitted in the criminal proceeding. Having secured his acquittal he then showed reluctance to complete the agreement with defendant 1 and declined to register the sale-deed which he had executed as part of the consideration for the compromise. Defendant 1 accordingly, on 22-8-1935, applied for compulsory registration of the sale deed. This was ordered by the District Registrar on 18th May 1936. In the meanwhile, on 23rd November 1935, the plaintiff instituted the suit out of which this appeal has arisen.

The plaintiff alleged in his plaint that the consideration for the compromise was the payment of Rs. 1550 but as he had only Rs. 800 he executed a handnote for the balance of Rs. 750 but defendant 1 not being agreeable to accepting a handnote in lieu of cash the plaintiff agreed to convey the disputed 40 bighas to him for a consideration of Rs. 4000 out of which consideration defendant 1 was to deduct Rs. 1550 and pay the balance to the plaintiff. The suit as originally instituted was for the recovery of the balance of the consideration money for the sale and for refund of Rs. 800 which had been deposited with defendant 3. After the sale deed had been registered the plaintiff amended the relief portion of the plaint and inserted a prayer for recovery of possession of the 40 bighas.

The Court of appeal below has disbelieved the plaintiff's version of the terms of compromise and accepted the version of defendant 1, namely that the conveyance of the 40 bighas was a part of the consideration for defendant 1 withdrawing from the prosecution. On behalf of the plaintiff-appellant it has been contended that the Court was not entitled to entertain evidence intended to show that the sale deed was something other than it purported to be, namely a sale for a consideration of Rs. 4000. S. 92 Evidence Act, is relied upon for that contention. Proviso 1 to the Section, however permits the proof of any fact which would invalidate any document referred to in the Section on grounds such as fraud, intimidation and illegality. The validity of a document may therefore be challenged in the present case on the ground of the illegality of the transaction. Proviso 1 appears to adopt the law as laid down in 1 Smith's L C (13th Edn.) 406.[1] In that case two persons who had been indicted on a charge of perjury by one Rudge agreed to give Rudge a note for £350 as a consideration for his not appearing to give evidence at the trial. In a suit on the note the defendant pleaded that the transaction was an illegal one and that it was unenforceable in law. It was held that illegality may be pleaded as a defence to an action on a bond. In a later case the doctrine was carried further in (1808) 9 East 408[2] at p. 421 where Lord Ellenborough observed :

> Since the case in (1732) 9 East 417*n*,[3] it has been generally understood that an obliger is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond.

So far as the law of this country is concerned it would appear to be the same. In 57 I A 117,[4] the Privy Council held that if it be an implied term of an ekrarnama or a reference to arbitration that a criminal complaint would not be further proceeded with, then the consideration for the ekrarnama or the reference, as the case may be is unlawful, and the ekrarnama or the award is invalid, quite irrespective of the fact whether any prosecution in law has been started or there is something for which it is to be dropped, and that it was not necessary that an agreement to settle criminal proceedings should be expressly stated as part of the consideration. It is enough if the inference necessarily follows from the evidence that the consideration was such. This was the finding of the Court below and I have no hesitation in accepting that finding that the execution of this sale deed was a part of the consideration for dropping the criminal proceeding against the plaintiff. It is clear that the consideration for the agreement between the parties was illegal and therefore that by reason of S. 23, Contract Act, it was void. The next question is whether the plaintiff is entitled to recover either the balance of the consideration money for the sale or the land, which is admittedly in possession of defendant 1. On the authorities I think it is clear that he must fail. The reason why the plaintiff cannot recover is stated by Wilmot L. J. in 1 Smith's L. C. (13th Ed.) 406,[1] in this language :

> This is a contract to tempt a man to transgress the law, to do that which is injurious to the com-

1. Collins v. Blantern, 1 Smith's L C (13th Edn.) 406.

2. Faxton v. Popham, (1808) 9 East 408=103 E R 629.
3. Pole v. Harrobin, (1732) 9 East 417*n*.
4. Kamini Kumar v. Birendra Nath, (1930) 17 A I R P C 100=123 I C 187=57 I A 117=57 Cal 1302 (PC).

munity: it is void by the Common law; and the reason why the Common law says such contracts are void, is for the public good. You shall not stipulate for inequity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action when you come into a Court of justice in this unclean manner to recover it back: *Procul, O! procul este profani.*

This is more succinctly rendered by the maxim: *in pari delicto melior est positio possidentis.* To the generality of this rule however there is an exception on which the plaintiff-appellant relies. That exception has been stated by Lord Mansfield in (1778) 2 Cowp 791,[5] as follows:

> Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in *pari delicto;* and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

It is contended that the plaintiff-appellant was not in *pari delicto* with defendant 1 in the transaction which resulted in the dropping of the criminal prosecution inasmuch as he was in the power of defendant 1 by reason of the pending prosecution. The answer to that contention is afforded by the decision in 42 Cal 286,[6] where it was held that

> no refund of money or return of consideration given under an agreement not to prosecute a criminal case will be allowed unless circumstances disclose pressure or undue influence. Mere fear of punishment in a criminal case does not constitute undue influence.

In the present case the Court below has found that there was no evidence whatsoever to justify an assertion that the plaintiff had acted under any undue influence, duress, compulsion or fear practised upon him by defendant 1. It was also suggested on behalf of the plaintiff-appellant that as the Magistrate had agreed to the compromise of the criminal proceedings the Civil Court is not entitled to say that it was illegal. The contention is negatived by the decision in (1844) 6 Q B 308,[7] where it was held that an agreement that there shall be no prosecution is illegal even though sanctioned by the presiding Judge.

It was next contended that the plaintiff did not put the defendant into possession of the land in consequence of the agreement which he had entered into but that defendant 1 succeeded in obtaining possession only at a later stage after the acquittal in the criminal case had been recorded and the sale deed had been subsequently compulsorily registered. The plaintiff however had executed the sale deed prior to the acquittal and did not resile from it until it had achieved its object. The fact that he subsequently endeavoured to frustrate the defendant in obtaining the benefit of the sale does not in any way improve his position.

The last point on behalf of the plaintiff-appellant is with respect to the claim for salary. The amount involved is Rs. 35. The Court below held that the onus of proving that the salary was due from the defendant to the plaintiff lay primarily on the plaintiff and that the mere denial of the plaintiff that the money had been received by him was not sufficient to discharge the onus. It is contended that the onus was wrongly placed on the plaintiff in view of the defendant's admission that the plaintiff was, at the time in question, his Tahsildar. It is not necessary, in my view, to decide whether the Court was right in its view regarding the onus, for, it is quite clear that the learned Additional District Judge did not believe what the plaintiff stated on oath whereas he regarded the defendant as a respectable zamindar, who was not likely to perjure himself for a comparatively small sum of money. Quite apart therefore from the question of onus, it is clear to my mind that the Additional District Judge would have accepted the denial of defendant 1 that anything was due from him to the plaintiff on account of salary in preference to the plaintiff's assertion that he had not been paid. In the result therefore I would dismiss this appeal but in view of the fact that the parties were in *pari delicto* in the matter of the compromise of the criminal proceeding I would direct each party to bear his own costs of this appeal.

Rowland J. — I agree. In the Courts below the parties were at variance as to whether the document sued on was a sale deed or a deed of surrender. As I understand S. 92, it operated to preclude the defendants from asserting that it was not a sale deed when it was expressed as a deed

5. Browning v. Morris, (1778) 2 Cowp 791=98 E R 1364.
6. Amjadunnessa Bibi v. Rahim Bukhsh, (1916) 3 A I R Cal 74=28 I C 713=42 Cal 286 = 19 C W N 383=21 C L J 642.
7. Keir v. Leeman, (1844) 6 Q B 308=13 L J Q B 259=8 Jur 824.

of sale on a consideration of Rs. 4000. But this, as my learned brother has said, was no bar to the defence proving anything that they were entitled to under the proviso to the Section. That this deed was a part of an illegal bargain in the same transaction with the deed it hardly required any extraneous evidence to establish, for, in the recitals of the document itself there is a reference to the fact that the executant as Tahsildar had been using his master's collection money for his own purpose and that thereby over Rs. 1500 of his master's money was outstanding with him for which a criminal case was started and was pending. On other points I agree with what has been said by my learned brother.

G.N./R.K. *Appeal dismissed.*

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* A. I. R. 1940 Patna 577

ROWLAND J.

Joy Krushna Mohanty and others
Petitioners
v.
Emperor.

Criminal Revn. No. 85 of 1939, Decided on 27th February 1940, from order of Dist. Magistrate, Puri, D/- 30th September 1939.

*** Penal Code (1860), Ss. 268 and 290 — Riparian owners on one bank of river erecting embankment on their land to protect their fields from floods—This resulting in accumulation of water on fields of owners on other side of river—Such act cannot be described as public nuisance and persons erecting such embankment cannot be convicted under S. 290.**

Where riparian owners of land on one bank of a river throw up an embankment on their own land to protect their fields from flood, and this results in accumulation of water on the fields of the owners of land on the other side of the river, it cannot be said that the embankment causes a common injury to the public in the vicinity. Hence, an embankment of this kind even if it tends to cause injury to some owners of property cannot be described as a public nuisance. The persons erecting such embankment cannot therefore be convicted under S. 290. [P 578 C 1, 2; P 579 C 1]

B. N. Das and S. Mahanti — *for Petitioners.*

Advocate-General — *for the Crown.*

Order.— The petitioners have been convicted by a Magistrate of the Third Class under S. 290, I. P. C., and each sentenced to pay a fine of Rs. 15. An appeal against their conviction has been dismissed and they have moved this Court in revision on the ground that the acts found to have been done by them did not come within the definition of a public nuisance in S. 268, I. P. C., and are not punishable under Sec. 290. The appellate judgment is very brief and I will state the facts a little more fully. The Mahanadi river, as it nears the sea, divides into a delta of channels which form loops and branches which fork and rejoin eventually entering the Bay of Bengal. The water of these mouths of the Mahanadi is said to be tidal for some miles inland from the sea. One of these branches passes along the western boundary of villages Kusumbar and Sundara bearing thana Nos. 171 and 178 in police station Kakatpur of Puri District. West of the stream which is called Padapada at about that point is village No. 177 Barjanga and further west and north are other villages. To the east of this stream there used to be an embankment running roughly from north to south which prevented flood water from spreading over the lands of villages Kusumbar and Sundara. The embankment is said to have been very old, but within recent years it was breached by heavy flood. The date of this breach is stated by the prosecution to have been in 1933 and stated by the defence as in 1937. Now the accused, who are residents of Kusumbar and Sundara, wished to repair the breach in the old embankment and this was objected to by the inhabitants of the villages on the west of the stream who said that the flood water ought to escape eastwards through the breach so as to relieve the flooding of the fields in their villages.

In this state of things there was a proceeding under S. 144, Criminal P. C., as it was reported that there was a danger of a breach of the peace. The Magistrate passed an order restraining the people of Sundara from re-erecting the old bund. Subsequently they constructed an embankment on a retired line further east which had the effect of closing the breach. For this they have been prosecuted and convicted under S. 290, I. P. C. It has been found that the new bund tends to lead to the accumulation of flood water and damage to crops on the fields of 30 to 40 villages situate west of the stream in the same manner as used to result in the time of the old bund before it was breached. The trial Court held that in the circumstances the accused were guilty of committing a public nuisance. The definition of the offence is in S. 268; the act complained of must be one which causes any common injury, danger or annoyance to the public or the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury,

obstruction, danger or annoyance, to persons who may have occasion to use any public right. The District Magistrate considered that the act was an offence under the first part of the Section. It is argued in revision that any injury which the villagers of Barjanga and other villages may suffer is not caused by the bund but by flood water. This argument does not I think affect the question, for any damage which is caused will be due to the conjunction of two causes, the existence of the water and the existence of the bund. It is next contended that the nuisance, if any, is of a private and not public nature. The act does not cause injury to the people in general who dwell or occupy property in the vicinity. It does not injure persons residing all round the site on which the bund is created but the persons who reside and have property to the west.

Among the examples of cases decided under the Sections, it is to be noticed that hardly any reported decisions are traceable which deal with cases of encroachment or obstruction in water channels. Two decisions of the Calcutta High Court are reported, namely, 20 Cal 665[1] and 14 Cal 656.[2] Both these were cases of alleged obstruction to the navigation channels in tidal navigable rivers; and the decision turned on whether the right of navigation which is a public right, had been obstructed. That is to say, they are decisions on the second part of the definition in S. 268, which it is not suggested is applicable here. The question is whether the first part of the Section applies and this is to be determined on a reading of the Section itself. The attempt to bring such an act as the erection of an embankment on one's own land within the scope of the definition in S. 268 and within the mischief of S. 290 seems to be a novel one; and it is not unreasonably suggested that if these Sections were really applicable, it was to be expected that they would have been used before. The case, in its essentials, is a common one. The riparian owner of land on one bank of a river throws up an embankment on his own land to protect his fields from flood: and this results in accumulation of water on the fields of the owners of land on the other side of the river. Such cases frequently give rise to litigation in which the parties have their respective rights tried out in the Civil Court. That is to say, ordinarily speaking the rights of parties in a matter of this kind are considered to be private rights, and the Courts ordinarily deal with them as such; the issues commonly deal with such questions as rights of easement and similar rights. If that is their nature, we must bear in mind that by S. 81, Penal Code,

> nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it is done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Of course, this Section is of a general nature; whereas the Explanation to S. 268 that "a common nuisance is not excused on the ground that it causes some convenience or advantage" is a special provision dealing with a particular subject. If the two provisions are in apparent conflict the special provision will prevail being treated as an exception to the more general one. We have therefore to see whether the embankment causes a common injury to the public in the vicinity. The familiar types of nuisance cases such as a tannery by its stink, or some kinds of machinery by their din, create an annoyance whose intensity increases as one gets nearer to them: it is the nearest neighbours who are most aggrieved. But the people who live or own property nearest to this embankment are not aggrieved at all; they are benefited by protection from flood. The persons aggrieved are persons further off, beyond the other, the western bank of the stream. It is said they are more numerous than the persons benefited by the embankment; but that does not seem to be the test. What the Sections are aimed at is general annoyance or injury to persons in the vicinity; and it is difficult to hold that this is established when no annoyance or injury is caused to the persons in the immediate vicinity. I do not therefore think that an embankment of this kind even if it tends to cause injury to some owners of property can be described as a public nuisance. In Ratan Lal's Law of Crime in the commentary on S. 268 at p. 624 (Edn. 14) it is stated on the authority of English decisions that

> no prescriptive right can be acquired to maintain, and no length of time can legalize, a public nuisance. Though 20 years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of long standing.

Let us then consider for a moment the rights of parties, at the time when the old bund stood. The Advocate-General was un-

1. Jugal Das Dalal v. Queen-Empress, (1893) 20 Cal 665.
2. In the matter of Umesh Chandra Kar, (1887) 14 Cal 656.

able to assert confidently that before the old bund was washed away any member of the public could have taken action to abate the nuisance without being successfully met by a plea of prescriptive right. The lands on the west of the river may or may not have the right to discharge their flood water over the lands to the east, i. e., in the direction of Sundara and Kusumbar ; but if they have, it would seem to be a private right, capable of being lost by lapse of time. That being so, my view is that what was done does not fall within the definition of a public nuisance so as to be punishable under S. 290, Penal Code. If it was necessary to prosecute the accused, it would seem that the proper Section to have utilized was S. 76, Bengal Embankment Act 1882. I shall express no opinion whether the petitioners have committed an offence under that Section because that case was not set up by the prosecution and the Section contains various ingredients to the presence or absence of which attention and evidence were not directed at the trial. It is enough to say that I am of opinion that the conviction of the petitioners under the Section which has been applied by the Magistrate cannot stand and it is hereby set aside and the fines are to be refunded.

D.S./R.K. *Conviction set aside.*

A. I. R. 1940 Patna 579

WORT J.

Subedar Mian — Plaintiff — Appellant.

v.

Sheo Shankar Missir — Defendant — Respondent.

Appeal No. 484 of 1939, Decided on 10th April 1940, from appellate decree of Addl. Dist. Judge, Saran, D/- 9th January 1939.

(a) Mortgage—Usufructuary—Redemption—Suit for—Mortgagor can join claim for rent paid by him to mortgagee's use.

In a suit for redemption the mortgagor can, to his claim for redemption, join a claim for rent paid by him to the mortgagee's use. [P 579 C 2]

(b) Mortgage—Usufructuary—Redemption—Suit for—Mortgagor claiming to set off against his liability rent paid by him to mortgagee's use—He can do so only if he was forced to pay —If there was no such obligation he is entitled only to three years' rent.

In a suit for redemption of a usufructuary mortgage the mortgagor claimed to set off against his liability the rent paid by him to the mortgagee's use:

Held that if the mortgagor was forced to pay the rent he could deduct the sum from his liability, but if there was no such obligation he would be entitled to three years' rent as a money decree against the mortgagee under S. 70, Contract Act : *A I R 1929 Pat 37, Expl.; 10 I C 113, Ref.*

[P 580 C 2 ; P 581 C 1]

H. R. Kazimi —*for Appellant.*

Hareshwar Prasad and Harnarain Prasad — *for Respondent.*

Judgment.—This appeal arises out of an action for redemption. The plaintiff is the appellant and the only question which arises is whether the defendant mortgagee was liable to account for rents paid by the plaintiff whilst the defendant was in possession. The District Judge in appeal came to the conclusion that the defendant was not so liable, because (to use his own words) this deduction cannot be allowed in an action or redemption between the mortgagor and mortgagee; to allow it would be to allow a joint trial to two distinct causes of action.

The learned Judge in the Court below seems to be unaware of the Civil P. C., O. 2, R. 3. In any event, the plaintiff could have claimed redemption and he could have joined with that claim a claim for rent paid by him to the defendant's use. He would have been barred of course in that case in respect to a claim for anything more than three years under the Limitation Act. The real question that has been argued is whether the defendant is liable to deduct from the amount due by him to the plaintiff those sums which had been paid by the plaintiff for rent. It is contended that there could be no such account and reliance is placed chiefly on A I R 1929 Pat 37.[1] That was a case of malikana dues. It appears that the Courts were unable to come to the conclusion whether malikana was due and to whom; indeed there seems to be no definite decision on that question. James J., delivering the judgment of the Court, referred to an authority reported in 10 I C 113[2] in which it was found that this fact gave no ground for taking accounts. The learned Judge (James J.) prefaced his observation by saying:

In the present case we are asked to declare that the mortgagee is liable to account not because of any default affecting the mortgagors, but on the ground that they have obtained as profits the money which ought under the deed to have been paid to the malikanadars.

The learned Judge then proceeds to observe :

The mortgagee was entitled to all the profits he could make out of the property, and it happened

1. Raghubar Narayan v. Mohit Narayan Jha, (1929) 16 A I R Pat 37=114 I C 473=7 Pat 44=11 P L T 83.
2. Fakir Muhammad Khan v. Ali Sher Khan, (1911) 10 I C 113.

that he had managed to add to the profits the rent of several years.

The learned Judge then observes this :

We need not doubt that the result of the case would have been different if the rent had been payable to the mortgagor, or if the mortgagor had himself been obliged to pay the rent to save the property.

The substance therefore of the decision is that where sums of money which were the usufruct of the property are to be set-off against the interest or principal or both, or, to put it in plain language, where the mortgagee is to reimburse himself from the profits of the property, then the mortgagor is not entitled to call upon him to account for the amounts which he has so received. I would repeat the words of James J. which I read a moment ago:

In the present case we are asked to declare that the mortgagee is liable to account, not because of any default affecting the mortgagors, but on the ground that they have obtained as profits the money which ought under the deed to have been paid to the malikanadars.

It is that question that the Court was deciding, and, if I may be allowed to say so, it is a decision which is consistent with all other decisions on the point : they are not liable to account as profits 'the money which ought under the deed to have been paid to the malikanadars.' The decision that under no circumstances is a usufructuary mortgagee liable to account would be contrary to the statute law. S. 76, T. P. Act, lays down the obligations of a mortgagee to take possession. There are several cls. (a) to (i). Cl. (c), is :

He must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold.

Now, this is one of the sub-clauses which is not mentioned in S. 77 of the Act which section provides :

Nothing in S. 76, Cls. (b), (d), (g) and (h) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and definite portions of the principal.

There is a contract of that description in this case. But S. 77, as will appear from what I have read, only excludes the obligations under S. 76, in contracts of that kind in respect of cls. (b), (d), (g) and (h): Cl. (c) is not one of them. The mortgagee is therefore under an obligation; and the last paragraph of S. 76, provides :

If the mortgagee fail to perform any of the duties imposed upon him by this Section, he may, when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss occasioned by this failure.

Now, had the words been 'be liable to account,' my decision might have been different ; but it is quite clear what the meaning of the sub-clause is 'be debited with the loss occasioned.' The plaintiff therefore must establish a loss. He would not be entitled therefore to have an account if he merely paid the sum voluntarily and had not in any way been forced to pay the sum which he now seeks to set off against his liability. That view of the matter is in conformity with the decision of this Court to which I have already referred and in particular with the words :

We need not doubt that the result of the case would have been different if the rent had been payable to the mortgagor, or if the mortgagor had himself been obliged to pay the rent to save the property.

The matter therefore comes to this: that if the plaintiff had been obliged to pay the rent to save the property then he would be entitled to set off against his liability those sums which he was obliged to pay for the loss he has occasioned. I might observe, for fear it should be thought I have forgotten the point, that the obligation under S. 76, cl. (c), from one point of view does not apply to this case, because as I understand it there is an obligation in this case by contract apart from the Section to pay the rent. But having regard to the observation of James J. in the case to which I have referred, it seems to me to be clear that the principle applicable is the same in each case, that is to say whether there is a contract to pay, or whether the obligation is by reason of S. 76. The result therefore is that the case must go back to the learned Judge to determine whether the plaintiff had been obliged to pay the sums of money as rent and therefore a loss has been occasioned to him which he is entitled to set off against his liability. If it be found that there was no obligation to pay and the payment was purely voluntary and there was no threat to the tenancy, then, in my judgment, the plaintiff would be entitled to recover three years' rent, all other sums being barred by limitation by reason of the provisions of O. 2, R. 3, Civil P. C.: that is to say the plaintiff would be entitled to join with the cause of action in the suit for redemption this claim as against the defendant mortgagee. I think the matter is clear : if the plaintiff has

been forced to pay, he can set off those sums against his liability ; if, on the other hand, there was no such obligation, he would be entitled to three years' rent as a money decree against the defendant under S. 70, Contract Act. There is no liability on the mortgagee to pay interest. Costs of this appeal will abide the result of the hearing in the Court below.

D.B./R.K. *Case sent back.*

A. I. R. 1940 Patna 581

AGARWALA AND ROWLAND JJ.

Jaga Singh and others — Defendants — Appellants.

v.

Basdeo Singh and others — Plaintiffs — Respondents.

Appeal No. 519 of 1938, Decided on 12th February 1940, from appellate decree of Dist. Judge, Muzaffarpur, D/- 19-2-1938.

(a) Bihar Tenancy Act (8 of 1934), S. 26-O —In applying S. 26-O distinction should not be drawn between pending suits in which landlord is plaintiff and pending suits in which landlord is defendant.

In applying S. 26-O there is no warrant for drawing a distinction between pending suits in which the landlord is a plaintiff and pending suits in which the landlord is a defendant: *A I R 1936 P C 49, Expl.* [P 582 C 2]

A mortgagee of an occupancy holding obtained a mortgage decree, and in execution of that decree purchased the holding. The landlord obtained a rent decree against the original tenant and in execution of it purchased the holding and obtained delivery. The mortgagee brought a suit for possession in 1936 and during its pendency deposited the fee under S. 26-O:

Held that S. 26-O was retrospective and the plaintiff by making the deposit had perfected his title which could not be defeated by landlord's decree. Hence he was entitled to decree for possession: *A I R 1936 P C 49, Ref.* [P 582 C 1]

(b) Bihar Tenancy Act (8 of 1934), Sch. 3, Art. 3—Landlord in execution of decree for arrears of rent obtaining delivery of possession as auction-purchaser — Such dispossession is not dispossession by landlord within meaning of Art. 3—Suit for possession in such case is governed by ordinary law of limitation.

Where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession as auction-purchaser, such dispossession of the tenant is not a dispossession by the landlord within the meaning of Article 3, Sch. 3 of the Act, so as to make that Article applicable. A suit to recover possession is governed by the ordinary law of limitation in such case: *A I R 1930 Pat 256, Foll.* [P 583 C 1]

N. K. Prasad II and Ramanugrah Prasad — *for Appellants.*

S. N. Sahay, D. L. Nandkeolyar and Gholam Mohammad—*for Respondents.*

Judgment. — This appeal arises out of a suit to declare title and recover possession over 5 bighas, 3 kathas, 2 dhurs of land. It is common ground that this was formerly the occupancy holding of Duli Rai. In 1927 the plaintiff-respondent brought a mortgage suit against Duli Rai to enforce a mortgage on this land. He obtained a preliminary decree dated 23rd June 1928, and a final decree dated 25th February 1929. The mortgaged property was put to sale in Execution Case No. 12 of 1930 and was purchased by the decree-holder, now the plaintiff, who took delivery of possession on 19th September 1930. The landlord's consent was not taken to the purchase of this property by the plaintiff, but after the passing of the Bihar Tenancy Amendment Act of 1934 he deposited the fee under S. 26-O of the Act with the Collector on 12th March 1937. That is the plaintiff's title which the Courts below have accepted and given him a decree against which an appeal is preferred by the principal defendant who is the landlord of the holding. This defendant brought Rent Suit No. 2376 of 1927 against Duli Rai and obtained an ex parte rent decree on which he took out Execution Case No. 992 of 1928 and put the holding to sale on 18th December 1928, about six months after the preliminary mortgage decree of the plaintiff. The landlord himself became auction-purchaser and took out his delivery of possession on 28th September 1930, that is nine days after the delivery of possession, in favour of the plaintiff.

The plaintiff applied under O. 21, R. 90, to set aside the sale alleging that the processes had been suppressed. The application was rejected by the first Court on 7th April 1931, and it is the plaintiff's allegation that his actual dispossession by the defendant took place on 8th April 1931. The plaintiff appealed against the order of 7th April dismissing his application under O. 21, R. 90 and an event that took place some time in the year 1931 was the death of the original tenant, Duli Rai. The plaintiff's appeal succeeded and the District Judge set aside the sale on 16th April 1932. On 12th September 1932 the plaintiff moved the Court for restitution of the property and obtained on 13th February 1933 an order of the first Court for restitution, but this order was on 19th August 1933, set aside on appeal by the District Judge because the rent decree had not been set aside or varied so as to import the pro-

visions of S. 144 and also because it was not alleged by the plaintiff that his dispossession had been by the act of the Court in delivering possession on 28th September 1930 but by an act of the opposite party, the auction-purchaser.

In revision this Court, on 1st February 1934, declined to interfere. The present suit was instituted on 1st February 1936 by the plaintiff to recover possession. In the meantime the amendments made in the Bihar Tenancy Act, by the Local Act 8 of 1934 had received the assent of the Governor on 31st October 1934 and came into force in June 1935. The enactment of S. 26-O gave the plaintiff a right to pay to the landlord or deposit with the Collector the prescribed fee in respect of the transfer and sub-s. (3) enacted that the consent of the landlord should be taken to have been given to the transfer on the day on which the receipt for the same is granted by the Collector. As already stated, the deposit was made on 12th March 1937, which is during the pendency of the suit. The suit has been decreed on the view that Ss. 26-N and 26-O, Bihar Tenancy Act, are retrospective and that the plaintiff by making the deposit referred to has perfected his title which cannot be defeated. The District Judge relies on the decision of the Privy Council in 15 Pat 268[1] and subsequent decisions of this Court.

In second appeal it is contended that the object of Ss. 26-N and 26-O being as was stated in the judgment of the Privy Council "to quiet old titles" they must be considered to have retrospective effect in favour of a raiyat who is in possession of the land transferred to him but not in favour of one who is out of possession so as to enable him to disturb the landlord who has lawfully entered. The second point taken is that the suit is barred by the special period of two years' limitation laid down in Art. 3 of Sch. 3 to the Bihar Tenancy Act. As to the first point, we can find nothing in the judgment of the Privy Council in 15 Pat 268[1] to suggest that their Lordships intended that distinction should be drawn between cases in which the landlord is the plaintiff and cases in which the tenant is the plaintiff. The case before their Lordships was one under S. 26-N, but in the course of their judgment their Lordships referred to S. 26-O and said :

> It will be seen that in the case of a transfer made after 1st January 1923, but before 10th June 1935, the provision is that the transferee may pay or deposit the landlord's transfer fee and thus perfect his title.

There is no suggestion that a transferee shall be incompetent to make the payment or that the Collector shall refuse to receive money in any case in which the transfer is impugned in a pending suit. We find nothing here to warrant us in drawing a distinction between pending suits in which the landlord is a plaintiff and pending suits in which the landlord is a defendant. In the cases of this Court to which we have been referred we are unable also to find that such a distinction is to be drawn. Mr. Nawal Kishore Prasad II was in fact forced to put his argument in this form because, so far as cases in which the landlord is plaintiff are concerned, the decisions hopelessly concluded him.

In 16 Pat 405[2] the landlord's transfer fee under S. 26-O had been deposited after the trial Court as well as the Appellate Court had decreed the landlord's suit and it was contended that the title of the transferee had become extinct by the decrees already passed against him before he made the deposit. The contention was negatived. It was held that the title of the transferee would not become extinct by the passing of a decree against him unless and until such decree has become final as it might by the lapse of the period of limitation for an appeal and the omission of the defendant to file an appeal against the decree. So far as S. 26-N is concerned, there is a direct authority in 17 Pat 333[3] that in applying this Section we cannot draw distinction between the cases in which the landlord is a plaintiff and cases in which the tenant is a plaintiff for the suit out of which the appeal arose was one instituted by the transferee to recover possession. The only case which has not yet directly arisen seems to be the case where both the transferee is the plaintiff and the Section applicable is not S. 26-N but S. 26-O. In my opinion, it is not possible to draw a distinction and to say that the observations of the Privy Council do not apply in the case like the present either on the ground that the plaintiff is the transferee or on the ground that the Section we are applying is S. 26-O and not S. 26-N. That

1. K. C. Mukerjee v. Ram Ratan Kuer, (1936) 23 A I R P C 49 = 160 I C 105 = 63 I A 47=15 Pat 268 (P C)

2. Walihan v. Parmeshwar Narain, (1937) 24 A I R Pat 582=171 I C 657=16 Pat 405=18 P L T 602.

3. Thakur Rai v. Issardayal Prashad, (1938) 25 A I R Pat 559=179 I C 104=17 Pat 333.

being so, the plaintiff was entitled to a decree unless the suit is barred by limitation.

Mr. Nawal Kishore Prasad II argued that the suit was well within the definition in Art. 3 of Sch. 3, Tenancy Act, being a suit to recover possession of land claimed by the plaintiff as a raiyat or under-raiyat and the defendant in the suit being in fact the landlord of the holding. We have not however to give our own reading of the Article as if the matter were res integra; we are bound to follow the decision of the Special Bench of this Court in 9 Pat 788.[4] There, on a review of all the authorities, it was held that where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession as auction-purchaser such dispossession of the tenant is not a dispossession by the landlord within the meaning of Art. 3 of Sch. 3, Bihar Ten. Act, so as to make that Article applicable. A suit to recover possession is governed by the ordinary law of limitation. The case before the Special Bench was a case in which the landlord had obtained delivery of possession through the Court and Mr. Nawal Kishore Prasad II tries to distinguish it on the ground that in the present case, on the plaintiff's own pleading, the delivery of possession issued by the Court was fraudulently suppressed and the defendant did not take possession until 8th April 1931, when without the assistance of any Court officer he is said to have forcibly dispossessed the plaintiff. But the distinction will not assist the defendant when we look to the occasion which led to the dispossession. It was on 7th April 1931 that the plaintiff's application under O. 21, R. 90, was rejected and it was on the very next day that possession was taken by the defendant according to the pleadings. So there can be no doubt in what capacity the defendant considered himself to be taking possession or in what capacity the plaintiff thought the defendant to be ousting him. We hold, therefore, that the case falls within the principle of the Special Bench decision cited and the plaintiff was entitled to bring his suit within twelve years from the date of dispossession, that is to say both points taken in the appeal fail, and we dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

4. Gajadhar Rai v. Ram Charan Gope, (1930) 17 A I R Pat 256=125 I C 565=9 Pat 788 = 11 P L T 197 (F B).

A. I. R. 1940 Patna 583

HARRIES C. J.

Panchanan Mukharji—Appellant.

v.

Commissioner of Cuttack Municipality—Respondent.

Appeal No. 180 of 1937, Decided on 29th August 1939, from appellate decree of Dist. Judge, Cuttack, D/- 20th September 1937.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 117 — Objection of assessee determined without giving assessee opportunity to appear and urge his own case — Assessment is illegal.

In order to comply with S. 117 of the Act, the assessee must be given an opportunity to put his own case and to call such evidence as may be relevant to the issue. Applications falling within S. 117 of the Act cannot be disposed of without the assessee being given an opportunity of presenting his case. If they are disposed of in such a manner then the assessment is clearly illegal. [P 584 C 1, 2]

(b) Bihar and Orissa Municipal Act (7 of 1922), S. 115 (2)—Earlier enhancement illegal — Enhancement made during general revision must be regarded as first enhancement and notice of it must be given under S. 115 (2).

Once the earlier enhancement is held to be illegal and ultra vires, the enhancement made during the general revision must be regarded as the first enhancement. The increase or enhancement contemplated by the Act must be a legal increase or enhancement and the Municipality cannot rely upon any illegalities committed by them. That being so, notice of such enhancement would have to be given to the assessee by reason of sub-s. (2) of S. 115. If no such notice is ever given, the enhancement made in the general revision of assessments is illegal. [P 585 C 1]

M. S. Rao, R. N. Sinha, H. Sen and A. S. Khan — *for Appellant.*

B. K. Ray and B. Mahapatra — *for Respondent.*

Judgment.—This is a plaintiff's second appeal from a decree of the lower Appellate Court dismissing his claim for a declaration that a certain assessment made by the defendants was illegal and ultra vires and for the return of a sum of money paid by way of enhanced tax. The plaintiff is householder in Ward II of the Cuttack Municipality which house is valued for the purposes of taxation at Rs. 240. In or about the year 1933 the plaintiff added a second storey to this house and later the Executive Officer in charge of the Cuttack Municipality revised the assessment under S. 107 (d), Bihar and Orissa Municipal Act. This was done soon after the Cuttack Municipality was superseded, the date of such supersession being 4th December 1933. The new annual value of the property was fixed at Rs. 420 and the tax was levied upon this basis. Later a

general revision of the assessment of property in Cuttack was made and in that general revision the assessment was maintained at Rs. 420. The plaintiff claimed that the proceedings whereby the assessment was enhanced to Rs. 420 were ultra vires and illegal. He further alleged that the value of the property could not be regarded as having been validly enhanced by the revision because the formalities necessary had not been complied with.

The amendment or alteration of the valuation list is dealt with in S. 107, Bihar and Orissa Municipal Act, and sub-s. 1 (d) provides that a holding may be revalued or reassessed where its value has been increased by additions or alterations to the building. It was for this reason that the Cuttack Municipality purported to alter the plaintiff's assessment. Sub-s. (2) of S. 107 of the Act provides that where the Commissioners propose to increase an assessment by reason of addition or alteration to buildings, they must give the assessee at least one month's notice of their intention. Sub-s. (3) of that Section provides that the assessee may object to the proposed increase and if he does, Ss. 116 to 119 of the Act apply so far as practicable. These latter Sections deal with the procedure on revision. S. 116 provides that anybody dissatisfied with the amount assessed upon him or with the valuation or assessment of a holding, may apply for a review, and S. 117 directs that every such application shall be heard and determined after the tribunal hearing the same has taken such evidence and made such enquiry as it deems necessary. Ss. 116 and 117 apply, as I have said, to objections to a proposed amendment of the list by reason of sub-s. 3 of S. 107 of the Act.

In the present case the plaintiff objected to the proposed enhancement of his assessment and it now appears that the District Magistrate did pass an order dismissing this objection. It is however common ground that the plaintiff was never given an opportunity to appear before the District Magistrate and to urge his own case. In those circumstances can it be said that this objection was heard and determined as required by S. 117 of the Act? A Bench of this Court, of which I was a member, recently decided that in order to comply with S. 117 of the Act the assessee must be given an opportunity to put his own case and to call such evidence as may be relevant to the issue. Applications falling within S. 117 of the Act cannot be disposed of without the assessee being given an opportunity of presenting his case. If they are disposed of in such a manner then the assessment is clearly illegal. In the earlier case to which I have referred, the Bench decided that where a revision was decided in the absence of the assessee a day before the actual date fixed for hearing, the assessment was illegal though the assessee had been given an opportunity later, if he so desired, to appear and argue his case. The Bench held that as the case had been disposed of in his absence the assessment was illegal. In the present case the assessee did everything which he was required to do. He was not given the full month's notice as required by the Act but he filed his objections and those objections should have been heard and determined after the objector had been given an opportunity of presenting his case. They were heard and decided in his absence and without his knowledge and accordingly I hold that the increased assessment which resulted from these proceedings was illegal and the increased amount which the Municipality collected cannot be retained.

Some time afterwards, it was decided that the assessment of the holdings in Cuttack should be revised as such had not taken place for five years. The statute provides machinery for this general revision of assessment. S. 115 (1) provides that when the assessment list in this general revision has been prepared or revised, the Chairman shall sign the same and shall give public notice by beat of drum and by placards posted up in conspicuous places throughout the Municipality of the place where the list may be inspected and sub-s. (2) of the Section provides that in cases in which any property is for the first time assessed or the assessment is increased, the Chairman must give notice thereof to the owner or occupier of the property if known.

In the list published as a result of the general revision of assessment, the assessment of the plaintiff's house stood at Rs. 420, that is the amount to which it had been illegally increased early in 1934. I have already held that that enhancement was illegal and of no effect. It was however contended on behalf of the Municipality that after the publication of this revised list the assessment became perfectly legal. It is said that the assessment had not been enhanced for the first time in the general revision and accordingly no special notice was required to be sent to the assessee. In my view as the original enhancement was

illegal then it must be wiped out of consideration altogether. It was open to the District Magistrate of the superseded Municipality to increase this assessment during the revisional assessment, but any such increase would be the first time the assessment had been legally increased. The learned District Judge appears to have thought that an illegal increase would have to be taken into consideration and that the figure as it stood in the revised list could not be regarded as the first enhancement of the assessment. In my judgment, as the attempt to enhance the value made early in 1934 was abortive and of no effect, the enhancement of this assessment in the revised list must be regarded as an enhancement made for the first time. That being so, notice of such enhancement would have to be given to the assessee by reason of sub-s. (2) of S. 115 of the Act. It is conceded that no such notice was ever given and that being so, the enhancement made in the general revision of assessments was also illegal and of no effect. Once the earlier enhancement is held to be illegal and ultra vires, the enhancement made during the general revision must be regarded as the first enhancement. The increase or enhancement contemplated by the Act must be a legal increase or enhancement and the Municipality cannot rely upon any illegalities committed by them. In my view, the learned District Judge was wrong in holding that the enhancement of the assessment during the general revision was legal and that no notice need be sent of it to the plaintiff.

For the reasons which I have given I am satisfied that the decree of the lower Appellate Court cannot be sustained and must be set aside. No other point was taken in this appeal. I therefore allow this appeal, set aside the decree of the lower Courts and decree the plaintiff's claim for the declaration and the amount claimed. The plaintiff must have his costs in this Court and in both the Courts below. If the Municipality have realized any further sums by way of enhanced tax since this suit was instituted, such should be refunded to the plaintiff.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 585

DHAVLE J.

Mt. Bigna Kuer and others—Appellants.

v.

Radha Prasad Rai — Respondent.

Appeal No. 315 of 1939, Decided on 26th January 1940.

(a) Hindu Law—Reversioner — Declaratory suit by plaintiff as nearest reversioner against widow — Plaintiff found to be remote reversioner while persons impleaded as strangers found to be nearest reversioners and to have colluded with widow — Plaintiff is not entitled to declaration — Nor can his claim be read as one for declaration on footing that though not nearest reversioner he was entitled to declaration on ground that nearer reversioners had colluded with widow.

The plaintiff sued the widow for a declaration as the nearest reversionary heir that certain alienation by her was not binding on him after her death. The Court found that the plaintiff was only a remoter reversioner while persons who were impleaded by him as strangers were the nearest reversionary heirs but had colluded with the widow :

Held: that the plaintiff was not entitled to the declaration nor could his claim be read as being on the footing that though he was not the nearest reversionary heir he was entitled to sue for a declaration because the nearest reversionary heirs had colluded with the widow. [P 586 C 1, 2]

(b) Hindu Law—Reversioner — Finding that defendants are nearer reversioners than plaintiff is one of fact.

The lower Appellate Court's finding on the evidence before it that the defendants are nearer reversioners than the plaintiff is a finding of fact and is binding in second appeal. [P 586 C 2; P 587 C 1]

Rai Gurusaran Prasad and Tarkeshwar Nath — *for Appellants.*

Mahabir Prasad and D. N. Varma — *for Respondent.*

Judgment. — This is an appeal by the defendants in a suit brought by the plaintiff as the nearest reversioner for a declaration that the kobala executed by defendant 1, widow of the last male Hindu holder, jointly with defendants 2 and 3, in favour of defendants 4 and 5, was of no effect against the reversioner after the death of the widow. The lower Courts have concurrently found that the plaintiff is not the nearest reversioner of the husband of defendant 1. They have also concurrently found that the kobala was a sham transaction. They have further concurrently accepted the genealogy set up by the defence, which makes defendants 2 and 3 the nearest reversioners and the plaintiff a remoter reversioner. The trial Court dismissed the suit on the ground that the plaintiff was not the nearest reversioner. The lower Appellate Court has decreed the suit on the ground that defendants 2 and 3, the nearest reversioners, had colluded with defendant 1 and thus precluded themselves from maintaining an action for a declaration.

It has been contended on behalf of the defendants-appellants that the footing on which the plaintiff brought this suit, namely that he was the nearest reversioner having

failed, no relief should have been given to him on the footing that though he is a remote reversioner, he is entitled to a declaration because the nearer reversioners have precluded themselves from obtaining similar relief. In support of this contention, the learned advocate has referred to 6 Cal 764,[1] 35 All 326[2] and 49 All 815.[3] Learned counsel who appears for the plaintiff-respondent has endeavoured to distinguish these cases relied on for the appellants; and the distinction, it seems to me, is plain without really being very material. In 6 Cal 764[1] for instance, there was no allegation that the nearer reversioners had precluded themselves from suing to set aside the adoption. At the same time the principle that was laid down by Sir Robert Collier was that when the next presumable reversioner is entitled to sue,

> in such a case, upon the plaint stating the circumstances under which the more distant reversionary heir claimed to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit.

This clearly requires a claim made by the distant reversionary heir as such. In the present case the plaintiff did not sue on that footing at all. On the contrary, he submitted a genealogy which made him the next reversionary heir, and in para. 5 of the plaint he called himself the reversionary heir and defendants 2 and 3 "mere strangers." It is true that in the next paragraph he spoke of the collusion of defendants 2.5 with defendant 1; but we cannot take it from this that the intention was to say that the nearer reversionary heirs had precluded themselves by their collusion, for, according to the plaint, defendants 4 and 5 are no relations at all, and as to defendants 2 and 3, the plaintiff's case was that they were mere strangers. In the Allahabad cases referred to by the learned advocate for the appellants, there seems to have been difficulty caused in reading into the plaint a claim to sue as a remote reversionary heir by the fact that some of the nearer reversionary heirs were not parties. In the present case the persons who have been found to be the nearest reversionary heirs are undoubtedly on the record; but it must be remembered that plaintiff brought them on the record as mere strangers. Notwithstanding their presence on the record therefore I am disinclined to read into the plaint a claim for a declaration on the footing that the plaintiff, though not the nearest reversionary heir, was entitled to sue for a declaration because the nearer reversionary heirs had colluded with the widow. The lower Appellate Court in allowing the plaintiff a declaration has referred to three cases: 37 All 45;[4] 50 All 678[5] and A I R 1933 All 152.[6] Learned counsel for the plaintiff-respondent has however not been able to urge that any of these cases supports the proposition that a plaintiff who sues as the next reversionary heir may be given a declaration on the footing that though he is not the next reversionary heir, heirs nearer than he have precluded themselves from suing. This concludes the appeal.

A cross-objection has been preferred by the plaintiff against the refusal of the trial Court to give him an opportunity to meet a document Ex. C, the certified copy of a plaint, filed on behalf of the defence at the time of trial. The lower Appellate Court considered that the trial Court ought to have given the plaintiff that opportunity. The document was however merely put in to corroborate the genealogy set up by the defendants, and the finding of the lower Appellate Court is :

> However apart from this document, I think I should accept the oral evidence of the witnesses, examined for the defence and I agree with the learned Munsif and hold that the oral evidence as adduced on behalf of the defence should be accepted in preference to that of the plaintiff and these clearly indicate that defendants 2 and 3 are really nearer reversioners than the plaintiff.

Mr. Mahabir Prasad has contended that this finding of the lower Appellate Court in favour of defendants 2 and 3 being nearer reversioners than the plaintiff is coloured by the view of that Court as regards the law applicable; but I have quoted the finding in extenso and find it impossible to read any such consideration into it. It is a finding of fact and makes it perfectly clear that even apart from Ex. C the lower Appellate Court did on the evidence before it, come to the conclusion that defendants 2 and 3 are nearer reversioners than the

1. Rani Anand Kunwar v. Court of Wards, (1881) 6 Cal 764=8 I A 14=8 C L R 381=4 Sar 195 (P C).
2. Meghu Rai v. Ram Khelawan Rai, (1913) 35 All 326=19 I C 814=11 A L J 382.
3. Sita Saran v. Jagat, (1927) 14 A I R All 811=102 I C 296=49 All 815=25 A L J 636.
4. Jhandu v. Tarif, (1914) 1 A I R P C 34=27 I C 892=37 All 45 (P C).
5. Deoki v. Jwala Prasad, (1928) 15 A I R All 216=113 I C 737=50 All 678=26 A L J 449.
6. Bandhan Singh v. Mt. Daulata Kuer, (1933) 20 A I R All 152=128 I C 389=1932 A L J 384.

plaintiff. This finding is binding in second appeal. The result is that this appeal is allowed, and the suit of the plaintiff-respondent dismissed with costs in all Courts. The cross-objection is dismissed. Leave to appeal is refused.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 587

HARRIES C. J. AND MOHAMAD NOOR J.

Sankar Malik and others — Appellants.

v.

Raja Braja Sundar Deb—Respondent.

Appeal No. 55 of 1937, Decided on 16th August 1939, from appellate decree of Sub-Judge, Cuttack, D/- 10th September 1936.

Landlord and Tenant — Person recorded as occupancy tenant in Record of Rights — Other evidence and entry in remark column showing that his tenure was service tenure — Landlord on tenant's refusal to perform services held entitled to eject him in spite of his acceptance of quit rent from tenant.

In the current Record of Rights certain person was recorded as occupancy tenant, paying quit rent. Apart from the evidence showing that this entry was wrong the person was shown in remark column of the Record of Rights as holding service tenure. The landlord accepted quit rent and when the tenant refused to perform the services for which the tenure was created brought a suit for ejectment :

Held that the presumption of the entry in the Record of Rights that the person was occupancy tenant was rebutted by other inconsistent entry in the remark column. The person was therefore holding service-tenure and on his ceasing to perform services the landlord was entitled to eject him even if he had accepted quit rent from him.

[P 587 C 2; P 588 C 1]

P. Mahanti — *for Appellants.*

L. Mahanti — *for Respondent.*

Mohamad Noor J. — The suit out of which this appeal has arisen was instituted by the plaintiff-respondent for ejecting the defendants-appellants from certain lands which according to the plaintiffs they (the defendants) held under him as service-tenure holders in six villages on the ground that they refused to perform the service for which the tenures were created. The trial Court decreed the suit for the lands of four of these villages, and dismissed it in respect of those in two villages Madhpur and Tukunia. It found that the defendants were service-tenure-holders of these lands and that they refused to perform the services, but relying upon an entry in the current Record of Rights that the defendants were occupancy raiyats paying a quit rent on account of their liability to perform services, it held that though this entry about the defendants being occupancy raiyats was wrong and was brought about fraudulently by the defendants, the plaintiff having realized the quit rent by certificate proceedings and also amicably recognized the status of the defendants as occupancy raiyats was not entitled to eject them. This decree of the learned Munsif seems to have been accepted by the defendants, but the plaintiff appealed in respect of the lands of the two villages for which the suit was dismissed. The learned Subordinate Judge has reversed the decree of the trial Court and has decreed the plaintiff's suit in respect of these lands also. He has held that the remark column shows that the defendants were service-tenure holders and as such the entry about their being occupancy raiyats was obviously wrong. The defendants have preferred this second appeal.

It was contended by the learned advocate for the appellant that the presumption arising from the Record of Rights that the defendants were occupancy raiyats has not been rebutted. But the fact is otherwise. The learned Munsif found that the father of defendant 1 was a service-tenure holder and on his death the tenancy was renewed in favour of defendant 1 and the lands were settled with him on condition of his rendering service, but he fraudulently got himself recorded as raiyat with a remark that he was to pay quit rent. This finding of the learned Munsif was based upon the evidence adduced on behalf of the plaintiff and therefore it must be taken that according to his view the presumption of the Record of Rights of the current settlement, which it may be noted was against the entries in the provincial and the revisional settlements, was rebutted by the oral evidence adduced on behalf of the plaintiff. The learned Subordinate Judge has also found the entry in the current settlement to be wrong and we must take it that according to him also the presumption about the correctness of the entry was rebutted. Apart from this, the entries in the current settlement are inconsistent. On the one hand, the defendants' status has been mentioned as that of occupancy raiyats, but at the same time it is stated in the remark column that they have to perform services. The presumption of one entry stands rebutted by another entry in a different column. The only ground, as I have stated, given by the learned Munsif for dismissing this part of the suit was that the acceptance of

rent by the plaintiff meant recognition of the status of the defendant, but in my opinion the learned Subordinate Judge is perfectly right in holding that the acceptance of quit rent mentioned in the Record of Rights did not deprive the plaintiff of his right to eject the defendant if defendant 1 refused to perform the services which he was bound to perform according to the terms of the tenancy.

The appeal seems to me to be concluded by the finding of fact, namely that the Record of Rights has been proved to be wrong by the evidence adduced and that the only legal point involved was whether the acceptance of rent under the circumstance stated above created an occupancy tenancy in favour of the defendants. In my opinion, the view of law taken by the learned Subordinate Judge is correct, and I would dismiss this appeal with costs.

Harries C. J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 588

HARRIES C. J. AND VARMA J.

Advocate-General, Orissa — Appellant.

v.

Bhikari Charan Mahanti and another — Respondents.

Government Appeal No. 4 of 1939, Decided on 12th March 1940, from decision of Dist. Magistrate, Balasore, D/- 5th June 1939.

(a) Penal Code (1860), S. 379 — Essential ingredient of theft is intention to take dishonestly — Taking moveable property under bona fide claim of right is not theft — Servants of Raj snatching away from complainant bird shot by him on Raj land without permission under bona fide belief that it belonged to Raj —Servants held not guilty of theft—Position of servant is stronger in such case.

The essential ingredient of theft is an intention to take dishonestly. Without such intention the taking of moveable property does not amount to theft. If the person taking any moveable property does it under a bona fide claim of right, then he cannot be found guilty of the offence of theft unless the Court holds that the claim is a mere pretence: *14 C W N 408; A I R 1917 Cal 648; A I R 1917 Pat 40 and A I R 1935 Pat 472, Rel. on.*

[P 591 C 1, 2]

The servants of the Raj, under a bona fide belief that all game within the Raj shot without permission belonged to the Raj, snatched away from the complainant a bird shot by him on the Raj land without permission :

Held that since the Raj had always claimed the game and wild animals within the Raj it could not be said that the servants' claim was not bona fide and that they had claimed the bird dishonestly. Under the circumstances no theft was committed : [P 592 C 1; P 593 C 1]

Held further that in such a case a servant was in a stronger position than his master, because a servant might, in certain circumstances, honestly believe that his master was the owner of certain property, whereas the master might well know that he was not : *9 C W N 974, Rel. on.*

[P 592 C 1]

(b) Penal Code (1860), S. 379 — Taking of property under bona fide claim of right is not theft—Bona fide belief must be proved to exist at actual moment of taking —Fact that later on plea inconsistent with aforesaid belief was taken is immaterial.

The taking of property under a bona fide claim of right is not theft. The bona fide belief must however be proved to exist at the actual moment when the property is taken. The fact that later on a plea inconsistent with the assertion of a bona fide claim of right was taken is immaterial.

[P 593 C 2]

Public Prosecutor for Orissa —

for Appellant.

P. C. Manuk and G. C. Das —

for Respondents.

Harries C. J.—This is an appeal by the Advocate-General of Orissa on behalf of the Provincial Government from an order of the learned District Magistrate of Balasore acquitting the respondents upon a charge of theft. The respondent Purna Chandra Singh was charged under S. 379, I. P. C., while the respondent Bhikari Charan Mahanti was charged under S. 379, read with S. 114, I. P. C., for abetting the commission of the offence of theft by Purna Chandra Singh. Both the respondents pleaded not guilty; but a learned Magistrate of the Second Class found them guilty of the offence with which they were charged and convicted and sentenced each of them to pay a fine of Rs. 25 and in default of payment to undergo rigorous imprisonment for a period of one month. The respondents appealed to the Court of the learned District Magistrate, Balasore, where they were found not guilty and acquitted. At the conclusion of his judgment the learned District Magistrate made the following observation :

But in view of the importance to the administration of the District that the doubts regarding the law relating to feræ naturæ should be made clear in the case of a conflict between a landlord and his tenant, this is, in my opinion, a fit case to go before the Hon'ble High Court for an authoritative ruling on the subject.

Presumably, acting on this observation, the Provincial Government have preferred this appeal from the order of acquittal. The facts of the case can be shortly stated as follows: The respondent Bhikari Charan Mahanti is a Circle Officer in the Kanika Raj, whereas the respondent Purna Chandra Mahanti is a Forest Jamadar in the Raj. The complainant is a tenant within the

Kanika estate and is a member of the Orissa Legislative Assembly. The subject-matter of the alleged theft is a dead bird worth about one rupee. On 3rd December 1938, a tenant of the Raj, one Mayadhar Naik (P. W. 2) together with Apurna Munjet (P. W. 3) went to a paddy plot No. 98 in village Garkola and there Apurna Munjet shot two gadargadira birds which were eating the paddy. They were accompanied by a servant Chintamani Barik (P. W. 6) and the latter was ordered to take back the birds to Mayadhar Naik's house and to hand them over to the complainant Chakradhar Behera (P. W. 1) who was staying with Mayadhar. Chintamani Naik took the birds to Chakradhar, and the latter ordered him to take one of the birds to Chakradhar's home which was in a village called Haldia, some distance away. Chintamani took the bird, and on his way he passed the Panchutikri Kachahri of the Kanika Raj. There he was stopped by the respondent Charan Mahanti and asked who had shot the bird. Chintamani Barik said that Apurna Babu had shot the bird and that he was taking it to the house of Chakradhar Babu. The respondents claimed that Apurna had no right to shoot the bird and that the dead bird belonged to the estate. It is said that Apurna refused to give up the bird, whereupon Purna Chandra Singh upon the orders of Bhikari Charan Mahanti snatched the bird from Chintamani Barik and took it away. Chintamani Barik returned to Mayadhar's house and there reported the matter to the complainant Chakradhar Behera. On their return from plot No. 8, Mayadhar and Apurna passed the Raj Kachahri and Apurna was stopped and questioned; Bhikari Charan Mahanti asked him if he had killed the bird and Apurna replied that he had killed two. He was taken to task and told that he had no right to shoot any birds without the permission of the Raj. His name, address and gun number were taken and he was asked to submit a written apology. Apurna Munjet refused and said that he had all along been shooting in the Kanika Raj without permission granted by the Raj authorities.

It appears that on the day in question the Sub-divisional Officer of Bhadrak was camping outside the village of Panchutikri, and Chakradhar Behera immediately went to him and made a complaint. He filed a written complaint supported by a solemn affirmation which is printed at pp. 1 and 2 of the paper-book. He sets out the facts of the case and in the solemn affirmation he says that the respondent told Chintamani Barik that the birds were killed without permission and that he would not be allowed to take away the birds. Thereupon Purna Chandra Singh snatched away the bird under the orders of the Circle Officer Bhikari Charan Mahanti. It is quite clear from this petition and solemn affirmation that the two respondents claimed that as the bird had been shot without permission granted by the estate authorities no one had a right to it and that it would have to be given up to the estate. Shortly after, Chakradhar Behera had made this complaint, the respondent Purna Chandra Singh appeared before the Sub-divisional Officer with the dead bird and reported that the bird was shot without authority. The Sub-divisional Officer directed Purna Chandra Singh to file a complaint, and this was done in due course. In that complaint which is printed at pages 72 and 73 of the paper-book it is alleged that the two gadargadira birds were shot on the abadi khasra land of the estate bearing plot No. 43. It is alleged that Apurna and Mayadhar entered the land, killed the birds without permission and after having killed them misappropriated the same. The complainant states that he protested and that Chintamani Barik took over one of the birds when told to do so. It is prayed that proceedings might be taken against Chakradhar Behera, Apurna Munjet, Chintamani Barik and Parikhit Naik for shooting and taking away the birds without the permission of the Raj.

The case against the respondents was heard by a Magistrate of the Second Class. He held that the birds were shot on plot No. 98 of village Garkola and not on the anabadi plot No. 43 of village Panchkutti as alleged by the defence. He further held that there was no custom in the Raj forbidding tenants to shoot birds or beasts on their holdings and he accordingly held that the birds, when they were shot, belonged to the tenant. He further held that the bird had been forcibly snatched away from Chintamani Barik and as the respondents had no right whatsoever to it he convicted them of theft and abetment of theft and fined each of them Rs. 25. The learned District Magistrate on appeal was satisfied that the birds were shot on plot No. 98 of village Garkola and not on anabadi land of the Raj. The learned Magistrate did not consider whether any custom existed in the Raj relating to the right to take game or

wild birds. He however was of opinion that all wild birds on the Raj belonged to the proprietor, and that being so the respondents who were the servants of the Raja Bahadur, could not be guilty of theft in taking the Raja's own property. He accordingly set aside the convictions and acquitted both the respondents.

On behalf of the Provincial Government, it has been contended that the decision of the learned District Magistrate is clearly erroneous. It is contended that the right to take and kill all game and wild animals belongs to the tenant and not to the landlord, unless such right to take and kill game, etc. has been reserved expressly or by implication or unless by custom the proprietor and not the tenant is entitled to get the game and wild animals. It is admitted in this case that Mayadhari Naik (P. W. 2) was an occupancy tenant of the Raja Bahadur and there is no suggestion in the case that at the creation of the tenancy the landlord reserved to himself the sole right of killing game, wild animals and birds. It is contended that the right to kill game, wild animals and birds is an incident to possession of property and that, apart from the circumstances which I have indicated, such right is given to the tenant upon the creation of a tenancy. Mayadhar Naik, though an occupancy tenant of Plot No. 98 of village Garkola, was not in possession of this plot when these birds were shot. Mayadhar Naik in evidence stated that at that time the entire plot was cultivated by Sridhar Mahanti of Khidarpur and Bhramarbar Padhari of Daulatpur on the sanja system. In short the plot had been let to the cultivators on payment of a fixed quantity of paddy. It would appear therefore that Mayadhar Naik was not the tenant in actual possession of the plot. There is no suggestion however that on the day in question he was on the plot without the consent of his sub-tenants though there is no evidence of such consent. However, in my view, it is not necessary in this case to consider the precise position of Mayadhar Naik with regard to this plot.

Mr. G. P. Das, the Public Prosecutor for Orissa, who has argued the case with great force on behalf of the Provincial Government has relied upon a number of authorities to establish the proposition that the right to take game belongs to the tenant and not to the landlord. He has pointed out that at Common Law in England the tenant is entitled to take and kill all wild animals on the land unless such right is reserved expressly or by implication by the landlord. He has contended that the English Common Law is correctly stated in Woodfall's Landlord and Tenant, Edn. 23, at p. 904. There it is stated :

> At Common Law the right to take and kill game (in which, as in all animals feræ naturæ, there is no property) belongs to the tenant, and not to the landlord, by virtue of the tenant's property in the land. It is and has long been very common, however, for the landlord to reserve the right to the game in the contract of tenancy, and the Game Act, 1831, which did away with the numerous restrictions and qualifications whereby a tenant was almost invariably prevented, even in a case where the game did not happen to be reserved to the landlord, from enjoying his right to it, has specially protected such reservation.

According to Mr. Das, such a rule is more appropriate to Indian conditions than English conditions because an occupancy tenant has a far greater interest in the land than a mere agricultural tenant in England who is in most cases a tenant from year to year, whose tenancy can be terminated by a year's notice to quit. In India the occupancy tenant cannot be ejected by a mere notice to quit. He has a right in the land which is heritable and now transferable as long as he continues to pay his rent and use the land for the purpose for which the tenancy was created, and after his death his descendants cannot be ejected therefrom. If the law of England gives a tenant from year to year a right to take and kill game and wild animals, a fortiori the Indian tenant should have such a right. It has been urged that the right of the tenant to take and kill game has been recognized by the Indian Courts, and reliance has been placed on a number of cases, namely, 4 Mad 268,[1] 49 I C 198,[2] 3 Pat 549[3] and 3 P L T 53.[4] It is to be observed that only the last case cited deals with the respective rights of landlord and tenant, and the case in 3 P L T 53,[4] deals not with game and wild animals and birds but with the right to take fish.

In my view it is not necessary in this case to express any opinion as to the rights of either landlord and tenant to game, because this case can be disposed of upon other grounds. In any event a Criminal

1. Makath Unni Moyi v. Malabar Kandapuni Nair, (1882) 4 Mad 268.
2. Kishore Chandra v. Radha Gobind Das, (1919) 6 A I R Pat 400=49 I C 198.
3. Emperor v. Artu Rautra, (1924) 11 A I R Pat 564=80 I C 82=3 Pat 549=25 Cr L J 594.
4. Henry Hill & Co. v. Sheoraj Rai, (1922) 9 A I R Pat 9=64 I C 346=3 P L T 53.

Court is not an appropriate tribunal to decide difficult and complicated questions relating to rights of property. It appears to me upon the plain facts of this case that the respondents cannot be convicted of the offence of theft. In the solemn affirmation made by the complainant Chakradhar Behera (P. W. 1), it is clearly stated that the respondents took the bird from Chintamani Barik, because they claimed that the bird belonged to the Raj as it had been shot without authority. It is also clear from the evidence of Apurna Munjet (P. W. 3) and Chintamani Barik (P. W. 6) that the respondents as officers of the Raj claimed the bird as belonging to the Raj because it had been shot without authority. If the two respondents took the bird believing that it belonged to the Raj as it had been shot without authority, then they could not be guilty of the offence of theft. "Theft" is defined in S. 378, Penal Code, and the definition is in these terms :

> Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

It is to be observed that the essential ingredient of theft is an intention to take dishonestly. Without such intention the taking of moveable property does not amount to theft. The word "dishonestly" is defined in S. 24, Penal Code, in these terms :

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly."

"Wrongful gain" and "wrongful loss" are defined in S. 23, Penal Code :

> 'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled. 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.

In my view, a person cannot be said to act dishonestly, that is with an intention of causing wrongful gain to himself or his master or wrongful loss to another, when he takes moveable property which he believes to belong to himself or his master. In short, if the person taking any moveable property does it under a bona fide claim of right, then he cannot be found guilty of the offence of theft. The defence of bona fide claim of right has been recognized by all Courts in India, and Mr. Manuk who has argued the case with great ability and fairness on behalf of the respondents has cited a large number of cases. In 14 C W N 408,[5] a Bench of the Calcutta High Court (Jenkins, C. J. and Woodroffe, J.) held that if an accused asserts a claim to a thing alleged to have been stolen by him, he should not be convicted unless the Court is in a position to say that the claim is a mere pretence. At page 409 Jenkins, C. J. observed :

> In this case it is clear that the petitioners who have been convicted assert a claim, and one who asserts a claim should not be convicted of theft, unless the Court is in a position to say that the claim is a mere pretence. This is the law as laid down in 9 C W N 974.[6] Here it is impossible to say that the claim is a mere pretence. Indeed, the lower Appellate Court contemplates that there must be a civil suit about the tank which has given rise to the present criminal proceedings. The result is that the rule must be made absolute, and the conviction and sentence set aside.

A similar view was taken by Mookerjee and Sheepshanks JJ. in 44 Cal 66.[7] It was held in that case that the removal of property in the assertion of a bona fide claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence. Whether the claim is bona fide or not must be determined upon all the circumstances of the case, and a Court ought not to convict unless it holds that the claim is a mere pretence. In this case the learned Judges cited and followed a statement of Sir Matthew Hale in his Pleas of the Crown (Vol. 1, pp. 508 and 509):

> It is the mind that makes the taking of another's goods to be a felony or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following (sic) direct in this case. If *A*, thinking he hath a title to the horse of *B*, seiseth it as his own, or supposing that *B* holds of him, distrains the horse of *B* without cause, this regularly makes it no felony but a trespass, because there is a pretence of title, but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it.

The learned Judges also cited with approval Sir Edward Hyde East's statement of the law in his Pleas of the Crown, Vol. 2, page 659 ;

> In any case, if there be any fair pretence of property or right in the prisoner, or if it be brought

5. Dhirendra Mohan v. Emperor, (1910) 14 C W N 408=5 I C 794=11 Cr L J 248.
6. Hari Bhuimali v. Emperor, (1905) 9 C W N 974=2 Cr L J 836.
7. Arfan Ali v. Emperor, (1917) 4 A I R Cal 648 =36 I C 136 = 44 Cal 66 = 17 Cr L J 456= 20 C W N 1270.

into doubt at all, the Court will direct an acquittal ; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy.

This view of the law was followed in this Court by Atkinson, J. in 39 I C 475.[8] In that case the learned Judge laid down that

> a man who honestly believes that he is taking away property from his own land cannot and ought not to be convicted of theft.

The learned Judge went further and held that :

> If a claim of title to property is honestly made and is not merely colourable, then the jurisdiction of the Criminal Court is ousted.

It was perhaps unnecessary to deal with the question as to whether the jurisdiction of the Court is ousted when a bona fide claim of right is made. It appears to me sufficient to say that if such a claim is honestly made, then no conviction for theft can possibly be made. In a later case of this Court, 16 P L T 645,[9] Dhavle J. also gave effect to the defence of a bona fide claim of right. In the present case the supposed owner, namely the Raja Bahadur of Kanika, did not himself claim the bird and the claim was made by his servants acting on his behalf. A servant may well be in a stronger position than his master, because a servant might, in certain circumstances, honestly believe that his master was the owner of certain property, whereas the master might well know that he was not. The position of a servant was considered by a Full Bench of the Calcutta High Court in 9 C W N 974.[6] In that case it was held that the Criminal Court should not convict of theft any person who asserts a claim of right unless it is in a position to say that that claim is a mere pretence. It was further held that a servant should not be held guilty of the offence of theft when what he did was at his master's bidding, unless it should have been shown that he participated in his master's knowledge of the dishonest nature of the acts. There must be some evidence before the Court from which such knowledge on the part of the servant can be inferred.

It appears to me that these cases clearly establish that if the present respondents honestly believed that the bird belonged to the Raj they cannot be convicted of theft. As I have stated earlier, the witnesses for the prosecution make it clear that the bird was taken from Chintamani Barik because the respondents claimed that it belonged to the Raj as it had been shot without authority. That is even admitted in the solemn affirmation filed with the petition. It is clear that the Kanika Raj has over a long period of time claimed the sole right to kill and take wild animals on Raj lands. The Raj has claimed the right to forbid the killing and taking of such animals without permission and has from time to time made known its views. As far back as the year 1907 a notice (Ex. C) was published in a local paper called "The Star." This notice is printed at p. 32 of the paper-book and was actually issued on 1st February 1907. The notice is in these terms :

> The public are hereby informed that shooting without permission, within the limits of Killah Kanika is strictly prohibited. The jungle in lands named 'Kalibhanja Dian' and 'Baguli Dian' are reserved and persons entering them, without permission, on any account, will be dealt with as trespassers.
>
> Any gentleman wishing to visit the estate for sporting purposes should apply for permission to the Manager at Ganja, the quarters of the estate.

It is not denied that such a notice was issued, but it is contended that the notice applies only to strangers. There can be no doubt, however that the person who issued the notice must have been under the impression that all game belonged to the Raj. The public were informed that shooting without permission within the limits of the Raj was strictly prohibited, that is shooting on either land in the Raja's possession or in the possession of tenants. The wording of the notice is wide enough to cover all types of land in the Raj. Shooting on all such land is forbidden, and even if the notice was intended to apply to strangers it is clear that the Raj claimed the right to the shooting on land in the occupation of tenants. If the tenants were entitled to grant permission, then obviously the Raj could not insist on its right to give permission. The form of the notice suggests clearly in my view that even as early as 1907 the Raja of Kanika claimed the sole right to take and kill game within the Raj. In the trial Court a large number of documents were adduced in evidence on behalf of the respondents with a view to showing that the Raj insisted that no one was entitled to shoot within the confines of the Raj without express permission. The rules of the Forest Department of the Raj were put in evidence and also a number of applications for licenses and the licenses granted. It was

8. Sadasiv Singh v. Emperor, (1917) 4 A I R Pat 40=39 I C 475=18 Cr L J 507.
9. Ram Brich Lal v. Emperor, (1935) 22 A I R Pat 472 = 159 I C 346 = 37 Cr L J 91 = 16 P L T 645.

urged in the Court below that these documents showed that by custom the Raja Bahadur had the sole right to take game. Mr. Manuk has not asked us to hold that the documents established any custom, but he has asked us to hold that these documents show that for a long period of time the Raja Bahadur of Kanika has rightly or wrongly claimed to have the sole right to take and kill all game and wild animals within the Raj.

In my judgment, the evidence adduced in this case undoubtedly shows that the owner of the Kanika Raj has always claimed the game. Such a claim may or may not be well-founded, and I express no opinion whatsoever upon it. It is sufficient in this case for me to hold that such a claim has been and is now being put forward. There is nothing whatsoever to suggest that such a claim is not bona fide. That being so, it is impossible to hold that the respondents who were Raj servants were claiming this bird dishonestly. As servants of the Raj, they knew that the Raj claimed all game shot without permission, and it appears to me that they took this bird believing that the Raj was entitled to it. They said so when they took the bird, and I have no reason whatsoever to doubt that their action was due to the undoubted claim of the Raj.

It was contended that the defence put forward on behalf of the respondents clearly shows that they were not actuated by a bona fide claim of right when they took the bird. One of the defences was that the bird was not shot on Mayadhar's plot but on anabadi or uncultivated land of the Raj. Uncultivated land of the Raj would, of course, be in the Raj's possession, and prima facie he would be entitled to shoot all wild animals upon it. It has been urged that the very fact that this defence was put up shows that the respondents were not acting honestly. It is true that both the Courts found that this defence was not established; but in my view the important point of time is the actual moment the bird was taken from Chintamani Barik. At that moment did the respondents believe that the bird really belonged to the Raj? If they did, then it must be held that their claim was a bona fide one. Nothing that occurred afterwards can really affect the matter. In my judgment, the evidence for the prosecution establishes that these respondents did nothing more than seize property which they honestly believed belonged to their master. That being so, they could not be convicted of theft.

It appears that this point was never raised before the Courts below. Had such a point been taken, there would in all probability have been no appeal. In my judgment, the respondents in this case acted under the honest belief that the bird belonged to the Raj and that concludes the matter. Again, I wish to make it clear that I express no opinion whatsoever upon the question as to whether the Raj's claim to game wild birds and animals on the land of occupancy or other tenants is or is not well founded in law. That is a matter which can only be determined in appropriate proceedings in another Court. For the reasons which I have given, I would dismiss this appeal.

Varma J. — I agree.

Mr. G. P. Das, the learned Public Prosecutor for Orissa, has tried to show that the acquittal was wrong by urging that neither the Raj nor its servants could have any rights to the birds shot by Apurna Munjet (P. W. 3) on plot No. 98 which was an occupancy holding of Mayadhar Naik (P. W. 2). The Criminal Court is not the proper forum to establish the relative rights of a landlord and a tenant to game birds, and it is not necessary on the materials before us to go into that complicated question. In this case we have to see whether a case of theft has been made out. "Theft," as defined in S. 378, I. P. C., is committed when property is removed dishonestly from the possession of another person. It is evident therefore that if the removal of the property is not dishonestly made, the charge of theft cannot sustain. In this case, whether the taking of the birds, worth about one rupee, was dishonest or not can be gathered from what the complainant himself stated on solemn affirmation. He stated that the accused asked Chintamani Barik from where he had received the birds, and

> Chintamani Barik told them that he received the bird from me and that he was taking it to my house. On hearing this they said that the bird was killed without their permission from the estate and they should not allow him to take that bird. Under orders of the Circle Officer, Purna Chandra Singh snatched away the bird from Chintamani Barik and took it to their Kutcherry house.

It is clear from this statement that the accused asserted a right to the bird as servants of the Raj. A petition of complaint was also subsequently filed by the Forest Jamadar of the Raj on 10th December 1938, against Chakradhar Behera (the complainant in this case), M. Apurna and Chintamani

Naik, and it was alleged in this petition that these persons took the dead bird from land owned and held by the Raj and misappropriated the same and therefore they should be summoned and tried. It was further stated therein that the Sub-Divisional Officer had already been informed of the incident on the date of the occurrence and the delay in filing the petition was due to the fact that permission of the Raj had to be obtained beforehand. Taking the two complaints together, it is clear that the assertion of the right of the Raj to game birds is a fact supported by the statements of the complainant himself in this case. This assertion of right is a very old one, and in this case the accused asserted that right as servants of the Raj. In such circumstances they cannot be said to have removed the dead bird dishonestly unless it be held that the assertion was a mere pretence. On the evidence to which reference has been made in the judgment just now delivered, coupled with the statements of the complainant of this case and the Forest Jamadar of the Raj, I am of opinion that the case falls within the principle laid down in 9 C W N 974.[6] The acquittal of the accused in this case cannot therefore be recalled, and I would dismiss the appeal.

G.N./R.K. *Appeal dismissed.*

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* A. I. R. 1940 Patna 594

HARRIES C. J.

Bhobani Naik — Appellant.

v.

Balaram Dhal — Respondent.

Appeal No. 19 of 1938, Decided on 25th August 1939, from appellate order of Dist. Judge, Cuttack, D/- 22nd December 1937.

*** Civil P. C. (1908), O. 21, R. 2— Uncertified payment cannot be certified after judgment-debtor's objection that execution application is time barred — Such payment cannot be regarded as saving limitation.**

An uncertified payment relied upon by the decree-holder to save limitation for application for execution cannot be certified after the judgment-debtor has raised an objection that the application is out of time. The payment not being certified as required by law cannot be regarded by the Court as saving limitation : *A I R 1928 All 629 (F B), Foll.* [P 594 C 2; P 595 C 1]

B. N. Dutta and H. P. Bhagat — *for Appellant.*

Judgment. — This is an appeal against an order of the learned District Judge of Cuttack dismissing an appeal from an order of the learned Munsif of Kendrapara disallowing a judgment-debtor's objection in execution proceedings. The appellant is a judgment-debtor and the respondent is a decree-holder. The respondent obtained a decree on 30th May 1933 and first put it into execution on 15th September 1933. This execution case was disposed of on 3rd January 1934. The next application for enforcing the decree was not made until the expiry of three years from the date of the disposal of the first execution case. The judgment-debtor therefore raised the plea of limitation. The decree-holder wanted to save limitation by alleging several payments but none of these payments appeared in the handwriting of the judgment-debtor and the learned Munsif held that these payments did not save limitation. The decree-holder then filed an amended petition by which he sought to amend his original petition by inserting therein that the judgment-debtor had made another payment of Rs. 14 within three years of the date upon which the first application was finally disposed of. It was said that this payment was recorded in the handwriting of the judgment-debtor or at least that a statement of the fact of payment was signed by him. Both the Courts below have held that this payment saves limitation and have dismissed the judgment-debtor's objection. It has been argued before me by the learned advocate for the appellant that it was not open to the Court to consider this payment having regard to the provisions of O. 21, R. 2, sub-r. (3). That sub-rule provides that:

> A payment or adjustment which has not been certified or recorded as aforesaid shall not be recognized by any Court executing the decree.

This payment had not been certified and the question arises whether or not it can be taken to save limitation. It has now been held by all the Courts that an uncertified payment cannot be considered. It has however been held that a decree-holder can certify an alleged payment after he has made an application for execution so as to be able to prove that payment in the execution proceedings, but in A I R 1928 All 629,[1] a Full Bench held that he could not certify an alleged payment after any objection had been taken either by an officer of the Court before the issue of notice or by the judgment-debtor when he appears to contest the application for execution. It appears to me that the present case comes entirely within the Allahabad Full Bench case and I must follow it. Here payment was relied upon and it was not even put

1. Joti Prasad v. Srichand, (1928) 15 AIR All 629 =112 I C 73=51 All 237=26 ALJ 966 (F B)

forward until the judgment-debtor had objected that the application was out of time and it was then too late to certify payment in order that the payment could be used to save limitation. This point appears to have been overlooked by both the Courts below and is not dealt with by them. In my view, this payment as it had not been certified as required by law could not be regarded by the Courts as saving limitation and accordingly the judgment debtor's objection should have been allowed and the decree-holder's application dismissed. The result therefore is that I allow this appeal, set aside the orders of the Courts below and allow the judgment-debtor's objection and dismiss the application for execution. The appellant must have his costs of this appeal and the costs in the Courts below.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 595

HARRIES C. J. AND VARMA J.

Mohamed Habib — Appellant

v.

Emperor.

Criminal Appeal No. 19 of 1940, Decided on 15th March 1940, from decision of Sess. Judge, Darbhanga, D/- 13th January 1940.

Penal Code (1860), Ss. 300, Exception 2, 304 — Deceased who was aggressor coming with stick and causing injuries to accused—Accused hitting back assailant and causing injuries on head resulting in death — Accused held did not exceed right of private defence.

Deceased, who was the aggressor, came to the scene of occurrence with a stick and caused injuries to the accused who in his turn hit back the assailant and caused injuries on the head which ultimately resulted in his death :

Held that it could not be said that the accused had exceeded the right of private defence, if at the time he inflicted the injuries he did not realize that they were of a very serious nature.

[P 596 C 2]

Held further that since the skull was not fractured, and it was due chiefly to the pressure on the brain that death ultimately resulted, it could not be said that the injury inflicted by the accused on deceased's head was of an unusually severe nature or that it was intended to be so.

[P 596 C 2]

K. K. Banerji and K. P. Varma — *for Appellant.*

Government Pleader — *for the Crown.*

Varma J. — This is an appeal on behalf of one Mohamed Habib who has been convicted by the Sessions Judge of Darbhanga, under S. 304, I. P. C., and sentenced to two years' rigorous imprisonment. Two other persons, Abdul Sattar and Sheikh Salim, stood their trial before the same Court but they have been acquitted by the learned Sessions Judge. The occurrence is said to have taken place on 19th July 1939, at village Andhri which is at a distance of 12 miles from Police Station Darbhanga. On that date the Sub-Assistant Surgeon from village Sakri, which is at a distance of five miles from Andhri, was summoned to attend to the injuries on Wahab at 8 P. M. He came and gave first-aid and advised them to take the injured person to the hospital. Wahab was taken to the hospital but he died without recovering consciousness. Habib, the present appellant, happens to be the youngest of four brothers. The eldest was Wahab, the deceased; the next was Razaque ; and the third was Sattar. It is said that these brothers have got a cousin Saleem. The prosecution case is that Sattar and Habib were sitting at about 4 P. M. at the door of Saleem. Wahab went there and asked his brothers to take back the registered deed from the Registration Office and then divide the belagan lands, adding that delay would entail fine. The receipt happened to be in the name of Habib. Sattar and Habib refused. Then Wahab asked for the receipt, so that he might take back the document. This led to an altercation and abuses, and on the orders of Ziarul Haque, who is said to be a father-in-law of Habib, to assault, Habib struck Wahab on the head with a lathi, and Saleem struck him on the right wrist. It is said that Sattar and Hafiz, son of Ziarul Haque, also struck Wahab with lathis. Wahab in self-defence hit Habib and Sattar. Wahab fell down senseless into a tank close by, and then the others turned on the complainant Razaque and chased him, but he ran away. Majeed is said to have taken out Wahab from the tank, and Wahab was taken to his own house.

The case of the accused is to be gathered from the written statement. The accused did not make any definite statement before the committing Magistrate and in the Sessions Court, although Habib admitted that there was a fight between the four brothers on account of a share of their aunt's property, he did not know who hit whom, nor did he admit having hit anybody in the fracas. It may be noted that Abdul Razaque was found to have an abrasion with a swelling on the left forearm about two days old. Sattar succeeded in proving that he had an abrasion with a swelling on the left leg, a bruise with swelling on the back of the left knee, a swelling on the left forearm, and also a bruise on the left arm. Habib

had a swelling on the left index finger and the thumb, and a swelling on the left forearm. The injuries on Wahab were these: (1) fracture of the right ulna, (2) a lacerated longitudinal wound 2″ × ¼″ scalp deep on the vault of the skull about 1″ to the right of the middle line. On dissection, there was found ante mortem clot around the wound. The doctor noticed an injury also on the chest but that injury does not seem to have been the result of an assault on Wahab ; it might have been due to a fall after having received the injuries on the head and the arm. Death, according to the doctor, was due to the injury on the head and the pressure caused on the brain on account of that injury. In the post mortem report the doctor says "the death in my opinion was due to shock and compression due to the head injury."

The trial was with the aid of three assessors. The first assessor was of opinion that Habib was not proved to have hit Wahab on the head, nor that Sattar or Saleem caused grievous hurt to Wahab; the second assessor was of opinion that the charge was not proved and the third assessor was also of the same opinion as the second one. The first information report in this case was lodged not earlier than 21st July 1939, at 8 A. M. although the occurrence is said to have taken place on 19th July 1939 at 4 P. M. The learned Sessions Judge has not accepted the defence version of the occurrence inasmuch as he says that it was not proved that the occurrence took place at the field which was the subject-matter in dispute. So far as the prosecution version is concerned, he considers that the delay in lodging the first information report should lessen our confidence in the exactness of the report. Of the eyewitnesses examined in support of the prosecution story, he relies to a certain extent upon the evidence of Zainul (P. W. 3) and Sadaruddin (P. W. 4); but he does not rely upon the evidence of Sundar Sao (P. W. 5). Without going into the details of the evidence, this case can be disposed of on the findings of the learned Judge himself. After having discarded the evidence of one of the eyewitnesses, and that for very good reasons, he was of opinion that it was Wahab, the deceased, who was the aggressor. He says that according to the evidence it was Wahab who first came to the spot carrying a stick, and that Habib and Sattar at the time had no weapons. It was however not clear from the prosecution evidence when and how they got the weapons. Now, on these findings the question that arises is whether it could be said that the appellant had a right of private defence. Wahab came to the place with a stick in hand. There is no doubt that some injuries were caused to Habib by means of a stick. Under those circumstances, if he hit back and caused injuries to his assailant which ultimately resulted in death, it cannot be said that he exceeded the right of private defence, if at the time he inflicted the injuries he did not realize that they were of a very serious nature. Looking at the nature of the injury caused on the head of Wahab, which ultimately caused the death of Wahab, it appears that the skull was not fractured ; and it was due chiefly to the pressure on the brain that death ultimately resulted. It cannot therefore be said that the injury inflicted by the appellant on Wahab's head was of an unusually severe nature or that it was intended to be so. It appears, therefore, that the appellant had in the circumstances a right of private defence which he did not exceed in protecting himself against his assailant. I would therefore allow the appeal, set aside the conviction and sentence passed upon the appellant and direct that he be acquitted and set at liberty forthwith. His bail bond, if any, will be cancelled.

Harries C. J.—I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 596

DHAVLE AND CHATTERJI JJ.

Harnarain — Judgment-debtor — Appellant.

v.

Dayabhai Hira Chand — Decree-holder — Respondent.

Appeal No. 335 of 1938, Decided on 11th April 1940, from original order of Sub-Judge, Motihari, D/- 15th November 1938.

(a) Limitation Act (1908), Art. 183 — 'Revivor' explained — Issue of notice under O. 21, R. 22 does not amount to revivor.

To constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and decree-holder is entitled to enforce it. In other words, there must be an order for execution which amounts to a decision that the decree is capable of execution. The issue of a notice under O. 21, R. 22 must be distinguished from an order for issue of execution. The former does not constitute a "revivor" within the meaning of Art. 183 : *A I R 1925 Cal 668, Rel. on.* [P 598 C 1]

(b) Limitation Act (1908), Art. 183—Revivor —Proceeding for obtaining leave under O. 21, R. 50 is not revivor.

The proceeding for obtaining leave under O. 21, R. 50 is not an application for execution, nor does the leave granted amount to any order for execution. Hence it does not amount to revivor. [P 598 C 1]

(c) Limitation Act (1908), Art. 183—Decree against firm—One partner arrested in execution —This does not amount to revivor against another partner not party to execution proceeding.

As a general rule nobody can be prejudicially affected by any judicial order to which he is not a party. Art. 182 is an exception to this general rule. A similar exception cannot be imported into Art. 183 when it is silent about it. Hence, where in execution of a decree against a firm an order for arrest is issued against one of the partners, the order is revivor so far as that partner is concerned but it does not amount to revivor as against another partner who was not party to execution proceeding : *A I R 1918 Mad 513 and A I R 1916 Mad 1038, Rel. on.* [P 598 C 2]

B. N. Mitter, K. N. Moitra, A. K. Mitter and Raj Kishore Pd. — *for Appellant.*

Chatterji J.—This appeal arises out of a proceeding in execution of a money decree. The decree was obtained on 7th November 1924, by the respondent against the firm of Chunilal Madan Lal in Original Suit No. 4849 of 1922 of the Bombay High Court. On 24th September 1925, the decree-holder applied for execution in the Bombay High Court praying for arrest of Madan Lal Srinivas, one of the partners in the firm of Chunilal Madan Lal. On that petition an order was passed by the Court on 14th October 1925, for the arrest of Madan Lal Srinivas. The execution case, however, proved infructuous. In 1936, the decree-holder got the decree transferred to the Court of the Subordinate Judge of Motihari and filed an application in that Court on 23rd April 1936, for execution of the decree against Har Narayan Chuni Lal, alleged to be one of the partners of the firm Chunilal Madan Lal. The Execution Case No. 120 of 1936, which was started on that application, was dismissed for default on 9-2-1937.

The present application for execution was filed on 19th February 1937, in the same Court against the same judgment-debtor, namely Har Narayan Chuni Lal. The latter opposed the application mainly on the ground that it was barred by limitation. This objection has been overruled and the execution case has been ordered to proceed. Hence this appeal by the judgment-debtor. Har Narayan Chuni Lal. The only question raised in this appeal is that of limitation. The decree under execution being passed by the Bombay High Court on its original side, the case will be governed by Art. 183, Limitation Act. That Article runs as follows:

Description of application.	Period of limitation.	Time from which period begins to run.
To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right; Provided that when the judgment, decree, or order has been revived, some part of the principal money secured thereby or some interest on such money has been paid or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment as the case may be.

The decree was passed on 7th November 1924, and the present execution was filed on 19th February 1937, that is to say, beyond 12 years. The learned Subordinate Judge has held that the orders passed in the previous execution proceedings in 1925, and 1936, operate as "revivor" within the meaning of Art. 183. The term "revivor" has not been anywhere defined or explained in the Limitation Act, but judicial decisions have laid down that

to constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it.

In other words, there must be an order for execution which amounts to a decision that the decree is capable of execution. It will be enough to refer here to the Full Bench decision of the Calcutta High Court in 43 Cal 903[1] which was approved by the Privy Council in 54 Cal 500.[2] So far as the Execution Case No. 123 of 1936 is concerned, it appears from the order sheet of that case, of which the record was called for by us, that notice under O. 21, R. 22, Civil

1. Chutterput Singh v. Sait Sumari Mal, (1916) 3 A I R Cal 488=36 I C 602=43 Cal 903=20 C W N 889=23 C L J 645 (F B).
2. Banku Behari Chatterji v. Naraindas Dutt, (1927) 14 A I R P C 73=101 I C 24 = 54 I A 129=54 Cal 500 (P C).

P. C., was issued, but it could not be served and as the decree-holder did not take any further steps the case was dismissed for default. Thus, there was no order for execution passed in that case. The issue of a notice under O. 21, R. 22 must be distinguished from an order for issue of execution. It cannot be said that in that case there was any decision, express or implied, that the decree was capable of execution. The proceedings in that execution case therefore do not constitute a "revivor" within the meaning of Art. 183, Limitation Act. This view is supported by the decision of the Calcutta High Court in 41 C L J 159.[3]

It appears that before the decree was transferred for execution to the Motihari Court leave was obtained under O. 21, R. 50 (2), Civil P. C., from the Prothonotary and Senior Master of the Bombay High Court to execute the decree against the appellant Har Narayan Chuni Lal as a partner in the judgment-debtor firm. The effect of the leave so granted is that Har Narayan Chuni Lal is liable under the decree. In other words, he must be deemed to be a judgment-debtor. The proceeding for obtaining leave under O. 21, R. 50 is not an application for execution, nor does the leave granted amount to any order for execution. The execution case of 1925 however stands on a different footing. In that case an order was passed on 14th October 1925, for arrest of Madan Lal, one of the partners of the judgment-debtor firm. This order amounted to a determination that the decree was capable of execution. Prima facie this order would operate as a "revivor."

But it is contended by Mr. B. N. Mitter for the appellant that the execution of 1925 being taken out against Madan Lal and the order for execution being passed against him, it may operate as a "revivor" as against him but not against the present appellant Har Narayan Chuni Lal who was not a party to that proceeding. The fact that in 1936 leave had to be obtained under O. 21, R. 50 (2) to execute the decree against Har Narayan Chuni Lal makes it obvious that he was not a party to the execution proceeding of 1925. The question then arises whether as against him the order dated 14th October 1925, passed in the execution proceeding of 1925, operates as "revivor." The execution was taken out against Madan Lal and the order was passed for his arrest. The present appellant was not a party to the proceeding. He cannot be bound by any order for execution passed in that proceeding. The order dated 14th October 1925 therefore cannot be said to operate as a "revivor" so far as he is concerned. But it may be said that the decree being against the firm, the order dated 14th October 1925, which was passed against one of the partners will operate as against the other partners as well, whether they were named in the proceeding or not. Mr. B. N. Mitter's answer to this argument is that the position of the different partners being that of joint judgment-debtors, execution against one of them will not operate as a "revivor" within the meaning of Art. 183, Limitation Act. He relies on the decision in 40 Mad 1127[4] in which it was held that an order of revivor of a decree against two persons jointly, when made on an application for execution against only one of them, does not keep the decree alive as against the other. That is a decision upholding in appeal the judgment of Bakewell J. in 38 Mad 1102.[5] In the latter case Bakewell J., pointing out the distinction between Arts. 182 and 183, Limitation Act, observed as follows:

> The fact that the Legislature has expressly provided for one case of joint debtors and omitted to make the same provision for another case appears to me to show an intention to place the two cases on a different footing.

In Art. 182 there is a distinct provision that

> where the decree or order has been passed, jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.

But Art. 183 makes no such provision. As a general rule nobody can be prejudicially affected by any judicial order to which he is not a party. The above stated provision in Art. 182 is an exception to this general rule. A similar exception cannot be imported into Art. 183 when it is silent about it. I agree with the view taken in 38 Mad 1102[5] and 40 Mad 1127[4] and I think the principle will equally apply where the decree is against a firm. It therefore follows that the order passed in the execution proceeding of 1925 does not operate as a "revivor" as against the present appellant. It must

3. Amulya Ratan Banerjee v. Banku Behari, (1925) 12 A I R Cal 668=87 I C 61=41 C L J 159.

4. Krishnaiya v. Gajendra Naidu, (1918) 5 A I R Mad 513 = 40 I C 608 = 40 Mad 1127 = 33 M L J 533.

5. James Russel McLaren v. U. Veeriah Naidu, (1916) 3 A I R Mad 1038=32 I C 1003=38 Mad 1102.

be observed that the execution of 1925 was taken out within one year after the passing of the decree. A notice under O. 21, R. 22 was therefore not necessary nor does it appear to have been issued. Now from the judicial decisions bearing on the interpretation of the term "revivor" it appears that it had its origin in the old practice prevailing in the Supreme Court according to which execution could not issue upon judgments more than a year old without issuing a writ of *scire facias* against the defendant. The idea seemed to have been that a judgment not enforced within one year became dormant and a proceeding was necessary to revive it. The procedure for revivor of judgment was to issue the writ of *scire facias* which as explained in 36 Cal 543[6] "was a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment." An analogous procedure for revivor of judgment was introduced into the original side of Chartered High Courts in India.

This procedure was subsequently embodied in Ss. 215 and 216 of Act 8 of 1859 which were replaced by Ss. 248 and 249, Civil P. C., 1882 (now O. 21, Rr. 22 and 23 of the Code of 1908). Under these provisions, where an application for execution of a decree more than one year old is made, a notice is required to issue to the person against whom execution is applied for calling upon him to show cause why the decree should not be executed against him. If he does not appear or does not show cause to the satisfaction of the Court, the Court orders the decree to be executed. The order for execution thus made operates as a "revivor." Primarily, therefore, the term "revivor" applies to a case where the order of revivor was made in a proceeding for execution of a decree more than a year old. But, upon an examination of the reported decisions, it seems to me that the procedure for "revivor" would include all cases where notice is required to be issued against the judgment-debtor before any order for execution can be made. "Revivor," to quote the words of Woodroffe J., from the above cited case in 43 Cal 903,[1] means "a decision holding that the decree is still capable of execution."

This implies that the decision must be given after notice to the judgment-debtor. Where therefore there is no provision for the issue of any notice before an order for execution can be made, there can hardly be a "revivor." No such notice was necessary in the execution proceeding of 1925. No doubt O. 21, R. 37, Civil P. C., as amended by the rules of this Court, provides for the issue of notice before issuing a warrant of arrest, but under the rule, as it stood in 1925 — and this was the rule under which the Bombay High Court passed the order for arrest dated 14th October 1925 — the issue of notice was discretionary. There is also nothing to show that such notice was issued in the proceeding of 1925. In the circumstances, I do not think the order for arrest passed in that proceeding can be regarded as a "revivor." However, this is a point which is not free from difficulty and in the view which I take of the case it is unnecessary to pronounce any definite opinion on it. I have proceeded on the assumption that the order dated 14th October 1925 would operate as a "revivor" so far as Madan Lal is concerned. In my view the present execution is barred by limitation. I would accordingly allow the appeal and dismiss the execution case as barred by limitation. As there is no appearance on behalf of the respondent, I would make no order as to costs.

Dhavle J. — I agree.

D.S./R.K. *Appeal allowed.*

6. Jogendra Chundra Roy v. Syam Das, (1909) 36 Cal 543=1 I C 168=9 C L J 271.

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* A. I. R. 1940 Patna 599

HARRIES C. J. AND CHATTERJI J.

Becharam Mallik

v.

Khas Joyrampur Colliery

Civil Ref. No. 3 of 1939, Decided on 12th February 1940, made by Commissioner, Workmen's Compensation, Dhanbad, D/- 27th September 1939.

*** (a) Workmen's Compensation Act (1923), S. 3 —Workman under no obligation to use conveyance provided by employer — Workman meeting with accident while proceeding to work in aforesaid conveyance—Accident cannot be said to occur in course of employment.**

Where a workman is under no obligation to use the lorry provided by the employer for taking the workmen from their homes to the mine and back but can use it or not as he felt inclined, then he is under no obligation to his employer to use the conveyance, and therefore he cannot be said to be acting in the course of his employment when he is injured while proceeding to his work in the conveyance : *(1926) 19 Butt Workmen's Comp. Case 119; (1938) 1 Butt Workmen's Comp. Case Sup. 73 and (1924) A C 59, Rel. on ; (1909) 1 K B 469, Held overruled in (1924) A C 59.* [P 603 C 1]

(b) Workmen's Compensation Act (1923), S. 3—Courts cannot refuse to follow English cases merely on ground that Indian workman may be more illiterate than English workman—If words in two statutes are similar, English cases should be followed.

The Courts in India cannot refuse to follow the English cases merely on the ground that the Indian workmen may be somewhat more illiterate and ignorant than the English workmen. The English cases may be distinguished if there is any real distinction between the Indian statute and the English one. But where the words of the two statutes are similar, the construction placed upon the English statute by the House of Lords must be the construction which the Indian Courts must place upon the words of the Indian statute.

[P 600 C 2; P 603 C 1]

U. N. Banarji — *for the Colliery.*

Harries C. J. — This is a reference by the learned Commissioner under the Workmen's Compensation Act, Dhanbad, referring a question of law for the decision of this Court under S. 27, Workmen's Compensation Act (8 of 1923). The facts giving rise to this reference can be shortly stated as follows : One Becharam Mallik was employed as a coal-miner at the Khas Joyrampur Colliery. Becharam Mallik lived in village Sarsakuli, which was at a distance of 22 or 23 miles from the colliery. Fifteen miles of this distance, however, was over a good motorable road, and the owners of the colliery provided a motor omnibus to transport their workmen to and from places situate along this motorable road. On 27th December 1938 Becharam Mallik was travelling in the motor bus going to his work at the colliery when he met with an accident. The learned Commissioner does not state the nature of the accident, but he says that the workman sustained severe injuries on his face and lips and was detained in hospital for 15 or 16 days as an indoor patient. The workman claimed compensation from his employers for the period during which he was incapacitated from working. The learned Commissioner has found upon the evidence in the case that there was no written agreement between the workman and the employers whereby the latter were under any obligation to provide motor omnibuses. The learned Commissioner, however, was satisfied that there was an implied agreement that the colliery should provide omnibuses for the miners to take them to and from their homes. The learned Commissioner, however, states quite clearly that there was no obligation on the part of the miners to travel by the omnibus provided and that they were free to come to the colliery to work by whatever means they chose. He however, adds that, the motor omnibus provided by the colliery was the only reasonable and feasible means of transport available to the workers.

The learned Commissioner was faced with a number of English decisions, and if these are followed there can be no question that the workman is not entitled to compensation. The learned Commissioner, however, thought that as circumstances were somewhat different in India these English cases should not be made applicable in India. The Commissioner rightly points out that colliery workmen in India are frequently very ignorant and illiterate people and are such that they cannot appreciate their legal rights. In the Commissioner's view it was most unlikely that Becharam Mallik had any idea that he was not bound by the terms of his contract to ride upon this omnibus. The learned Commissioner seems to have thought that English workmen had far greater knowledge of their rights and therefore, different considerations might apply to India from those obtaining in England. In my view this Court cannot refuse to follow the English cases merely on the ground that the Indian workmen may be somewhat more illiterate and ignorant than the English workmen. The English cases may be distinguished if there is any real distinction between the Indian statute and the English one. The English Statute, the Workmen's Compensation Act of 1925, S. 1 is in these terms :

> If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained . . .

The Section giving the workman a right to compensation in India is S. 3, Workmen's Compensation Act 1923, and that is in these terms :

> If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter . . . . .

It will be seen that the two Sections giving the British and Indian workman a right to compensation are in very similar terms. Both these Sections provide that a workman shall be entitled to compensation if he sustains personal injury by accident arising out of and in the course of his employment. Accident alone does not give a workman a right to compensation. To entitle him to compensation at the hands of his employers, the accident must arise out

of and in the course of the injured workman's employment. There is therefore no difference between the English and Indian statutes as to the type of accident which gives the workman a claim to compensation.

The question which has to be decided in this reference is whether or not the accident arose out of and in the course of Becharam Mallik's employment. The learned Commissioner was inclined to the view that the accident did arise out of and in the course of his employment. There can be no doubt that the view which prevailed in England until fairly recently was in favour of the workman's present contention. The leading case was (1908) 1 K B 469[1] in which it was held that the employment of a workman included the use of a train or other means of transport when by the terms of service there was an express or implied obligation on the part of employers to provide such means. As I have already stated, the learned Commissioner has found that there was an implied obligation on the part of the employers in the present case to provide an omnibus for the transport of the workmen. The case in (1908) 1 K B 469[1] was, however, considered by the House of Lords in (1924) A C 59.[2] In that case a workman employed at a colliery was injured in a railway accident while travelling in a special colliers' train from his work to his home at *M*. By an agreement between the colliery company and the railway company, the railway company agreed to provide special trains for the conveyance of the colliery company's workmen to and from the colliery and *M*, and the colliery company agreed to indemnify the railway company against claims by the workmen in respect of accident, injury or loss while using the trains. Any workman who desired to travel by these trains signed an agreement with the railway company releasing them from all claims in case of accident, and the colliery company then provided him with a pass and charged him a sum less than the full amount of the agreed fare, and this sum was deducted week by week from his wages. It was held by Lord Buckmaster, Lord Atkinson, Lord Wrenbury and Lord Carson, (Lord Shaw dissenting) that, there being no obligation on the workman to use the train, the injury did not arise in the course of the employment within the meaning of the Workmen's Compensation Act, 1906 (now the Act of 1925). The case in (1908) 1 K B 469,[1] already referred to, was expressly overruled. At p. 66 Lord Buckmaster observed :

> The real question to my mind is whether, when he entered the train in the morning, it was in the course of his employment within the meaning of the Act. I find it difficult to fix the test by which this question can be answered in favour of the respondent. In (1908) 1 K B 469[1] the circumstances are, as the Court of Appeal thought, indistinguishable from the present, and it is there stated that the phrase 'in the course of his employment' is satisfied if the workman is in the place where the accident occurred by reason of an implied term of the contract of service that he should have the right, if not the obligation, to use the train. I find it difficult to accept this test. A man entitled by virtue of his contract of service to a holiday and a free ticket will equally be on his journey by virtue of the right obtained by his contract of service. But it seems to me difficult to say that an accident occurring to him in the train must be in the course of his employment. The workman was under no control in the present case, nor bound in any way either to use the train or, when he left, to obey directions ; though he was where he was in consequence of his employment, I do not think it was in its course that the accident occurred.

Lord Buckmaster makes it plain that the workman is not in the course of his employment when he is riding in a vehicle provided by his employer unless by the terms of his contract he is bound to travel in that vehicle. In (1924) A C 59[2] it was conceded that the workman was not bound to travel by the train provided, though the train was the most reasonable means of proceeding to the colliery. The case in (1924) A C 59[2] was again considered by the House of Lords in (1926) 19 Butt Workmen's Comp Cas 119.[3] In this case a colliery labourer was employed by the respondents at their colliery. He lived three and a quarter miles from the colliery, which was on a high hill, the road from his house to the colliery being an open mountain road with ponds and bogs along the route. In winter thick fogs hung over the mountain. The respondents, over thirty years ago, to enable them to form a shift as early as 7 A. M., provided trains by which the miners could travel to the colliery. These trains were run by the Great Western Railway Co., under an agreement between them and the respondents. The colliery agent, in evidence, said that the men were expected to travel by these trains. The coaches and platform were owned by the respondents. On 18th October 1923,

1. Cremins v. Guest, Keen & Nettlefolds Ltd., (1908) 1 K B 469=77 L J K B 326=24 T L R 189=52 S J 146.
2. St. Helens Colliery Co. v. Hewitson, (1924) A C 59=93 L J K B 177=(1924) W C & I Rep 1=130 L T 291=68 S J 163=40 T L R 125.
3. Newton v. Guest, Keen & Nettlefolds Ltd.,(1926) 19 B. W. C. C. 119=135 L T 386=73 S J 689.

the workman, whilst crossing the line about 5-35 A. M. to join one of these trains to travel to the colliery, was knocked down by a light engine, and, as a result of the injuries he received, his left leg had to be amputated. The County Court Judge found that the only practicable and reasonable means of access to the colliery for the applicant was the train provided by the respondents, and held that it was therefore the man's duty to travel by this train and consequently that the accident arose out of and in the course of his employment. The House of Lords however held that there was no evidence on which it could be found that it was part of the workman's duty to use the train whenever he went to and from the mine, and therefore it formed no part of his contract of employment. The accident consequently did not arise in the course of his employment. In (1926) 19 Butt Workmen's Comp Cas 119[3] the learned County Court Judge had summed up the facts in these words :

> After considering all the evidence, I have come to the conclusion that the only way in which the respondents were able to work the Fochriw Colliery effectively, was by providing trains to take the large number of workmen living in and around Merthyr, who were employed at the colliery, to and from the colliery * * * Under all the circumstances I am satisfied that the trains were the only practical and reasonable means of access to the colliery for the large number of men living in and around Merthyr working on the morning shift : and consequently that Newton, when crossing the line to the train, was in the act of using the only reasonable and practical means of access open to him when he met with the accident.

At the opening of his judgment, Viscount Cave, L. C. said :

> The facts in this case have been found by the learned County Court Judge, and there is no dispute whatever about them. The question which your Lordships have to determine is what is the proper legal inference from those facts.

It will be seen that in (1926) 19 Butt Workmen's Comp Cas 119[3] the conveyance provided by the employers was the only reasonable and practical means of arriving at the colliery. That is also the case here. The learned Commissioner has found that the motor omnibus upon which the workman was injured afforded the only practical means of arriving at the colliery. However in (1926) 19 Butt Workmen's Comp Cas 119[3] the House of Lords held that even if the vehicle provided the only practical means of access to the colliery, yet it could not be inferred from that that a workman was legally bound by his contract of service to use that vehicle. As pointed out by Lord Cave at page 127 :

> I do not think that there is any evidence on which it could be found that it was part of his contract that he should use the train whenever he went to or from the mine, or that it was his duty to use the means of access so provided for him. If on any occasion he had declined to travel by the train, it is impossible to say that he would have been committing a breach of his contract, or that he had broken the terms on which he was employed. It seems to me that a finding to that effect would be really straining the facts in order to come to a conclusion in favour of the appellant.
>
> It seems to me that in the present case it would be impossible to say that, if Becharam Mallik did not travel by the omnibus provided for him, he would be breaking the terms of his contract of service. If he wished to cycle to the colliery, inconvenient as that might be, it would be no breach of his contract, and the employers could not complain. In my view, the present case is indistinguishable in principle from the case in (1926) 19 Butt Workmen's Comp Cas 119.[3] The two cases of the House of Lords to which I have referred, had been followed by the English and Scotch Courts on numerous occasions. The case in (1938) 1 Butt Workmen's Comp Cas Sup 73[4] is a case very similar to the present case. In (1938) 1 Butt Workmen's Comp Cas Sup 73,[4] a workman while engaged on work at a distance from his home, was conveyed over part of the distance on a motor lorry which was provided by his employers. There was no express contract between the workman and his employers for the use of this conveyance, but, before accepting the job, the workman knew that the lorry would be provided free of cost, and he would not have accepted the offer of employment if it had not been available. This free conveyance was entirely optional, but it was used by employees who resided at a distance from the work. There was no direct transport connexion between the workman's home and place of work, and travel by the ordinary route would have materially increased both the cost and the time of the journey. While being conveyed to his work, the workman fell from the lorry and was killed. It was held by the Court of Session that as the workman was not under any contractual obligation to use the lorry, his death while he was proceeding to his work on that conveyance was not the result of an accident arising in the course of his employment.
>
> The Scotch case follows the principles laid down in the House of Lords cases and,

4. Black v. Aitkenhead & Son, (1938) 1 Butt Workmen's Comp Cas Sup 73.

in my view, must be followed in the present case. As the words of the English and Indian statutes are similar, it appears to me that the construction placed upon the English statute by the House of Lords must be the construction which this Court must place upon the words of the Indian statute. The question in India is the same as in England and that is, did the accident arise in the course of the man's employment? If the workman was under no obligation to use the lorry but could use it or not as he felt inclined, then he was under no obligation to his employer to use the conveyance and therefore he could not be said to be acting in the course of his employment when he was injured. In my judgment Becharam Mallik is not entitled to compensation on the facts of this case and I would answer the reference accordingly.

Chatterji J. — I entirely agree.

G.N./R.K. *Reference answered.*

A. I. R. 1940 Patna 603

HARRIES C. J. AND VARMA J.

Chaudhury Chandra Narain Jha
Petitioner

v.

Emperor.

Criminal Revn. No. 72 of 1940, Decided on 11th March 1940, against order of Sess. Judge, Darbhanga, D/- 16th January 1940.

(a) Criminal P. C. (1898), Ss. 233 and 537— Accused prosecuted for three cases of cheating — All cases lumped together in one charge — Irregularity is cured by S. 537 where accused is not prejudiced thereby.

Where an accused is prosecuted for several cases of cheating and all those cases are lumped together in one charge and even the sums of money advanced by the victims of the offences of cheating have been lumped together, the irregularity is cured under Ss. 225 and 537 by the finding that no prejudice has been caused to the accused thereby : *A I R 1938 P C 130, Rel. on.* [P 604 C 1]

(b) Penal Code (1860), S. 420 — Misrepresentation — Proof of — Actual words used should be stated.

For the purpose of proving cheating by misrepresentation it is better to get the exact words used by the accused. [P 605 C 1]

(c) Criminal Trial — Evidence — Benefit of discrepancies in evidence of spy as prosecution witness should go to accused.

Where a spy employed by the police is called as a prosecution witness the benefit of the discrepancies in his evidence must be given to the accused. [P 605 C 1]

M. Yunus and M. Azizullah —
for Petitioner.

Varma J. — The petitioner Chaudhury Chandra Narain Jha was convicted on three counts by a Magistrate of Darbhanga and sentenced under each of those counts as follows : In Case No. 397 of 1939, for having attempted to cheat Sonelal Gupta, he has been awarded a sentence of one year's rigorous imprisonment with a fine of Rs. 150, in default three months' rigorous imprisonment; in Case No. 428 of 1939, which is in connexion with the cheating of Ramdhani Mahto Pasi, he has been sentenced to six months' rigorous imprisonment with a fine of Rs. 150, in default three months' rigorous imprisonment; and in Case No. 429 of 1939 which is connected with Misri Sahni, he has been given the same sentence as in Case No. 428 of 1939. The sentences of imprisonment are to run concurrently with the result that he has got a sentence of one year's rigorous imprisonment with a fine of Rs. 450 in all. The original sentences of fine were more, but it is the modified sentences on appeal, that I have mentioned just now.

The case for the prosecution is that on 25th May 1939 Inspector Rajbali Thakur, on receipt of some information from a spy that gold mohurs were being faked with the object of cheating the public, arranged to have a test purchase. He gave the spy Rs. 20 and received a faked gold mohur which is an exhibit in this case. On receiving some further information on 5th June 1939 he deputed the senior Town Sub-Inspector to search the house of one Rambilas Mahto who is an electro-plater. Sonelal Gupta who was the victim in Case No. 397 of 1939 was deputed to act as a decoy. Sonelal Gupta went with the spy with a marked ten-rupee note. He came and gave certain information to the police office. The police went to a sweetmeat shop known as the Prabhas Cabin and surrounded the shop. The petitioner who was there was searched and the marked note, four faked gold mohurs and one silver coin which if electroplated with gold would have looked like a gold mohur were recovered from him. On his own statement the Inspector drew up a first information report. The house of Rambilas was then searched and certain articles connected with electroplating were recovered. Now, these searches had the effect of rousing the curiosity of at least two other persons who had dealt with the petitioner. One was Ramdhani Pasi who had purchased a gold mohur from the petitioner and the other was Misri Sahni. Ramdhani Pasi, on hearing of these searches, got

the gold mohur which he had purchased from the petitioner, tested by one goldsmith Sitarama Sonar and found that the gold mohur was faked. He went and lodged an information before the police and in his own information he mentioned the name of Misri Sahni, and the latter also made a statement and produced the gold mohur which was found to be faked. Later on, in the course of the investigation, a test identification was held and on 21st June 1939, in that test identification Ramdhani and Misri both picked out the present petitioner. After conviction the petitioner went in appeal. The lower Appellate Court modified the conviction connected with the case of Sonelal Gupta from under S. 420 to one under Ss. 420/511, I. P. C., and as I have just now said he reduced the sentence of fine. The petitioner has now come in revision before us.

Mr. Yunus, appearing on behalf of the petitioner, has urged that the charge framed in this case is improper and it offends against the provisions of S. 233, Criminal P. C. This point was urged before the lower Appellate Court. In order to appreciate this point I would quote the charge which runs as follows:

I, Muhammad Usman, Magistrate, First Class, hereby charge you Choudhury Chandra Narain Jha alias Kandhaiyaji as follows:

That you on or about 9th May and 5th June 1939 at Mahalla Mullaganj and Laheria Sarai cheated Ramdhani Mahton Pasi, Misri Sahni and Sonelal Gupta (P. Ws.) by dishonestly inducing them to deliver cash Rs. 50 to you on account of the price of two faked gold mohurs passed as genuine and also on account of advance for four similar gold mohurs. The said Rs. 50 was the property of the said three witnesses and thereby committed an offence punishable under S. 420, I. P. C., and within my cognizance.

Looking at this charge it is clear that the three cases of cheating have been lumped together in one charge. Even the sum of money advanced by the victims of the offences of cheating have been lumped together, although it was Rs. 20 in the case of Ramdhani, Rs. 20 in the case of Misri and Rs. 10 in the case of Sonelal. The question is whether the irregularity in the charge has prejudiced the petitioner before us. The law on this point has been clearly laid down by their Lordships of the Judicial Committee in 19 P L T 343.[1] There were two appellants in that case and they were charged with offences under the Electricity Act. Appellant 1, Babulal Choukhani, was convicted of theft of electricity. His conviction by the Magistrate for conspiracy was quashed on appeal by the High Court. Appellant 2 was convicted of aiding and abetting appellant 1, the conviction given against him for conspiracy being likewise quashed. The charges framed against both the appellants, jointly with the other accused were as follows:

That you between January 1934 and 20th January 1935, at 2 and 2-1 Chittaranjan Avenue (Bharat Lakshmi Picture House), Jupiter Cinema, 66-2 Beadon Street, Sealdah Hotel, 225 Harrison Road and other places in Calcutta, Howrah and 24-Parganas, along with Krishna Chandra Shome, Bhola Nath Chatterji, Hardwar Singh, Aswini Kumar Panja, Nanilal Ghose alias Noni Mistri, Putu, Mohammad Abdul Azim and Bhudeb Chandra Seth, and others were parties to a criminal conspiracy to commit theft (dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited by tampering with meters at the premises of the consumers and that in pursuance of the said conspiracy, theft of electric energy was in fact committed at Bharat Laxmi Picture House, Jupiter Cinema, and other places and thereby committed an offence punishable under S. 120 B, I. P. C., read with S. 39, Electricity Act and S. 379, I. P. C., and within the cognizance of this Court.

Appellant 1, Babulal Choukhani, alone was further charged as follows:

That you between April 1934 and 16th January 1935, at Bharat Laxmi Picture House, situate at 2 and 2-1 Chittaranjan Avenue, Police Station Jorasbanko, Calcutta, committed theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited and thereby committed an offence punishable under S. 39, Electricity Act (9 of 1910) read with S. 379, I. P. C., and within the cognizance of this Court.

Appellant 2 alone was further charged as follows:

That you between April 1934 and 16th January 1935, at Bharat Lakshmi Picture House, abetted Babulal Choukhani in the commission of the offence of theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Ltd., which offence was committed in consequence of your abetment and you have thereby committed an offence punishable under S. 109, I. P. C., read with S. 39, Electricity Act (9 of 1910) and S. 379, I. P. C., and within the cognizance of this Court.

The first point raised before their Lordships was in connexion with S. 239 (d), Criminal P. C., but we are not concerned in this case with that provision of law. It was contended in that case that the charge of theft was not properly framed, because the charge as framed alleged a multiplicity of offences between April 1934 and January 1935 whereas the offence did not constitute a single continuing offence; they were separate offences committed on particular date

1. Babulal Chaukhani v. Emperor, (1938) 25 A I R P C 130=174 I C 1 = 65 I A 158 = 32 S L R 476=I L R (1938) 2 Cal 295=19 PLT 343 (P C).

and should have been separately charged. The Judicial Committee observed as follows:

> Their Lordships feel that the form of the charge was most irregular and regrettable and one which should be avoided. But they cannot regard this objection as one which in the circumstances of this case should receive effect, especially because they agree with the High Court that no injustice was inflicted on the appellants. The specific offences of which they were accused were satisfactorily proved by competent evidence, corroborated in all necessary respects. There was no miscarriage of justice. In addition the irregularity was such as could be, and was cured under Ss. 225 and 537 by the finding that the accused had not been prejudiced.

In the case before us the lower Appellate Court has come to the conclusion that the case continued for a length of time and the witnesses were cross-examined elaborately on behalf of the accused, and, although the form of the charge was such as should be avoided, no prejudice was caused to the petitioner. I agree with the finding of the learned Judge that the petitioner has not been prejudiced by the defect in the charge. The second point urged by Mr. Yunus is that attempting to cheat Sonelal has not been made out, because there was no case of representation on the part of the petitioner which would bring the offence under S. 420. The learned Judge in the Court below has himself noticed that the first information in respect of that occurrence does not specify that the petitioner made any false representation to Sonelal to induce him to believe that the gold mohurs were genuine. No doubt, towards the end of his examination-in-chief, Sonelal said that the accused made him believe that the gold mohurs (Exs. III to VI) were genuine and nothing was wrong with them; but his evidence on this point falls short of the mark. If misrepresentation had to be proved, it would have been better to get the exact words used by the petitioner, and it must also be remembered that Sonelal himself was being used as a decoy by the police. The benefit of the discrepancies in the evidence of Sonelal must be given to the accused. I would therefore give the petitioner benefit of the doubt with regard to this charge and set aside his conviction and the sentence passed on him under Section 420/511, I. P. C.

So far as the conviction under S. 420, I. P. C., connected with the other two prosecution witnesses, Ramdhani Pasi and Misri Sahni, is concerned, they are poor people and they came to inform the police on hearing of the searches carried on in the shop and of the person of the present petitioner. Their evidence has been accepted by both the Courts below. There is no reason to discard their evidence now. I would therefore uphold the conviction of the petitioner for cheating these two witnesses as well as his sentences passed in cases Nos. 428 and 429 of 1939. There is one other point which was raised by Mr. Yunus and that was that evidence, which was clearly inadmissible, has been brought upon the record. Firstly, that the statements made by the spy, who was not examined, have been brought on the record through the Inspector; and secondly, certain statements by P. W. 16 were made in his cross-examination with regard to the statements made by him before the Sub-Inspector. The learned Judge has held that these statements were inadmissible, and he has based his conclusions on evidence other than these statements.

A special plea was raised on the question of sentence by Mr. Yunus on the ground that the petitioner comes of a respectable family and he is a young man of 18 years. Looking at the nature of the offence, it is only a person of some substance who can pass a fake mohur for a genuine one. No one would easily purchase even a genuine mohur from a poor man. The offence is a serious one and I see no reason to interfere with the sentences connected with the cheating of Ramdhani Pasi and Misri Sahni. In the result the sentence of one year's rigorous imprisonment with a fine of Rs. 150 for having attempted to cheat Sonelal Gupta will be set aside; but the sentence of six months' rigorous imprisonment, with a fine of Rs. 150, in default three months' rigorous imprisonment in each of the two cases, Nos. 428 and 429 of 1939, relating to the offences of cheating Ramdhani Pasi and Misri Sahni, will stand, the sentences to run concurrently.

Harries C. J. — I agree.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 605

HARRIES C. J. AND ROWLAND J.

Emperor

v.

Girdhari Teli — Accused.

Death Ref. No. 5 and Criminal Appeal No. 49 of 1940, Decided on 17th April 1940, made by the Judicial Commissioner, Chota Nagpur, D/- 19th March 1940.

(a) Criminal P. C. (1898), S. 162 — Court cannot use statements made by witnesses to police during investigation to show that their evidence in Court of Session did not introduce any new matter.

Court has no right to use statements by witnesses to the police in order to show that their evidence in the Court of Session did not introduce any new matter. Statements made to the police during investigation can be used in cross examination to contradict a witness, but they cannot be used to corroborate that witness's evidence, and they certainly cannot be looked at by a Court when no reference whatsoever has been made to the statements during the course of the case.

[P 607 C 1, 2]

(b) Penal Code (1860), S. 302 — Accused striking other person savage blow with axe in region of abdomen and causing his death—He is guilty of murder.

Even the most illiterate and ignorant person would realize that a savage blow with an axe in the region of the abdomen and spine is bound to cause death or injury which would result in death. Hence, where an accused has killed another person by striking such blows he is guilty of murder.

[P 608 C 1]

Assistant Government Advocate — *In support of reference.*

Kedarnath Varma — *Against reference.*

Harries C. J.—This is a reference under S. 374, Criminal P. C., made by the Judicial Commissioner of Chota Nagpur for confirmation of a death sentence passed upon Girdhari Teli. The latter has also appealed against his conviction and sentence, and it will be convenient to dispose of both the reference and the appeal in this judgment. Girdhari Teli, together with his three sons, Chowa Teli, Bandhu Teli and Behari Teli, were tried by the learned Judicial Commissioner of Chota Nagpur assisted by three assessors upon a charge of murdering one Kali Teli on 19th August 1939, in the village of Marudih. Two of the assessors were of opinion that Girdhari was guilty of murder, whereas the third assessor was of opinion that Girdhari had killed Kali but he did not think that Girdhari had any intention to kill. Two assessors were of opinion that Bandhu and Chowa had joined in the assault on Kali but could not say whether they intended to kill Kali or not. These two assessors were not satisfied that Behari took any part in the assault and would give him the benefit of the doubt. The third assessor was not satisfied that either Chowa or Behari was present at the assault and would give Bandhu the benefit of the doubt as he himself was beaten. The learned Judicial Commissioner was of opinion that there was some doubt in the cases of Bandhu, Chowa and Behari, and accordingly he acquitted them upon the charge of murder. He was, however, satisfied that the charge against Girdhari had been established beyond all reasonable doubt, and he therefore convicted him of murder, and as he could find no extenuating circumstances whatsoever he sentenced Girdhari to death.

Girdhari and the deceased man, Kali, belonged to the same family, Girdhari being the son of one Mahor Teli, whereas Kali was the son of Anup, a brother of Mohar Teli. The family of Girdhari had separated from that of Kali Teli, and it was the case for the prosecution that considerable ill feeling had arisen by reason of the fact that Girdhari had obtained possession of more than his fair share of the family property. It is the case for the prosecution that a panchayati had been called by both Girdhari and Kali and that the panches had made an award and had actually divided some of the family property. Unfortunately however some property still remained to be divided, and it was a portion of this property that gave rise to the dispute which caused the death of Kali.

On the day in question, namely 19th August 1939, Kali, together with his nephew Aklu and servants, had gone to plough a field called Simrabad. After ploughing that field, Kali went at about 10 A. M. to another field called Kubri Mahua and cut the boundary ridge of that field to let out the water. As he was doing this, the four accused persons are said to have come up to him and Girdhari is alleged to have said "I will not allow you to plough this field, you are taking more than your share." Kali is said to have asked Aklu to bring a measuring pole in order to measure the land. Kali had also said that he was ploughing the land because he had always done so. Aklu, it is said, went to his house which was about one hundred yards away and was returning towards the field when Girdhari struck Kali on the head with a pole axe, and immediately afterwards struck him another violent blow on the right side in the region of the abdomen, and as a result of these blows Kali was felled to the ground. The three sons of Girdhari are then said to have pressed Kali and caused his entrails to protrude through the gaping wound which had been caused on his right side. A number of people are said to have come on to the scene, whereupon Girdhari and his sons went away.

Aklu went to Police Station Deori, and

at 11-30 A. M. he informed a constable that Kali had been attacked and severely injured by Girdhari. The senior officers of the Thana were not present, and accordingly Aklu's statement was not recorded as a first information report. A constable was sent with Aklu back to the village to take the injured man to Mirzaganj hospital. It appears that a doctor had been sent for, who came and examined Kali. He was then in a moribund condition, and the doctor thought it advisable to record his dying declaration. In that dying declaration Kali says that he was ploughing his field at about 10 A. M. when he was attacked by six persons. Girdhari first of all came and struck him with a sword on his abdomen and then Chowa struck him with a phalsa on the back of the head. Then all four persons threw him down and got upon his person. Then they fled away, and the declarant became unconscious. It is to be observed that in his dying declaration Kali says that six persons assaulted him. He only gives five names, and Bandhu he actually names twice. Later on he limits the assailants to four. It is quite clear from this dying declaration that it is a confused statement, and the evidence of the doctor who recorded it, Bhagwat Prasad Singh (P. W. 15), also makes it clear that Kali at this time was in a very precarious condition, and his condition might well lead to considerable confusion of mind. [After examining the evidence of the defence and prosecution, his Lordship continued.]

If this prosecution evidence be accepted, there can be little doubt that the attack was a premeditated one; but I find it difficult to accept this evidence on its face value. No reference is made in the first information report to Chowa's wife giving Girdhari to pole-axe or to the fact that she was carrying a pole-axe concealed under a leaf umbrella. Further, it is to be observed that these witnesses did not mention this fact in the Court of the committing Magistrate. It is true that their examination in that Court appears to have been perfunctory, but no mention of these important facts appear in their depositions. The learned Judicial Commissioner pointed out that though these witnesses had not made such statements in the Court of the committing Magistrate the police diary showed that they had made such statements when they were first interviewed by the investigating officer. In my view, the learned Judicial Commissioner had no right to use statements by witnesses to the police in order to show that their evidence in the Court of Session did not introduce any new matter. Statements made to the police during investigation can be used in cross-examination to contradict a witness, but they cannot be used to corroborate that witness's evidence; and they certainly cannot be looked at by a Court when no reference whatsoever has been made to the statements during the course of the case.

The learned Judicial Commissioner in this case appears to have taken the statements made to the police as substantive pieces of evidence which could be used by the prosecution. Eliminating the statements made to the police, there are two statements by each of the eye-witnesses, one in the Court of Session and one before the committing Magistrate. In the Court of Session each witness mentions this incident of Chowa's wife handing Girdhari the pole-axe, whereas in the Court of the committing Magistrate not one of the witnesses made reference to such an incident. That being so, I am left in considerable doubt whether such an incident occurred. Further, I am very doubtful whether Girdhari ever shouted to Chowa's wife to bring what he had instructed her to bring, that is the pole-axe. This might well be an embellishment added by Talo Koiri to his evidence in the Court of the committing Magistrate. I find it difficult to accept this part of the case as established beyond all reasonable doubt.

It is clear from the medical evidence that Aklu received a number of injuries and so did Bandhu. Bandhu had two lacerated wounds on the left side of his head and one lacerated wound on the right temporal region as well as an abrasion on the outer side of the front of the left elbow. Aklu had four injuries, a bruise on the left thigh, a scratch on the left shoulder, an abrasion on the upper part of the right side of the back and a bruise on the left little finger. Aklu in evidence attempted to account for the injuries on his body by stating that he went to Kali's assistance and was struck on the left thigh by Bandhu. He only mentioned one injury though in fact he had four. Aklu gives no explanation for the injuries found on Bandhu. The fact that these injuries were caused, shows that the evidence for the prosecution is not entirely true, as no witness has stated that there was any kind of marpit between the parties. In my view the injuries to Bandhu

and Aklu show that there was some scuffle and that in that scuffle they received the injuries found upon them. It is impossible to say whether such marpit took place before or after Kali had been struck to the ground, but one thing appears to be tolerably clear that the assault on Kali took place during a heated quarrel. In my view these circumstances tend to show that the attack on Kali was not a premeditated one but was one made during a dispute concerning possession of Plot No. 1503.

Even if that view be accepted, it in no way follows that Girdhari's crime is anything less than murder. There is nothing on the record to show that Girdhari, was in any real danger and that he was entitled to use the pole-axe in defence of his own person. He certainly was not entitled to use anything in defence of property because he was the aggressor and had come to Plot No. 1503 which was in Kali's possession. Even if there was a quarrel and abuse, there was no justification whatsoever for Girdhari using a lethal weapon such as a pole-axe, particularly when he himself was in the wrong and was the aggressor. The blow might have been struck in a quarrel, but the circumstances are such that Girdhari cannot possibly pray in aid any of the exceptions to S. 300, I. P. C. The blows were extremely vicious and savage ones, and the person who struck them must have either intended to cause death or cause such bodily injury as would in the ordinary course of nature result in death. Even the most illiterate and ignorant person would realize that a savage blow with an axe in the region of the abdomen and spine was bound to cause death or injury which would result in death. In my view Girdhari, in striking these blows which caused Kali's death, was guilty of the offence of murder and was rightly convicted under S. 302, I. P. C.

There however remains the question of sentence. If the attack had been a premeditated one, I should not have interfered with the sentence passed. However, holding as I do, that there was no premeditation and that the attack was made in a quarrel, I do not think that a sentence of death is necessary. In all probability Girdhari, enraged by what had occurred, picked up this axe and without any real thought attacked Kali with fatal results. In my judgment a sentence of transportation for life is sufficient in this case to meet the ends of justice. I would therefore discharge this reference and set aside the sentence of death but would confirm the conviction under S. 302, I. P. C., and substitute a sentence of transportation for life for the sentence which I have set aside. To this extent, and this extent only, I would allow the appeal.

Rowland J.—I entirely agree. The incident on which the Judicial Commissioner rests his finding as to premeditation on the part of Girdhari, that is to say the story of how the axe was handed to him at his request by Chowa's wife—cannot be relied on for that purpose. It was not given in evidence at the commitment inquiry, is not referred to in the commitment order, and is not therefore a part of the prosecution case which the defence had notice that they had to meet. If it was intended to use this incident at the trial, the particulars of it ought to have been elicited at the inquiry. Failing that, the Public Prosecutor should not, without obtaining the special permission of the Court (for which the time to ask was when opening his case), have led evidence about it. Whether or no it was a "new story" from the point of view of the witnesses, it was new to the accused.

And it was not permissible to use statements made to the police during investigation to show that it was not a new story in the mouth of the witnesses. Under S. 162, Criminal P. C., such statements can only be used for the purpose of contradicting the prosecution witnesses. As was said in 8 Pat 279[1] there is nothing in the Code to justify the use of these statements by the prosecution for its own purposes and especially for the purpose of corroborating the statements made by prosecution witnesses in Court. The Section was recently under the consideration of their Lordships of the Privy Council in 18 Pat 234,[2] and their Lordships have clearly indicated their view that the provisions of the Section are to be strictly observed of which it behoves all the Courts in the mufassal duly to take note.

D.S./R.K. *Reference discharged.*

1. Jhari Gope v. Emperor, (1929) 16 A I R Pat 268=118 I C 130=30 Cr L J 858=8 Pat 279 =10 P L T 460.
2. Pakala Narayana Swami v. Emperor, (1939) 26 A I R P C 47=180 I C 1=66 I A 66=I L R (1939) Kar 123=18 Pat 234 (P C).

A. I. R. 1940 Patna 609

HARRIES C. J. AND MANOHAR LALL J.

Byomkesh Mukharji — *Defendant* — Appellant.

v.

Madhabji Mepa Maru, Plaintiff and others, Defendants — Respondents.

Appeal No. 173 of 1936, Decided on 28th March 1940, from original decree of Sub-Judge, Dhanbad, D/- 28th March 1936.

Lease—Mining Lease—Lease stating royalty payable at certain rate but not stating when it is to be payable—Royalty can be held to be payable within reasonable time of coal being abstracted, e. g. three months.

Where a contract states that royalty at a known rate is to be payable on coal, in the absence of any direction as to when it is payable the Court is bound to hold that it becomes payable within a reasonable time of the coal being abstracted. Royalty cannot be regarded as due at the end of some given period as it is difficult to treat royalty on the same footing as rent because the amount cannot be possibly ascertained until the raisings of coal have been weighed and checked, etc. Three months held reasonable. [P 609 C 2; P 610 C 1]

B. N. Mitter and Ram Swarup Sinha — *for Appellant.*

Sir M. N. Mukerji, P. R. Das, Nitai Chandra Ghose, R. S. Chatterji, N. N. Ray and Sudhir Ch. Ghosh — *for Respondents.*

Harries C. J. — This appeal was heard by this Bench on 10th January 1939.* The claim in the suit out of which the appeal arose was one for royalty and was brought against a number of persons. The Lower Court had passed a decree against defendant 3 for Rs. 9416-14-3 and against certain other defendants for a larger sum. Defendant 3 appealed to this Court though the other defendants did not. For the reasons given in the judgment of this Court dated 10th January 1939, we were satisfied that the defendant had worked certain minerals belonging to the plaintiff and had agreed with the plaintiff to pay royalty in respect of the minerals worked, and we were satisfied that if the claim was within time the defendant was liable to the extent of Rs. 9416-14-3 as found by the Court below.

No point had been made in the written statement or in evidence or argument in the Court below on the question of limitation. The point was taken for the first time in this Court that the plaintiff's claim was out of time. We held that though the point had not been pleaded or taken in the Court below we were bound to take notice of it. There were no materials before this Court upon which this question of limitation could be decided, and we therefore framed an issue and asked the lower Court to record its findings upon that issue. The issue was "Is the claim against defendant 3 barred by time?" The parties, though given permission to adduce further evidence, did not do so, and the Court below upon the materials on the record, has come to the conclusion that the plaintiff's suit was within time and has returned a finding accordingly. The claim was in respect of royalty due for the period March 1930 to January 1931. It is to be observed that a sum of Rs. 900 had during that period been paid on account of that royalty. This Court had held that the royalty was payable not under any lease, as there was no lease between the plaintiff and defendant 3. This Court had held that royalty was payable under a special agreement evidenced in the three letters which are referred to in detail in the earlier judgment. Those letters, in my view, show that defendant 3 had agreed to pay royalty at the rate fixed in an earlier lease of these minerals which was not binding upon defendant 3. The agreement between plaintiff and defendant 3 was however entirely silent as to how and when the royalty was to be paid.

Where no time is stated for the performance of a contract a reasonable time must be allowed for its performance (*see* S. 46, Contract Act). Where money has to be paid under a contract and the contract does not specify when such money is payable, then the money must be paid within a reasonable time. This contract states that royalty at a known rate is to be payable and in the absence of any direction as to when it is payable the Court is bound to hold that it became payable within a reasonable time of the coal being abstracted. It has been urged that the Court should treat royalty on the same footing as rent and that it should be regarded as due at the end of some given period. It is difficult to treat royalty on the same footing as rent because the amount cannot be possibly ascertained until the raisings of coal have been weighed and checked, etc. Mining leases usually provide for the mode and the time of payment of royalty; but there are no such provisions in the agreement governing the parties in this case. In my judgment the contract entered into by the defendant in this case must be construed

* *Reported in* (1939) 26 A I R Pat 421.

as a contract to pay royalty within a reasonable time of the coal being raised. Defendant 3 did pay from time to time and left the property on 31st January 1931. At that time a large sum was due in respect of coal raised. Having regard to the nature of the debt and the amount, I am of opinion that a reasonable time to pay this royalty would be three months or so. In any event I hold that there was no breach of this contract until the beginning of May 1931 at the very earliest. That being so, the plaintiff was entitled to three years from 1st May 1931, and he actually brought his suit within that time, namely on 10th April 1934. In my judgment the suit was within limitation and accordingly that point fails.

All other questions were dealt with in the earlier judgment and the result is that the appeal fails. I would accordingly dismiss it with costs. The plaintiff-respondent gave notice to the Central Bank of India, respondent 4, that in the event of this appeal succeeding the plaintiff would claim as against this respondent. This special notice has caused this respondent to appear in Court, and in my view the plaintiff must pay the costs of respondent 4 for their appearance in Court today. The plaintiff-respondent is entitled to his costs in this Court as against the defendant-appellant. The pro forma respondents other than respondent 4 are not entitled to any costs in this appeal.

Manohar Lall J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 610

HARRIES C. J. AND MANOHAR LALL J.

Lokenath Prasad Dhandhania —
Assessee — Petitioner.

v.

Commissioner of Income-tax, Bihar and Orissa — Opposite Party.

Misc. J. C. No. 32 of 1939, Decided on 2nd April 1940, Case by Commissioner of Income-tax, Bihar and Orissa, D/- 29th July 1939.

Income-tax Act (1922), S. 2 (14) — Partnership of *A* and *B* in equal shares — Gift by *A* of his interest to *B* absolutely—*B* held not entitled to registration of firm consisting of himself as donee of one part and joint Hindu family of which he was karta of other part.

A partnership consisted of *A* and *B* doing business in equal shares. *A* made a gift of his interest in favour of *B* reciting that property would go to *B* and his sons generation after generation. Subsequently another deed of partnership was drawn up between *B* as donee of one part and the joint Hindu family of which he was the karta of the other part :

Held that the donee was *B* in his absolute capacity and not the joint Hindu family of *B* and his sons. [P 611 C 1]

Held further that *B* was not entitled to have registration of a firm consisting of himself as the donee of the one part and the joint Hindu family of which he was a karta of the other part. [P 610 C 2 ; P 612 C 1]

Dr. D. N. Mitter and J. C. Sinha — *for Petitioner.*

S. M. Gupta — *for Opposite Party.*

Manohar Lall J. — The Commissioner of Income-tax has submitted a statement of the facts which are relevant to the question formulated at p. 26 by a Bench of this Court on 30th March 1939. The question formulated may be conveniently stated here :

Is the assessee as donee under the deed of gift from Debi Prasad, dated 13th May 1933 entitled to have registration of a firm consisting of himself as the donee of the one part and the joint Hindu family of which he is a karta of the other part ?

The facts found by the Commissioner are not disputed and may be briefly reproduced thus : The geneological table of the family of the assessee is given at p. 23. It shows that the original ancestor of this family was one Bhudarmal who had four sons, Chandi Prasad, Durga Prasad, Rai Bahadur Debi Prasad and Lakhi Prasad. Chandi Prasad was the father of Lokenath and Radha Krishna. Lokenath has two sons Badribishal, a major, and Kishorilal, a minor. It appears that on 26th January 1920, Chandi Prasad had become of unsound mind and the other members of the family, that is to say Lokenath, Durga Prasad, Debi Prasad and Lakhi Prasad entered into a deed of partnership on a contractual basis having four annas share each in the family properties. In 1923 Durga Prasad and Lakhi Prasad withdrew from the partnership and the business then became the business of Rai Bahadur Debi Prasad and Lokenath in equal shares. On 21st February 1930, a fresh deed in confirmation of this situation was drawn up between Rai Bahadur Debi Prasad and Lokenath, and the firm as such was registered by the Income-tax Officer. On 13th May 1933, Rai Bahadur Debi Prasad made a gift of his interest in favour of Lokenath absolutely. The recitals in the deed of gift are that the property will go to Lokenath and his sons generation after generation.

This has been treated by the Income-tax Department as meaning that the donee was

not Lokenath in his absolute capacity but that the donee was the joint Hindu family of Lokenath and his two sons. It is clear that this interpretation is incorrect. The recitals in the deed amply justify the conclusion which was sought to be drawn by the learned Advocate that Lokenath became the absolute owner of the share which before that date belonged to Rai Bahadur Debi Prasad. On 24th February 1936, another deed of partnership was drawn up between Lokenath in his individual capacity of the one part and the joint Hindu family consisting of himself and his two sons of which he is the karta of the other part. That deed is printed at p. 23 of the paper-book, and it is the construction of this deed which has given rise to the question which is to be answered in his reference. The assessee filed an application for registration under S. 2, sub-s. (14), Income-Tax Act, along with a copy of this instrument of partnership before the Income-tax Officer. The Income-tax Officer by his order dated 22nd March 1937 refused to register the firm on the foot of this deed upon the ground that in his opinion no firm as defined in S. 2, sub-s. (6-A), Income-Tax Act, existed, and that as there was no partnership firm under the Indian Contract Act he had no power to register such a firm.

The Assistant Commissioner by his order dated 21st December 1937, confirmed that decision. It is out of this appellate order that the assessee moved an application to the Commissioner to make a reference to the High Court which was refused by the Commissioner who also took the view that he could not understand how a man could be a partner with himself and also was of the opinion that the gift to Lokenath was a gift to the joint Hindu family which I have already held to be incorrect. The learned Advocate for the assessee has drawn our attention to the decision of their Lordships of the Judicial Committee in 15 P L T 655,[1] where at p. 659 Sir Lancelot Sanderson, in delivering the opinion of the Board, approved of the following statements in Mayne's Hindu Law (Edn. 9), at p. 398:

> Where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not 'ipso facto' become partners of the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger: the partnership will be governed by the Act.

The Act referred to in this passage was the Contract Act, but the sections referring to partnership in that Act have been repealed and are now embodied in the Partnership Act, 1932. It seems to me that this observation of their Lordships when applied to the facts found in the present case which I have reproduced above, lead inevitably to the conclusion that the question formulated should be answered in the way suggested by the Commissioner. The recitals in the deed of partnership at p. 23 are very clear and show that the partnership was being entered into between Lokenath on the one hand and the joint Hindu family of which Lokenath was the karta on the other hand. The question which has been formulated was formulated upon this assumption of facts. The learned advocate for the assessee contended however that the partnership was not entered into between Lokenath as karta of the joint Hindu family but between Lokenath, Badribishal and Kishorilal. But it was admitted that Kishorilal was an infant and the only major who was then capable of contracting was Badribishal. If the partnership had been entered into by Badribishal on the one hand and Lokenath on the other there would be something to be said in favour of the argument advanced by the assessee; but the share of the other contracting parties in this deed is stated to be eight annas belonging jointly to Lokenath, Badribishal and Kishorilal.

It is true that Badribishal has signed at p. 24, but it is nowhere suggested that he signed on behalf of himself. It may be that Badribishal signed the deed as Lokenath was entering into the partnership on behalf of himself and on behalf of the joint Hindu family and therefore Badribishal signed it on behalf of the joint Hindu family. But in all the petitions which were filed by the assessee before the Income-tax Department and in the orders pronounced by these officers from time to time the position has always been accepted that the other contracting party in this partnership was the family of which Lokenath was the managing head. In these circumstances, it appears to me that the partnership which was sought to be entered into on 24th February 1936, was between Lokenath on the one hand and Lokenath on the other hand as the managing member of the joint Hindu

1. Pichappa Chettiar v. Chockalingam Pillai, (1934) 21 AIR P C 192=150 I C 802=15 P L T 655 (PC).

family with the result that in this case the family as a unit did not become a partner; in other words that the partnership could be only treated to be in fact between the member of the joint Hindu family and the karta as the other contracting party which in this case is the same person. The result inevitably follows that there is no partnership in law which could have been registered by the Income-tax Officer. For these reasons I am of opinion that the answer to the question set out above is in the negative. The assessee will pay the costs of this reference. The hearing fee is fixed at one hundred and fifty rupees. This is exclusive of the amount of Rs. 100 which is already in deposit with the Commissioner.

Harries C. J. — I agree.

D.S./R.K. *Answer in negative.*

A. I. R. 1940 Patna 612

WORT J.

Ado Das — Petitioner

v.

Bansi Das and others—Opposite Party.

Civil Revn. No. 452 of 1939, Decided on 5th April 1940, from order of Sub-Judge, Ranchi, D/- 20 May 1939.

(a) Civil P. C. (1908), O. 21, R. 89 — Purchase money of property sold and decretal amount minus sum received by decree-holder must be deposited—Applicant is not entitled to credit for amount for which decree-holder purchased property.

The person who seeks to set aside a sale under O. 21, R. 89 must deposit not only the purchase money of the property sold, but also the amount of the decree unless the decree-holder may have received any sum. The decree-holder cannot be deemed to have notionally received a sum equal to the amount for which he purchased the property and therefore the applicant under O. 21, R. 89, is not entitled to credit for that amount : *AIR 1930 Pat 318, Doubted but foll.* [P 612 C 2]

(b) Civil P. C. (1908), O. 21, R. 89, S. 115—Order directing applicant to deposit whole of decretal amount with view to setting aside sale —Order relates to matter which Court has right to decide—High Court will not set it aside merely because it may take different view of law.

An order under O. 21, R. 89 directing an applicant to deposit the whole of the decretal amount with a view to setting aside a sale in execution of a decree relates to a matter which the Court has a right to decide and will not be set aside by the High Court in revision merely because it may take a different view of the law with regard to the matter. [P 612 C 2]

T. K. Prasad — *for Petitioner.*

K. K. Banerji — *for Opposite Party.*

Order. — This rule is directed against the order of the Judge directing the present petitioner to deposit the whole of the decretal amount with a view to setting aside a sale in execution of a mortgage decree. The matter seems to be perfectly clear from one point of view, namely that this is a matter which the learned Judge had a right to decide, and it is impossible to say that I have got to set the order aside merely because I may take a different view of the law with regard to the matter.

But although it is my duty to deal with the matter on that footing, I propose to say a word about the merits. The plaintiff purchased one of the properties and there seems to be no dispute that the properties were sold separately. Now, it is quite clear under O. 21, R. 89, Civil P. C., that the person who seeks to set aside a sale must deposit not only the purchase money of the property sold, but also the amount of the decree unless the decree-holder may have received any sum. I might have taken the view that at any rate notionally the decree-holder received a sum equal to the amount for which he (the decree-holder) purchased one of the properties. The present petitioner will therefore be entitled to credit for that amount, or to put it more accurately to deposit a sum less that amount. But I am precluded from coming to any such conclusion by reason of the decision in 9 Pat 310.[1] The contention of the learned Advocate however is that the case is differentiated from the present by reason of the fact that that was a third party purchaser. That is an argument which cannot be supported. It might very well be said that at any rate in the case of a third party purchaser the decree-holder has received or is entitled to receive the money, but if we are to take that somewhat meticulous view of the matter, if he cannot be said to have received the money in the case of a third party purchaser, how can he be said to have received the money when he himself is the purchaser because he gets nothing until the sale is confirmed. For both these reasons it seems to me that the rule must be discharged with costs; hearing fee one gold mohur.

G.N./R.K. *Rule discharged.*

1. Rameshwar Singh Bahadur v. Mangal Prasad Sahu, (1930) 17 A I R Pat 318 = 125 I C 570 =9 Pat 310=11 P L T 880.

A. I. R. 1940 Patna 613

CHATTERJI J.

Madhusudan Mahanti

v.

Emperor.

Criminal Ref. No. 4 of 1940 (Orissa), Decided on 9th May 1940, made by Sess. Judge, Cuttack-Sambalpur, D/- 21st March 1940.

(a) Press and Registration of Books Act (1867), Ss. 1 and 9 — Document consisting of only one sheet cannot be regarded as pamphlet.

Act does not contemplate that a single sheet of paper in which a writer publishes an article relating to some current topic should be regarded as a pamphlet of which a copy is required to be delivered to the officer concerned under the Act.

[P 613 C 2]

(b) Press and Registration of Books Act (1867), S. 1 — Definition of "book" is exhaustive.

The definition of "book" as given in S. 1 is exhaustive and hence it is wrong to say that "book" may include documents other than those specifically mentioned in the definition.

[P 614 C 1]

(c) Press and Registration of Books Act (1867), S. 16—S. 16 does not provide for conviction.

Section 16 does not provide for conviction and sentence.

[P 614 C 1]

G. C. Das — *for Reference.*

G. P. Das — *against Reference.*

Order. — This is a reference under S. 438, Criminal P. C., by the learned Sessions Judge of Cuttack recommending that the conviction and sentence passed on the accused Madhusudan Mahanti by a 1st class Magistrate, Cuttack, in two cases under S. 16, Press and Registration of Books Act (Act 25 of 1867), may be set aside. The cases were started on the complaint of the Sub-Deputy Magistrate in charge, Book registration, Cuttack, to the effect that the accused did not deliver to his office, as required under the provisions of S. 9 of Act 25 of 1867, copies of two pamphlets printed in Oriya, namely, (1) "Appeal to Guardians" dated 6th April 1939 and (2) "Nikhil Utkal Chhatra Sangha—Bulletin No. 1" dated 3rd April 1939. The accused is admittedly the printer of a press known as the "Observer Press" at Cuttack. The trying Magistrate found that the two documents in question which in his opinion are pamphlets and as such fall within the definition of "book" as given in Act 25 of 1867 were printed in the said press of the accused and he did not deliver copies of the same to the office of the complainant as required by the provisions of S. 9 of the Act. Accordingly in both the cases he convicted the accused under S. 16 of the Act and sentenced him to pay a fine of Rs. 25 in each case and in default to suffer one month's simple imprisonment. The accused filed applications in revision before the Sessions Judge of Cuttack who has made the reference to this Court. The learned Sessions Judge is of opinion that "either of the two documents in respect of which the accused has been convicted is a book as defined in Act 25 of 1867. In S. 1 of the Act a book is defined as follows :

"Book" includes every volume, part or division of a volume, and pamphlet, in any language, and every sheet of music, map, chart or plan separately printed or lithographed.

The question therefore is whether the documents in question come within this definition. In one case "Nikhil Utkal Chhatra Sangha—Bulletin No. 1" Ex. 2 consists of one sheet of paper with two printed pages. In the other case "Appeal to Guardians" Ex. 1 consists of one folded sheet of paper with four pages. The learned Sessions Judge is of opinion that

a pamphlet must consist of more than one sheet and therefore the document which only contains one sheet cannot be a pamphlet.

According to Oxford Dictionary "pamphlet" means :

(1) A small treatise occupying fewer pages or sheets than would make a book, composed and written, or printed, and issued as a separate work, always unbound, with or without paper covers;

(2) More specifically, a treatise of the size and form above described on some subject or question of current or temporary interest, personal, social, political, ecclesiastical, or controversial, on which the writer desires to appeal to the public.

In Concise Oxford Dictionary the meaning of "pamphlet" given is "Small unbound treatise, esp. on subject of current interest." According to the New Waverley English Dictionary "pamphlet" means :

A small book of a few sheets stitched, but not bound, usually on some subject of temporary interest.

It thus appears that according to the dictionary meaning a document consisting of only one sheet cannot be called a pamphlet. I do not think the Act contemplates that a single sheet of paper in which a writer publishes an article relating to some current topic should be regarded as a book of which a copy is required to be delivered to the officer concerned under the Act. In my opinion neither of the two documents Ex. 1 and Ex. 2 is a book as defined in the Act. The convictions, therefore, cannot stand. Mr. G. P. Das in opposing the reference contends that the definition of "book"

as given in S. 1 of Act 25 of 1867 is not exhaustive. He lays stress on the word 'includes.' In other words, his contention is that "book" may include documents other than those specifically mentioned in the definition. To accept this argument would make the definition useless. I should like to observe that the penalty prescribed by S. 16 of Act 25 of 1867 is that the printer shall for every such default forfeit to the Government such sum not exceeding fifty rupees as a Magistrate having jurisdiction in the place where the book was printed may . . . determine to be in the circumstances a reasonable penalty for the default and in addition to such sum, such further sum as the Magistrate may determine to be the value of the copies which the printer ought to have delivered.

The Section therefore does not provide for conviction and sentence. This may be contrasted with Ss. 12, 13, 14, 15 and 16(a) all of which prescribe that the offender "shall, on conviction before a Magistrate, be punished by fine . . ." I accept the reference and set aside the convictions and sentences passed on the accused. The fines, if paid, will be refunded to him.

D.S./R.K. *Reference accepted.*

A. I. R. 1940 Patna 614

AGARWALA AND ROWLAND JJ.

Baijnath Ram Marwari — Appellant.

v.

Rai Kumar Sinha — Respondent.

Appeal No. 180 of 1939, Decided on 23rd January 1940, from appellate order of Dist. Judge, Bhagalpur, D/- 17th July 1939.

Bihar Tenancy Act (8 of 1934), S. 177-A — Words "and occupied by him" in S. 177-A — Meaning explained.

The words "and occupied by him" in S. 177-A mean occupied by the raiyat or under-raiyat as such raiyat or under-raiyat and does not exempt from attachment houses or buildings not occupied by a raiyat or under-raiyat as a dwelling house or for some purpose connected with his vocation as a raiyat or an under-raiyat : *7 Bom 530 and A I R 1933 Rang 227 (FB), Rel. on.* [P 614 C 2; P 615 C 1]

S. N. Dutta — *for Appellant.*

C. P. Sinha — *for Respondent.*

Agarwala J. — This appeal is by the judgment-debtor from an order of the District Judge of Bhagalpur confirming an order of the Munsif. The appellant carries on business as a money-lender and dealer in grain at Colgong where he has a residential house and two godowns for the storage of grain. Six miles from Colgong he has a holding of 305 bighas in respect of which he is a raiyat. The landlord of this holding obtained a decree for arrears of rent of the holding and in execution of that decree attached the three buildings at Colgong. The judgment-debtor claimed exemption of these buildings from sale in execution under S. 177-A, Bihar Tenancy Act, which was introduced in 1937. The Court below has exempted from attachment the house actually occupied by the judgment-debtor as a residence and has attached only the two godowns. S. 177-A provides that a decree for arrears of rent obtained against a raiyat or an under-raiyat shall not be executed by the sale of houses and other buildings with the materials and sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment, belonging to the raiyat or under-raiyat and occupied by him. There is a proviso which permits the sale of such houses and buildings in execution of a decree for arrears of rent due in respect of the site of such houses or buildings. The question that arises is what is meant by the words "and occupied by him" in this Section. The new Section is analogous to S. 60 (1) (c), Civil P. C., which exempts from attachment and liability to sale in execution of a decree houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him. In 7 Bom 530[1] the corresponding provision of the Code of Civil Procedure of 1882 was under consideration and it was held that the exemption under the Civil Procedure Code is of a house or building occupied by an agriculturist, and this, we think, means the house dwelt in by an agriculturist as such, and the farm buildings appended to such dwelling. It does not include other houses which in one sense may be occupied; what is meant is a physical occupation, by an owner, of his house as a dwelling appropriate or convenient for his calling.

This decision was cited with approval by the Full Bench of the Rangoon High Court in 11 Rang 372[2] where it was observed that the correctness of the Bombay decision had never been doubted in the High Courts in India. In my view the words "and occupied by him" in S. 177-A, Tenancy Act, mean occupied by the raiyat or under-raiyat as such raiyat or under-raiyat and does not exempt from attachment houses or buildings not occupied by a rai-

1. Radhakisan Hakumji v. Balvant Ramji, (1883) 7 Bom 530.
2. Bank of Chettinad v. Ko San Ok, (1933) 20 AIR Rang 227 = 145 IC 326 = 11 Rang 372 (FB).

yat or under-raiyat as a dwelling house or for some purpose connected with his vocation as a raiyat or an under-raiyat. Consequently I would dismiss this appeal with costs.

Rowland J.—I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 615

AGARWALA AND ROWLAND JJ.

Ajodheya Lal Mahaseth and another — Appellants.

v.

Mahanth Brij Kishore Dass — Respondent.

Appeal No. 238 of 1939, Decided on 19th January 1940, from appellate order of Dist. Judge, Darbhanga, D/- 25th May 1939.

(a) Civil P. C. (1908), S. 47 and O. 22, R. 10— Expression "representative" in S. 47 includes person on whom interest has devolved by assignment, transfer or otherwise — Aforesaid person can be added as party under O. 22, R. 10 or in exercise of inherent powers of Court.

The expression "representatives" in S. 47 is not limited to the legal representatives of a deceased person but includes persons on whom an interest has devolved by assignment, transfer or otherwise. The aforesaid person can be added as a party in execution proceedings either under O. 22, R. 10, Civil P. C., or in exercise of the inherent powers of the Court: *24 Cal 62 (F B), Rel. on; A I R 1922 P C 304, Expl.; 19 Cal 683, Ref.* [P 615 C 2; P 616 C 1]

(b) Civil P. C. (1908), S. 47 — Transferee from judgment-debtor pendente lite added as party under S. 47—Effect.

The effect of joining the judgment-debtor's transferee as a party is not in itself to conclude him from raising such objections as may be available to him against the execution of the decree but make it obligatory on him to take any objection that he may wish to raise in the execution proceeding and not by a separate suit in accordance with the provisions of S. 47. [P 616 C 2]

Nirsu N. Sinha, B. P. Mahaseth and H. P. Sinha — *for Appellants.*

B. C. De — *for Respondent.*

Rowland J. — The appellants are the decree-holders in a rent suit. The principal respondent is a person who was not a defendant in the suit but purchased the rent claimed holding on 7th December 1937, in execution of his own mortgage decree obtained against the tenant of the holding who was the defendant of the rent suit. The date of institution of the rent suit was 21st September 1937. The date when the respondent bought the holding was 7th December 1937 and the date of the decree in the rent suit was 28th April 1938. The decree-holder applied to execute the decree and wished to make the respondent a party as transferee and thereby representative-in-interest of the judgment-debtor. The respondent had brought his purchase to the notice of the landlord decree-holder by paying the transfer fee and selami in accordance with the provisions of the Bihar Tenancy Act, as amended and the landlord, as he was bound to do, had accepted these fees. The respondent objected and prayed that his name be expunged from the execution proceeding on the ground that he was a purchaser subsequent to the decree. The dates which I have just given show that the respondent is not a purchaser subsequent to the decree but a purchaser pendente lite. The Munsif in dealing with the objection observed that payment of the landlord's fee would not relieve the holding from the liability to pay previous arrears of rent due on it for which the decree under execution has been passed. He said :

> Of course the purchaser is not personally liable but previous arrears are always a charge on the holding and his purchase is subject to that charge. S. 73, of the new Bihar Ten. Act, is quite clear on the point. All this is however, no ground for making the objector a party to the execution proceedings.

The District Judge affirmed this decision referring to the provision in S. 73 of the Act which lays down that the transferor is liable for all arrears due before the date of the transfer and said that the real person liable for the payment of rent is the original tenant who is the judgment-debtor and not the purchaser of the holding i. e., the respondent. The District Judge did not consider the provision of the Act which makes rent a first charge on the holding in whosesoever hands the holding may be.

In appeal it is argued that S. 47, Civil P. C., applies to the decision of all questions relating to the execution, discharge and satisfaction of the decree arising between the decree-holder and the judgment-debtor or their representatives and the expression "representatives" is not limited to the legal representatives of a deceased person but includes persons on whom an interest has devolved by assignment, transfer or otherwise. The corresponding provisions of the former Civil Procedure Code were considered in the Full Bench of the Calcutta High Court in 24 Cal 62.[1] In that case the person regarding whom the question arose was a transferee of the equity of redemption from the mortgagor. He had asked to be

1. Ishan Chunder v. Beni Madhub, (1897) 24 Cal 62=1 C W N 36 (F B).

added as a party in order that the proceedings for sale of the mortgaged property which he had purchased might be held in his presence and he might have the opportunity of taking such objections as might be open to him under S. 244, corresponding to the present S. 47. The Courts below had refused to allow him to be impleaded, but it was decided by the Full Bench that the term "representative" includes a purchaser of the interest of the judgment-debtor, who, so far as such interest is concerned, is bound by the decree and that the term is wide enough to include an execution purchaser of the judgment-debtor's interest.

It is contended for the respondent that O. 22, R. 10, which would be direct and ample authority for adding the respondent as a party in a pending suit as a transferee of the interest of the defendant does not apply to proceedings in execution. As to this it is difficult to find a decision directly in point. R. 12 of O. 22, which excludes execution proceedings from the operations of Rr. 3, 4 and 8 of this Order does not exclude the operation of O. 22, R. 10. Mr. De for the respondent pointed out that Ss. 49 to 53, Civil P. C., expressly apply to the levying of execution against the legal representative of a deceased judgment-debtor and say nothing about transferees. The answer, as I have already indicated, seems to be that S. 47, which has been held to apply to a person who became a representative by being transferee, must be given effect to and I can see no way in which this can be done except by adding the transferee as a party either under O. 22, R. 10, or in exercise of the inherent powers of the Court on the analogy of that rule. We have been referred for the respondent to the Privy Council decision in 1 Pat 581,[2] where the decree-holder having obtained a decree for possession of six villages together with mesne profits against a defendant who set up his own title sought to add as parties to the proceeding at the stage of ascertainment of mesne profits lessees who had been inducted by the Raja and had since surrendered their leases. Their Lordships held :

Order 22, R. 10, does not apply. There has been no assignment, creation or devolution of any interest within the meaning of that rule.

Their Lordships' words would seem to indicate that if there had been an assignment, creation or devolution of an interest within the meaning of the rule it would have been applicable and indeed, their Lordships immediately proceed to refer to the earlier decision in 19 Cal 683[3] and the general principle therein expressed that a wide construction should be put upon the provisions of the Act with regard to introducing parties by devolution and to the desirability of ascertaining all possible points in execution proceedings without a fresh suit. Indeed, there are points which may require to be determined as between the decree-holder-appellant and the present respondent such as whether the respondent is personally liable for the decretal amount or whether the decree is executable as a rent decree so as to be effective against the interest of the respondent. Such questions ought to be determined in the presence of both parties in order that a binding decision may be arrived at. But the appeal has been argued here on behalf of the respondent as if by the application to make him a party to the execution it was sought to conclude him from raising such (points?) as may be available to him against the execution of the decree. It should perhaps be pointed out that the effect of joining him as a party is not in itself to conclude those objections but make it obligatory on him to take any objection that he may wish to raise in the execution proceeding and not by a separate suit in accordance with the provisions of S. 47, Civil P. C. I would allow the appeal and set aside the order of both the Courts below expunging the name of the objector from the execution proceeding and direct that the execution do proceed in the presence of the objector. Any objection to the execution must be preferred by the objector within a time to be fixed by the executing Court. The appellants are entitled to their costs of this appeal and of the objection and the appeal in the Court below.

Agarwala J. — I agree.

G.N./R.K. *Appeal allowed.*

2. Manindra Chandra Nandi v. Ram Kumar Lal, (1922) 9 A I R P C 304=68 I C 973 = 49 I A 220=1 Pat 581 (P C).

3. Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892)19 Cal 683=19 I A 166=6 Sar 209 (PC).

A. I. R. 1940 Patna 616

AGARWALA J.

Ganeswar Parida—Defendant
—Appellant.

v.

Harish Chandra Dutta—Plaintiff—
Respondent.

Appeal No. 9 of 1938, Decided on 30th November 1939, from appellate decree of Dist. Judge, Cuttack, D/- 10th Sept. 1937.

Civil P. C. (1908), O. 34, R. 6 — Mortgaged property ceasing to be available for sale owing to no fault of mortgagee—Mortgagee is entitled to personal decree.

Where property, the subject of a suit for sale on a mortgage has ceased to be available for sale owing to no fault of the mortgagee, the latter is entitled to a personal decree, the whole right to which the mortgagee has had all along, but which right has merely been suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or to be otherwise unavailable: *A I R 1928 All 71, Rel. on; A I R 1938 All 98, Expl.* [P 617 C 1, 2]

S. K. De—*for Appellant.*

L. K. Das Gupta—*for Respondent.*

Judgment. — This appeal is by the defendant and arises out of a suit to enforce a mortgage executed by the appellant in favour of the respondent. The plaintiff mortgagee sued for the sale of the mortgaged property and also prayed that in the event of the sale proceeds being insufficient to satisfy the debt a personal decree should be passed against the mortgagor. The suit was compromised and the compromise decree provided that in the event of the decretal dues not being satisfied by sale of the mortgaged properties the decree-holder would be entitled to recover the balance from the person and other properties of the mortgagor. Before that decree could be executed the mortgagor's coparceners instituted a suit in which they prayed for a declaration that the mortgage was invalid for want of legal necessity. That suit was decreed exparte and the mortgagee-decree-holder was restrained from executing the decree which he had obtained. He then applied under O. 34, R. 6, for a personal decree against the mortgagor-judgment-debtor. Both the Courts below have agreed in granting this application. On behalf of the mortgagor it is contended that as the mortgaged property has not been sold R. 6, of O. 34, has no application and no personal decree can be passed. In other words, the contention of the mortgagor is that the mortgagee has no right to recover the mortgage debt from the person of the mortgagor until the mortgaged property has been put up to sale and has failed to realize the amount necessary to satisfy the debt. This contention has been negatived in 50 All 321[1] in which a Division Bench of the Allahabad High Court held that

where property, the subject of a suit for sale on a mortgage, has ceased to be available for sale owing to no fault of the mortgagee, the latter is entitled to a personal decree, the whole right to which the mortgagee has had all along, but which right has merely been suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or to be otherwise unavailable.

The learned advocate for the appellant referred to a later decision of another Division Bench of the same Court in A I R 1938 All 98.[2] That case arose out of a mortgage suit in which a final decree had been passed. Before the decree could be executed the son of the mortgagor-judgment-debtor obtained a decree in another suit impugning the mortgage decree passed on it. The mortgagee subsequently applied for a simple money decree under O. 34, R. 6. The Court below granted a money decree. Against that decree the mortgagor-judgment-debtor moved the High Court. The learned Judges expressed their dissent from the decision in 50 All 321[1] but did not refer the case to a Full Bench; nor was it necessary to do so as they disposed of the application on another ground, namely on the ground that owing to the delay of the judgment-debtor in moving the Court he was not entitled to any assistance from the Court. In view of this the observations regarding the correctness of the decision in 50 All 321[1] were obiter. I respectfully agree with the ratio decidendi in 50 All 321[1] which has been applied to the facts of the present case and, therefore, dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

1. Bisheshar Nath v. Chandu Lal, (1928) 15 A I R All 71=108 I C 459=50 All 321=25 A L J 1042.

2. Ram Saran Das v. Banwari Lal, (1938) 25 A I R All 98=173 I C 729=I L R (1938) All 148=1937 A L J 1181.

A. I. R. 1940 Patna 617

FAZL ALI AND VARMA JJ.

Harihar Prasad Singh and others — *Defendants* — Appellants.

v.

Hitlal Singh and others, Plaintiffs and others, Defendants — Respondents.

Appeal No. 36 of 1936, Decided on 9th December 1938, from original decree of Addl. Sub-Judge, Monghyr, D/- 19th August 1935.

(a) Bihar Tenancy Act (8 of 1934), S. 22 (3) —Thicadar purchasing occupancy holding during period of his lease—He becomes non-occupancy raiyat in respect thereof — His vendees acquire neither non-occupancy nor occupancy rights.

Where a thicadar purchases an occupancy holding during the period of his lease he becomes a non-occupancy raiyat in respect of the holding so

purchased : *A I R 1920 Pat 97 and A I R 1938 Cal 804, Rel. on.* [P 619 C 1]

And as it is well settled that land held in non-occupancy right is not ordinarily transferable, the thicadar's vendees acquire no rights either non-occupancy or occupancy in them. [P 619 C 1]

(b) Cosharers — Transaction assented to by some of cosharers is not binding on others — Nor can transaction alter nature of land.

Any transaction which is assented to only by some of the cosharers, cannot be binding on the entire body of landlords and cannot alter the character of the land, e. g., tenants of bakasht lands cannot be converted to farzidars on behalf of proprietors. [P 619 C 2]

(c) Cosharers — Ouster — Fact that some of cosharers allowed others to remain in possession of common land for some time does not necessarily amount to ouster—Nor can it defeat their right of partition.

Where lands are held in common, each cosharer is entitled, subject to paying compensation to the other cosharers, to cultivate any part of the lands not being cultivated by them. The other cosharers are not thereby ousted and their remedy, if they object, is merely to obtain a partition. The mere fact therefore that some of the cosharers allowed others to remain in possession of the common lands for some time will not necessarily amount to ouster, nor can it defeat their right to claim partition : *A I R 1924 P C 144, Rel. on.* [P 620 C 1]

B. C. De and D. C. Varma — *for Appellants.*

S. S. Bose, G. P. Singh, Rameshwar Misra, S. K. Mitra, Kaushal Kishore Sinha and S. P. Srivastava — *for Respondents.*

Fazl Ali J.—This appeal arises out of a suit for the partition of a number of villages which once belonged to a family represented by one Chintaman. Chintaman left five sons —Madhumangal, Bishwanath, Bijaygobind, Narsingh and Bhagwat. Owing to the rule of primogeniture, which obtained in the family, Madhumangal got the bulk of the estate after the death of Chintaman, and certain villages were given to the remaining four sons by way of maintenance. The present suit relates to these villages. The only question which this Court is asked to determine relates to the partition of 441 bighas of land which are situated mainly in villages, viz., Itwa, Simra, Olapur and Chakipar. At this point it becomes necessary to state the previous history of these lands. The record-of-rights shows that the bulk of these lands was in possession of a number of tenants who were recorded therein as occupancy raiyats. Some lands were also recorded as ghairmazrua. In 1912 Narsingh and Bhagwat, two of the sons of Chintaman, gave a thica lease in respect of the villages under partition to two persons named Ratu and Ramnarain for a period of nine years. It appears that by this time the whole of 441 bighas was in the cultivation of tenants, and in 1916 the thicadars brought suits for rent against them and obtained decrees against them. On 15th September 1919, the thicadars purchased these lands in execution of their decrees and shortly after that they conveyed them to certain persons by means of two kobalas which were executed on 22nd May 1920 and on 25th September 1920 respectively. By the kobala of 22nd May 1920 the thicadar sold 213 bighas out of the 441 bighas to Narsingh and the sons of Bhagwat, who are still proprietors of a small share in one of the villages under partition; and on 25th September 1920 they sold 228 bighas to one Jagdish Narain who had in the meantime acquired a 3 annas interest in the villages under partition, by means of a kobala executed in his favour by Saraswati, widow of Bijaygobind, one of the sons of Chintaman. The interest which Bhagwat and Narsingh possessed in the property except Maisaha has now passed into the hands of defendants 12 to 15, who have preferred this appeal. The whole of the interest of Jagdish Narain has, on the other hand, passed into the hands of defendants 5 to 9 and certain others. Saraswati still retains a small interest in some of the villages under partition; and the remaining share of Bijaygobind's branch has now passed into the hands of defendant 10. Similarly, the four annas interest of Bishwanath has been acquired by the plaintiff-respondents. The point which has to be decided by this Court is how these 441 bighas of land are to be partitioned between the persons interested in the villages under partition at present.

One of the questions which arose for decision in the Court below was as to the character of these lands. It was contended by the plaintiffs as well as by defendants 12 to 15 that the tenants who were recorded in respect of these lands in the record-of-rights were mere farzidars on behalf of the proprietors and they have throughout retained their character of bakasht lands. The learned Subordinate Judge who tried the suit has however held that the evidence adduced in the case is not sufficient to support this view, and having regard to the entry in the record-of-rights and other evidence, I am not prepared to differ from his conclusion. Thus, for the purpose of this appeal we must start with the assumption that these lands were kaimi jotes of a

number of tenants, when they were purchased by the two thicadars, Raktu and Ramnarain, in the year 1919. S. 22 (3), Bihar Tenancy Act, clearly provides that a person holding land as an ijaradar or farmer of rents shall not, while so holding, acquire, by purchase or otherwise, a right of occupancy in any land comprised in his ijara or farm.

This provision has been construed in a number of cases and it has been held that where a thicadar purchases an occupancy holding during the period of his lease he becomes a non.occupancy raiyat in respect of the holding so purchased: *see* 5 Pat L J 302;[1] and 43 C W N 57.[2] It follows from this that Raktu and Ramnarain became non.occupancy raiyats of these lands after their purchase and as it is well settled that land held in non-occupancy right is not ordinarily transferable, the thicadar's vendees could not acquire either non-occupancy or occupancy rights in them. The question then arises as to what was the status of the cosharer landlords, who purchased these lands from the thicadars with reference to these lands. The question does not appear to me to present any difficulty. Under the Bihar Tenancy Act these thicadars cannot be deemed to be in any better position than what they would have been in if they had purchased a non-transferable occupancy holding before the passing of that Act. By virtue of this new Act a statutory right of transfer is conferred on occupancy raiyats subject to the payment of the landlord's transfer fee, but no such right is given to non-occupancy raiyats. From this it must follow that these cosharers cannot resist the claim of the other cosharers to a share in these lands in proportion to their interests in the villages in question. The learned Subordinate Judge, however, has taken a somewhat peculiar view as to the rights of the cosharers in respect of these lands as will appear from the following passage which may be quoted from his judgment:

By the auction purchases the ijaradars got only a precarious right in the lands in question. When they sold the lands to Jagdish Narain Singh the latter became entitled to retain possession over 11 annas share of the lands. He was maintenance-holder of 3 annas share, and in the view of the recital in Ex. B-2 it may be taken that the maintenance-holders of 8 annas share also gave their implied consent to the sale to him. I do not think Jagdish Narain Singh acquired the right to remain in exclusive possession over the remaining 5 annas share of the lands. For similar reasons I think the maintenance-holders who purchased by the kebala Ex. B-2 also acquired the right to remain in possession of 11 annas share of the lands sold by the kebala. It may be mentioned in this connexion that as the holdings in question were not transferable, Jagdish Narain Singh was not entitled to the benefit of S. 22 (2), Ben. Ten. Act.

Later on the learned Judge added:

For the reasons given above my finding is that 11 annas share of the lands in Sch. 2 of the plaint is not bakasht of 16 annnas proprietors. Defendants 5 to 9 are entitled to retain possession of 11 annas share of the lands sold by the kebala of which Ex. C-2 is a certified copy, while the cosharers who now own the interests of the purchasers under the kebala Ex. B-2 are entitled to remain in possession or hold the lands sold by Ex. B-2. The remaining 5 annas share is bakasht of the remaining cosharers maintenance-holders.

The result of this decision is that defendants 12 to 15, who have roughly speaking 8 annas share in the villages under partition have been held to be entitled to 11/16ths of 213 bighas out of the disputed lands, and defendants 5 to 9 have been given 11/16ths of 228 bighas; the remaining lands have been divided as between plaintiffs and defendant 10 in proportion to their share in the villages. Now, it appears to me that the view expressed by the learned Judge cannot be sustained. In the first place, there is no justification for the view that Narsingh and Bhagwat, at the time they purchased a portion of the lands, gave their implied consent to the sale of the remaining lands to Jagdish Narain; but even if they had done so, neither of these two vendees could resist a suit for the partition of these lands by the remaining cosharers. It is to be remembered that any transaction which is assented to only by some of the cosharers, cannot be binding on the entire body of landlords and could not alter the character of the land. In the circumstances, which I have already stated, the whole of 441 bighas of land were liable to be partitioned among the cosharer landlords in proportion to their shares; and this is what should have been done by the learned Subordinate Judge.

It was argued by Mr. Bose, who appeared for defendants 5 to 9, that his clients and their predecessor-in-interest having been allowed to take possession of the lands by the other landlords the latter cannot turn round and claim a share in them. But I do not think any case of estoppel or acquiescence arises on the facts of this case, nor does the question of limitation arise, because in the first place, within twelve years of

1. J. P. Morgan v. Ramjee Ram, (1920) 7 AIR Pat 97=56 I C 366=5 Pat L J 302=1 P L T 310.
2. Midnapore Zemindari Co. Ltd. v. Secy. of State, (1938) 25 AIR Cal 804=180 I C 278=I L R (1939) 1 Cal 349=43 C W N 57=69 C L J 51.

the purchase of these lands from the thicadars, defendants 5 to 9 were dispossessed and they had to bring a suit to recover possession in the year 1932. Again, it has been clearly laid down by the Judicial Committee in 51 Cal 631[3] that where lands are held in common, each cosharer is entitled, subject to paying compensation to the other cosharers, to cultivate any part of it not being cultivated by them. This being so, the other cosharers are not thereby ousted and their remedy, if they object, is merely to obtain a partition. The mere fact, therefore, that some of the cosharers allowed others to remain in possession of these lands for some time will not necessarily amount to ouster, nor can it defeat their right to claim partition. In my opinion, therefore, these lands should be divided among the parties in proportion to their share in the villages under partition. It appears that the plaintiffs have a fourth share in all the villages under partition, with the exception of Kathora in which they have 2 annas out of a total share of 8 annas; defendants 12 to 15 have a half share in all the villages except Maisaha in which they have only one-fourth share; defendants 5 to 9 have 3 annas share in most of the villages under partition, but they have only one anna interest in Olapur and have no share in village Kathora; defendant 23 has one anna share in Itwa, Olapur and Maisaha, and half-anna in Kathora (the learned Judge assumes that she has one anna in Simra but that appears to be wrong); defendant 10 has 1 anna share in Simra, 2 annas in Olapur and $1\frac{1}{2}$ annas in Kathora; and defendants 16 to 20 have 4 annas share in village Maisaha only. All that need be said, therefore, is that these 441 bighas of land should be divided among the various parties to the suit in proportion to their respective shares.

Before concluding this judgment it is necessary to refer to a point raised by Mr. Bose, who appears on behalf of defendants 5 to 9. It is pointed out by him that on 9th September 1923 Narsingh, whose interest has now passed to defendants 12 to 15, had sold 12 bighas 15 kathas 8 dhurs out of the lands purchased by him from the thicadars to them. The kebala recites that Narsingh and his cosharers had been, from the date of their purchase to the time of the execution of the deed, "in possession and occupation as raiyats of the said occupancy kaimi jote lands", and authorises the vendees to get "their names entered in the office of the landlord as raiyats in my palce". It is contended by Mr. Bose that the defendants 5 to 9 thus acquired a right not only to 228 bighas which they purchased directly from the thicadars, but also to the 12 bighas 15 kathas 8 dhurs which they purchased from Narsingh and which is now claimed by defendants 12 to 15. It appears to me, however, that these lands must be treated in the same manner as the other lands and that all the cosharers are entitled to share them in proportion to their interest in the property under partition. Narsingh was only one of the cosharers, and at the time he sold these lands defendants 12 to 15 had already acquired interest in village Simra in which these lands are situated.

The only other point which needs mention is that defendant 10 having purchased a 2 annas share in Olapur village only, it must be made clear that for the purpose of partition Olapur and Maisaha (which is said to be a dakhili village appertaining to the former) must be treated as two separate units and defendant 10 should be given a share in proportion to his interest in Olapur. The result is that this appeal is allowed and the cross-appeals are dismissed. The parties will bear their own costs in this Court.

Varma J.—I agree.

G.N./R.K. *Appeal allowed.*

3. Midnapore Zamindary Co., Ltd. v. Naresh Narayan Roy, (1924) 11 AIR P C 144=80 I C 827=51 I A 293=51 Cal 631 (P C).

A. I. R. 1940 Patna 620

AGARWALA AND ROWLAND JJ.

Lal Mohan Prasad — *Plaintiff* — Appellant.

v.

Govind Sahu and others — *Defendants* — Respondents.

Appeal No. 192 of 1939, Decided on 29th April 1940, from appellate decree of Sub-Judge, Ranchi, D/- 13th December 1938.

(a) Transfer of Property Act (1882), S. 41 — Estoppel under S. 41 not set up in written statement — Plea should not be allowed at hearing.

Where no case of estoppel under S. 41 is set up in the written statement the case should not be allowed to be put forward at the hearing.

[P 621 C 1, 2]

(b) Transfer of Property Act (1882), S. 92 —Cl. 3 of S. 92 does not detract from right of subrogation given by cl. 1.

Clause 1 of S. 92 confers the right of subrogation on all persons other than the mortgagor to whom the right to redeem is given by S. 91 including any co-mortgagor. Cl. 3 does not detract from this right

but enacts that it can be extended to a creditor who without taking an interest in the property has advanced money with which the mortgagor has been enabled to redeem the mortgage.

[P 621 C 2]

Mahabir Prasad and Rajeshwari Prasad — *for Appellant.*

S. M. Mullick and N. K. Prasad II — *for Respondents.*

Rowland J. — This is an appeal by the plaintiff in a suit under R. 63, O. 21, Civil P. C. The plaintiff was a decree-holder who having obtained a mortgage decree and put the property hypothecated to sale obtained a personal decree on 12th February 1936, for the balance due on his mortgage against defendants 13 to 22, the heirs of his mortgagor Sheikh Tawakal. In execution he sought to attach one anna six pies share in village Kundelowa which had been the property of Shaikh Tawakal. Defendants 1 to 11 preferred a claim case under O. 21, R. 58 as this property had been transferred to them in January 1935, by defendants 13 to 17. The claim succeeded: hence, the suit in which the plaintiff contended first that the whole transfer was void as having been without consideration, collusive and fraudulent; alternatively that defendants 13 to 17 had only 21/40ths share in the property transferred and could not be entitled in respect of the remaining 19/40ths which belonged to defendants 18 to 22. It was found by both Courts that defendants 1 to 11 acquired a valid title to 21/40ths of the property, but that 19/40ths did not belong to the transferors. The first Court gave the plaintiff a decree to the extent of 19/40ths of the property declaring that this share was liable to attachment and sale. On appeal it was contended firstly that defendants 18 to 22 and the plaintiff as claiming under them were estopped on the principle of S. 41, T. P. Act, from setting up their title; and secondly that in any case defendants 1 to 11 were entitled to be subrogated to the rights of prior mortgagees whom they had redeemed by payment of mortgage money amounting to Rs. 3600. The Subordinate Judge who heard the appeal allowed the first contention and rejected the second.

In second appeal, it is pointed out that no case of estoppel under S. 41, T. P. Act, was set up in the written statement and that this case should not have been allowed to be put forward at the hearing. Mr. Mullick for the respondents contends that it was a case of estoppel falling within S. 115, Evidence Act, and relies on the Privy Council decision in 22 Cal 909[1] for the contention that such an estoppel could be applied if it arises even though not pleaded; but indeed there is no evidence of representation by defendants 19 to 22 to defendants 1 to 11 on which an estoppel under S. 115, Evidence Act, could be based. The first contention of the plaintiff must therefore be allowed. He is entitled to put the 19/40ths share to sale subject to what I have next to say.

The Subordinate Judge was in error in holding that the benefit of subrogation could not be claimed by the defendants under S. 92, T. P. Act. Cl. 1 of this Section confers the right of subrogation on all persons other than the mortgagor to whom the right to redeem is given by S. 91 including any co-mortgagor. Cl. 3 does not detract from this right but enacts that it can be extended to a creditor who without taking an interest in the property has advanced money with which the mortgagor has been enabled to redeem the mortgage. The application of this clause in my view may be illustrated thus. *M* has mortgaged a property to *E*. *M* borrows money on a plain handnote from *C*. With it he pays off the mortgage money. *C* gets no right of subrogation. Alternatively *M* borrows from *C* under a registered instrument containing an agreement that *C* shall be subrogated to the rights of the mortgagee. In this case *C* obtains the benefit of subrogation. The true position of defendants 1 to 11 is clearly within cl. 1 of S. 92. They are persons who have acquired the equity of redemption to the extent of 21/40ths. This puts them in the position of co-mortgagors with the owners of the other 19/40ths of the equity of redemption. Having redeemed the entire mortgage they are entitled to the right of subrogation under S. 92 or S. 95 and the 19/40ths in their hands can only be attached and sold subject to a redemption of their charge by payment of 19/40ths of the mortgage money. The appeal must be allowed and the suit decreed in a modified form the plaintiff getting a declaration that he is entitled to bring to sale 19/40ths share of the property subject to the mortgage lien of defendants 1 to 11 as explained above. Parties to bear their own costs throughout.

Agarwala J.—I agree.

D.S./R.K. *Appeal allowed.*

1. Mahomed Mozuffer Hossein v. Kishori Mohan Roy, (1895) 22 Cal 909 = 22 I A 129 = 6 Sar 583 (P C).

A. I. R. 1940 Patna 622

AGARWALA AND ROWLAND JJ.

Lala Rajbali Lal and others —
Plaintiffs—Appellants.

v.

Partappur Co. Ltd. — *Defendant* —
Respondent.

Appeal No. 114 of 1939, Decided on 9th January 1940, from appellate decree of Addl. Dist. Judge, Saran, D/- 27th August 1938.

(a) Evidence Act (1872), Ss. 21 and 34 — Zamindari papers of proprietor found to be books of account regularly kept in course of business — Admission therein being admissible under S. 34 can be proved by or on behalf of person making it.

Admission in the zamindari papers of the proprietor which are found to be books of account regularly kept in the course of business being admissible under S. 34 can be proved under S. 21 by or on behalf of the person making it. [P 622 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 116 —Words "term of years" in S. 116 — Meaning *(Quære)*.

Whether the words "lease for a term of years" in S. 116 refer to a lease for more than one year or include a lease for one year or for a fraction of a year: *Case law referred.* [P 623 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 116— Zirat land — Lease by proprietor for term of years or from year to year — S. 116 applies — Lessee can neither acquire nor confer on sub-lessee rights of occupancy or non-occupancy raiyat.

A proprietor is entitled to the benefit of S. 116 if he has taken the precaution of letting out his zirat lands under a lease for a term of years or under a lease from year to year. In such a case S. 116 will apply to the land with the result that his lessee can neither acquire nor confer on any sub-lessee a tenancy carrying the benefits of Chaps. V and VI, Ben. Ten. Act, which deal with the rights of occupancy raiyats and non-occupancy raiyats : *26 Cal 546, Rel. on.* [P 623 C 2]

B. C. De and Phulan Prasad Varma — *for Appellants.*

Sir M. N. Mukharji and Har Narayan Prasad — *for Respondent.*

Rowland J. — This is an appeal by the plaintiffs who claim to have acquired raiyati right in 13 bighas 2 kathas 9 dhurs of land in village Damakia under the defendant company which holds the village on lease from the Hathwa Raj as proprietor. The land claimed in the suit appears to have been entered in the Record of Rights as being in part zirat, in part bakasht thikadar and in part gairmazrua, the last named class being only a small area of 3 kathas 5 dhurs. The substantial contest is with regard to the other two items. It has been held by the Courts below that the lands recorded zirat and the lands recorded bakasht are both zirat or private lands of the proprietor, the finding being that the Record of Rights entries, so far as they are to the contrary, are rebutted by the evidence adduced. The suit has been dismissed on the ground that occupancy rights cannot accrue in land leased out in the manner and in the circumstances found in the present instance.

Two points are taken in appeal. One contention is that on the finding of the lower Courts that the land is zirat there is an error in law in holding that occupancy right cannot accrue. The second point taken is that the finding that the land is zirat ought not to stand because the lower Appellate Court in arriving at it has relied on evidence which was not admissible for the defendant and against the plaintiffs. I may take the latter point first. The Courts below have taken into consideration zamindari papers of the proprietor and of the defendant which are said to have indicated that the land was treated as zirat since at least 12 years before the commencement of the Bengal Tenancy Act. There was other evidence before the Courts but the point taken is that these statements in the zamindari papers are admissions within the meaning of S. 17, Evidence Act, and that under S. 21 of the same they could be proved against the person making them but not by or on behalf of the person making them or his representative in interest. In the argument it is rightly pointed out that Ss. 17 and 21, Evidence Act, are applicable and that the admissibility of these papers is to be considered in the light of those Sections. But the stipulation in S. 21 which was relied on for the appellants is subject to three exceptions embodied in the Section itself, the third of which is that an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission; and the papers of which the admissibility has been called in question appear to be entries in books of account regularly kept in the course of business and as such relevant under S. 34, Evidence Act, in the present instance. I am not prepared therefore to say that any error of law was committed in taking these papers into consideration and, in any case, they are not the only evidence on which the lower Appellate Court has proceeded. The findings of fact therefore cannot successfully be challenged in second appeal.

Now I return to the first point promulgated. It has been argued that settlement by verbal leases, each for a period of one year or less such as were made by the defendant in favour of the plaintiffs will not operate to bring the provisions of S. 116 into force so as to prevent the accrual of occupancy rights. The Section applies to proprietor's private lands "where any such land is held under a lease for a term of years or under a lease from year to year;" and it has been held in this Court in 8 Pat 471 = 10 P L T 565[1] that in order to bar the acquisition of right of occupancy or of the right of a non-occupancy raiyat in respect of proprietor's private or zirat lands it is necessary that such lands should be held under a lease for a term of years or under a lease from year to year. Where such lands are not so held there is nothing to prevent the accrual of the rights of a non-occupancy or an occupancy raiyat. The correctness of this decision was affirmed in face of a contrary opinion which had been expressed obiter in certain cases by the decision of a Full Bench in 9 Pat 347 = 10 P L T 569,[2] in which a passage is cited with approval from 26 Cal 546.[3] The passage runs:

> As we understand the Section its object is evidently to exclude the proprietor's private lands from the operation of Chaps. 5 and 6, Ben. Ten. Act, provided that the proprietor has taken a certain precaution which is indicated by the concluding words of the Section 'where any such land is held under a lease for a term of years or a lease from year to year.

Macpherson J. appears to have read the words quoted from the Section as meaning "a lease for more than one year or a lease from year to year" for he goes on to say:

> The precaution is a lease of one of those two kinds which under the operation of S. 17 (d), Registration Act, must be registered.

It is argued that such leases as were granted in the present case, orally and for a period of one year or less, do not come within the terms of the Section as "a lease for a term of years or a lease from year to year," the expression "term of years" being taken to imply more than one year. It has however been held in A I R 1938 Pat 299 = 19 P L T 180[4] that "term of years" includes a lease for one year or for a fraction of a year. There seems to be a difference between this decision and that of the Full Bench as to the meaning to be attached to the expression "lease for a term of years"; but it is not necessary to decide here which meaning of the words is correct because the appeal must fail on another ground.

The case before us does not depend on the construction and effect of the letting by the defendant to the plaintiffs but on the effect of the letting of the land by the proprietor. A similar position came before the Calcutta High Court in 26 Cal 546.[3] The suit was by the landlord to eject as trespassers two defendants Deva Roy and Ajodh Roy of whom it was found that the defendant Deva Roy came upon the land while it was held by the other defendant Ajodh Roy as a thikadar under the proprietor under a lease for a term of years; and the substance of the decision was that those two circumstances were sufficient to bring the case within S. 116, Ben. Ten. Act. The proprietor is entitled to the benefit of this Section if he has taken the precaution of letting out his zirat lands under a lease for a term of years or under a lease from year to year. If he has done this, S. 116 will apply to the land with the result that his lessee can neither acquire nor confer on any sub-lessee a tenancy carrying the benefits of Chaps. 5 and 6, Ben. Ten. Act, which deal with the rights of occupancy raiyats and non-occupancy raiyats. Mr. De argued that the authority of this decision should not be accepted. We have not been shewn any case in which it has been questioned and we see no reason ourselves to doubt its correctness. On the law as there laid down it is clear that the plaintiffs have not acquired the right which they claim in the lands in suit and the decision of the Courts below dismissing the suit must be affirmed. I would dismiss the appeal with costs.

Agarwala J. — I agree.

G.N./R.K. *Appeal dismissed.*

1. Shiva Shankar v. Kali Ojha,(1929)16 AIR Pat 392=118 I C 309=8 Pat 471=10 P L T 565.
2. Tengaroo Sukul v. Chatthu Bhar, (1929) 16 A I R Pat 460=118 I C 316=9 Pat 347 = 10 P L T 569 (F B).
3. Sheonandan Roy v. Ajodh Roy, (1899) 26 Cal 546=3 C W N 336.
4. Umashankar Prasad v. Kunj Bihari Thakur, (1938) 25 A I R Pat 299=173 I C 904=17 Pat 218=19 P L T 180.

A. I. R. 1940 Patna 623

FAZL ALI AND MEREDITH JJ.

Rampratap Marwari — Appellant.

v.

Lachman Mistri — Respondent.

Appeal No. 175 of 1939, Decided on 13th March 1940, from original order of Dist. Judge, Manbhum, D/- 20th March 1939.

(a) Provincial Insolvency Act (1920), Ss. 5 and 18 — O. 9, R. 13, Civil P. C., applies to insolvency proceedings — Application to set aside ex parte order granting debtor's insolvency petition is competent.

From the provisions of Ss. 5 and 18 it follows that O. 9, Rule 13, Civil P. C., is applicable to proceedings under the Insolvency Act also and therefore the Insolvency Court is competent to entertain an application by the creditor to set aside an ex parte order granting the application of a debtor for being declared insolvent : *7 C L J 268 and A I R 1932 Lah 522, Rel. on.* [P 624 C 2]

(b) Provincial Insolvency Act (1920), S. 19 and S. 79, Rules under, R. 5 (Calcutta High Court)—S. 19 is mandatory — Notice must be served on each creditor separately—Mere publication of general notice in official gazette is not enough—Question of prejudice is irrelevant.

The provisions of S. 19 are mandatory. Mere publication of the general notice in the official gazette is not enough. It must be served by registered post on each creditor. The question whether the creditor was prejudiced or not by the non-service of the notice is irrelevant. Therefore where the creditor proves absence of notice the Court is bound to allow his application for setting aside an ex parte order granting the debtor's petition for being declared an insolvent and rehear the matter.

[P 625 C 1, 2]

S. C. Mazumdar and Ramanugrah N. Sinha — *for Appellant.*

R. S. Chattarji — *for Respondent.*

Fazl Ali J. — This is an appeal by a creditor from an order of the District Judge of Manbhum, rejecting his application praying that the order adjudging one Lachman Mistri as an insolvent be set aside and Lachman Mistri's insolvency petition be reheard. Lachman Mistri made his application on 18th June 1938, in which he mentioned four creditors including the appellant. It appears that notices were issued to all the four creditors including the appellant, but in the notice which was issued to the appellant he was described as Ram Kumar Marwari, and not as Rampratap Marwari. A notice stating that Lachman Mistri had made an application for being declared insolvent was also published in the Bihar Gazette on 20th July 1938. On 23rd July 1938, the learned Judge passed an ex parte order granting the application of Lachman Mistri for being declared insolvent. On 28th July 1938, the appellant appeared in Court and made an application for setting aside that order on the ground that he had received no notice of Lachman's application. The learned Judge dismissed this application on 20th March 1939, and hence this appeal.

The first question to be decided is whether an application for setting aside an insolvency order, which was made ex parte can be entertained. It is contended on behalf of the respondent that such an application is not maintainable under the Insolvency Act, and the learned advocate appearing on his behalf contends that if such an application could be entertained, there would have been a provision in the Act similar to S. 25, cl. (1). In that clause it is provided that

> in the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

It is pointed out that whereas the Act specifically provides that in the case of a petition presented by a creditor the petition may be dismissed if the Court is satisfied that there was no service on the debtor of notice of the order admitting the petition, no similar provision is made where a petition is presented by a debtor and the creditor is not served with a notice. S. 18, Insolvency Act, provides that

> The procedure laid down in the Civil Procedure Code 1908, with respect to the admission of plaints, shall, so far as it is applicable, be followed in the case of insolvency petitions.

Again, S. 5 of the Act runs as follows:

> (1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.
>
> (2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits.

From these provisions it follows that O. 9, R. 13, Civil P. C., is applicable to proceedings under the Insolvency Act also and this view is supported by the decision of the Calcutta High Court in 7 C L J 268[1] and certain observations made in A I R 1932 Lah 522.[2] In my opinion, therefore, the learned Judge was competent to entertain the application made by the appellant before him. As to the merits of the application, it has been pointed out on behalf of the appellant that even the learned Judge has held that no notice was actually served on the appellant. The learned Judge has relied on the fact that a general notice had been duly published in the Bihar Gazette

1. Mool Chand Ram v. Sarjoog Pershad, (1908) 7 C L J 268.
2. Umar Din v. Raghu Nath, (1932) 19 A I R Lah 522=138 I C 377=33 P L R 698.

to the effect that Lachman Mistri had applied for being adjudicated insolvent and 23rd July 1938 had been fixed for hearing and he has held that in view of the notification the appellant must be presumed to have had sufficient notice of the insolvency petition as well as of the date of the hearing. S. 19, Insolvency Act, says that 'where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition' and "notice of the order shall be given to creditors in such manner as may be prescribed." As the rules, which govern the procedure in this province, are the same as those framed by the Calcutta High Court under S. 79 of the Act, it becomes necessary to refer to R. 5 framed by the Calcutta High Court as regards the publication of notice to be issued under S. 19. This rule runs thus:

> Notice of an order fixing the date of the hearing of a petition under S. 19 (2) shall be published in the local official Gazette and advertized in such newspapers as the Court may direct. A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition.

It is to be noted that this rule nowhere provides that mere publication of the notice in the official Gazette will be enough. It distinctly provides that a copy of the notice should also be forwarded by registered letter to each creditor. In the present case, the registered letter never reached the appellant. The learned Judge has presumed that the appellant must have had notice of the insolvency petition, because it was published in the official Gazette, but I find that the names of the creditors who were mentioned in Lachman Mistri's petition were not published in the Gazette, and the notice was published as late as 20th July 1938, that is only three days before the date fixed for the hearing of the application. The appellant has stated on oath that he had no notice of either the application or the date of the hearing, and, in my opinion, whatever presumption might arise from the fact of the publication of the notice in the Gazette has been rebutted by the one-sided evidence given in this case. That being so, the learned District Judge ought to have allowed the petition of the appellant and reheard the matter. The learned Judge has endeavoured to show that the appellant has not been in any way prejudiced. He has stated in his order that even if it is assumed that the appellant is the only creditor, his own decree against the insolvent amounts to more than Rs. 1665, and that there is nothing to show that the insolvent had so much assets as to enable him to pay up this amount. In my opinion, however, the learned Judge has in this matter misread the petition filed by the appellant before him. However that may be, under the law as it stands the question of prejudice appears to me to be irrelevant. The appellant has shown that he had not received the notice issued under S. 19 of the Act, and as that provision is mandatory the learned Judge ought to have reheard the matter. In these circumstances I would allow this appeal. The order of the learned Judge is set aside. There will be no order as to costs.

Meredith J.—I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 625

FAZL ALI AND MEREDITH JJ.

Saguni Missir — Petitioner

v.

Emperor.

Criminal Revn. Appln. No. 670 of 1939, Decided on 1st February 1940, from order of Addl. Sessions Judge, Patna, D/- 6th November 1939.

(a) Penal Code (1860), S. 211 — Petition to Assistant Superintendent of Police asking him to take action regarding cognizable offence — Assistant Superintendent of Police directing enquiry to be made by Sub-Inspector — Sub-Inspector finding case to be maliciously false — Offence under S. 211 is committed.

A person made a petition to the Assistant Superintendent of police charging certain person with cognizable offence and asking him to take necessary action. The Assistant Superintendent of police directed an enquiry to be made by Sub-Inspector who made an enquiry and reported that the case was maliciously false. The Assistant Superintendent of Police thereupon made a complaint under S. 211:

Held that the conviction under S. 211 was not vitiated by any error of law. [P 626 C 2]

(b) Penal Code (1860), S. 211 — Magistrate taking cognizance of complaint under S. 211 and passing orders before petition of protest by opposite party — Prosecution under S. 211 without disposing of protest petition is not improper.

Where a Magistrate has taken cognizance of a complaint under S. 211, and has passed orders thereon and subsequently the opposite party has made a protest petition, the order of Magistrate of prosecution under S. 211 without first disposing of the protest petition is not improper: *A I R 1934 Pat 573, Rel. on.* [P 627 C 1]

Syed Ali Khan — *for Petitioner.*

Mehdi Imam for Asst. Govt. Advocate, and K. K. Banerji —

for Opposite Party.

Fazl Ali J. — This is an application under Ss. 435 and 439, Criminal P. C., by one Saguni Missir, who has been convicted under S. 211, I. P. C., and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 50. It appears that for some time past a dispute has been going between the petitioner and one Jamuna Jha with regard to a temple situated in Patna City in front of the petitioner's house. On 17th May 1939, one Mathura, who is said to be a friend of Jamuna Jha, brought a case under S. 324 against Chuni Kahar and other persons who, according to the prosecution, belonged to the party of the petitioner. Chuni Kahar and others were at first released on bail, but subsequently their bail bonds were cancelled on 27th June 1939. On that very day the petitioner lodged a saneha before the Assistant Sub-Inspector of Police at Khajekalan Police Station in which it is recorded that four persons, namely Jagmohan, Mathura, Parmeshwar and Khapta Kahar, had abused him in front of his house. On 28th June, the petitioner went with his mukhtear and filed a petition before the Assistant Superintendent of Police to the effect that eight persons including the four who had been mentioned in the saneha had come on the evening of 27th June to the temple which was the subject of dispute between him and Jamuna and others, had the lock of its entrance door broken and removed one mukat (Crown) from the idol installed in the temple and some other articles of worship, and also threatened to break his limbs if he intervened. The prayer which was made in the petition was that the Assistant Superintendent of Police

may be pleased to depute some unconcerned responsible officer to institute a case and make an enquiry at the spot, as the petitioner is ready to prove his case.

The Assistant Superintendent of Police thereupon directed an enquiry and ultimately the Sub-Inspector in charge of the thana reported that the case was maliciously false. Upon this the Assistant Superintendent of Police made a complaint to the Sub-divisional Officer for prosecuting the petitioner under S. 211, I. P. C., on 12th June. On that very day the Sub-divisional Officer recorded the following order :

A complaint under S. 211, I. P. C., received. Cognizance taken. Issue warrant of arrest bailable for Rs. 500 against the accused for 27th.

It appears that on the same day the petitioner filed a protest petition before the Sub-Divisional Officer in which, after briefly narrating the incidents regarding which he had filed a petition before the Assistant Superintendent of Police and stating that he was ready to prove the case, he prayed that

the report of the Police be put up and the matter may be enquired into by any Magistrate before any order is passed on the report.

The Magistrate directed this complaint to be put up with connected papers, on the next day, and on that day he rejected the petition stating that he had already passed final orders upon the complaint of the Assistant Superintendent of Police before the petition was filed, and it was too late now to modify that order. The learned Sub-Divisional Officer further remarked that the petitioner would have a chance of proving his case in the proceeding already instituted. After that the Sub-Divisional Officer proceeded to try the petitioner and convicted him under S. 211, I. P. C. The petitioner appealed to the Sessions Judge, but his appeal was dismissed. Both the Courts below have concurrently found that the allegations made by the petitioner in his petition to the Assistant Superintendent of Police were maliciously false and they have given good reasons in support of their finding. The only question which therefore arises upon this application is whether the conviction of the petitioner is vitiated by any error of law.

The first point of law raised by the learned Advocate appearing for the petitioner is that as the Assistant Superintendent of Police himself neither could nor did enquire into the case, no offence under S. 211, I. P. C., was committed merely by reason of the fact that the petition, dated 28th June, was filed before him. It is not suggested that the petition made on that day did not disclose a cognizable offence, but it is contended that only the Sub-Inspector in charge of the police station could enquire into that offence and therefore though, an offence under S. 211 might have been committed if an information had been lodged before the Sub-Inspector, no such offence has been committed, because the petitioner approached the Assistant Superintendent of Police. In my opinion the contention is not sound. The offence being a cognizable one, it could be enquired into either by the police officer in charge of the police station or by any officer to whom he was subordinate and within whose jurisdiction the offence was said to have been committed. The Assistant

Superintendent of Police did take action on this petition and directed an enquiry, and it cannot be said that he was not in a position to get the offender punished. It also appears on the evidence in the case that a regular police case was instituted upon the petitioner's application to the Assistant Superintendent of Police and the persons named as accused in that petition were arrested and subsequently released on bail. Thus, the first contention raised on behalf of the petitioner must fail.

The second contention is that the petitioner having filed a protest petition, which amounted to be a complaint before theMagistrate, the latter had no jurisdiction to order his prosecution without disposing of his complaint. Both the Courts below have however pointed out that the protest petition was filed after the Magistrate had taken cognizance of the case under S. 211, I. P. C., and therefore the procedure of the Magistrate was not open to any objection. This view is fully supported by the decision of this Court in 13 Pat 789.[1] In my opinion there is no ground for interfering with the conviction of the petitioner, and in view of the fact that the petitioner has in this false case implicated not only Jamuna with whom he had a dispute but also most of the persons who had figured as prosecution witnesses in the criminal case brought by Mathura against Chuni Kahar and others, I consider that the sentence which has been passed on him is by no means severe. I would therefore dismiss this application.

Meredith J. — I agree.

D.S./R.K. *Application dismissed.*

1. Daroga Mahto v. Emperor, (1934) 21 A I R Pat 573=152 I C 847=13 Pat 789=36 Cr L J 200 =15 P L T 756.

A. I. R. 1940 Patna 627

WORT AND MANOHAR LALL JJ.

Rameshwar Nath — Defendant — Appellant.

v.

Naramdeshwar Prasad Narain Singh and another, Plaintiffs—Respondents.

Appeal No 83 of 1937, Decided on 8th March 1940, from original decree of Sub-Judge Chapra, D/- 30th January 1937.

(a) Mortgage—Usufructuary—Deed providing that mortgagee should appropriate produce in excess as profit in lieu of interest — Premium obtained by mortgagee by settlement of bakasht land held could not be regarded as produce.

In a zarpeshgi mortgage deed it was provided that the mortgagee should appropriate entire produce which he might have in excess as profit in lieu of interest. The mortgagee had settled certain bakasht land and had realized premium of certain amount :

Held that the premium which he obtained by the settlement of the bakasht lands was not the produce of the land. The meaning of the word 'produce' in the deed itself was that which would ordinarily be placed upon it, that is, the produce of cultivation. [P 628 C 1, 2]

(b) Mortgage—Usufructuary — Settlement of bakasht lands by mortgagee — Right of occupancy raiyats to remain in possession is not affected by mortgagor taking possession.

Where a usufructuary mortgagee has settled bakasht land, the right of the tenant cannot be determined by a contract between the mortgagor and the mortgagee, but is to be determined by the rule of law. If these tenants are occupancy raiyats, their right to remain on the land will continue in spite of the mortgagor going into possession. [P 628 C 2]

(c) Mortgage—Usufructuary mortgage made before T. P. Act of 1882 came into force — Mortgagee was bound to pay Government land revenue.

In British India a mortgagee in possession of immovable property under a mortgage made before the T. P. Act of 1882 came into force was under the ordinary law then in force bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property : *A I R 1924 P C 102, Foll.* [P 629 C 1]

Dr. D. N. Mitter and J. N. Sahai — *for Appellant.*

Gendhari Prasad Singh and Lal Narain Singh — *for Respondents.*

Wort J.—This is an appeal by the mortgagee defendant in an action for redemption. The only question that arises, there being no doubt as to the right of the plaintiffs to the return of the zarpeshgi deed, is that of accounting. The zarpeshgi dates back to the year 1872 and was for a sum of Rs. 8325. The rental of the property was estimated to be about 682. The mortgagee was to pay, according to the terms of the zarpeshgi Government revenue amounting to Rs. 120, and was to appropriate the balance Rs. 562, "besides the entire produce which he may have in excess of the profit in lieu of interest on the said peshgi money and remuneration for the thika;" I am quoting from the document itself (Ex. H). Therefore until the mortgagor was prepared to pay the principal, subject to any question of account, the zarpeshgidar was entitled to remain in possession.

Now, in taking the account the learned Judge in the Court below has come to the

conclusion that the zarpeshgidar had settled certain bakasht lands and had realized a premium of Rs. 1299 for such settlement, but that he should have received an additional Rs. 1911 that is to say, instead of obtaining the Rs. 1299 he should have obtained Rs. 3210, and in taking the account of the monies due by the plaintiff to the defendant. The Judge has made this allowance of Rs. 3210. Incidentally I might state here that the learned Judge has allowed the sum of Rs. 1299 twice over. That of course will have to be eliminated from the account. In addition to that the learned Judge has come to the conclusion that as regards the rent of these bakasht lands settled by the mortgagee in possession another Rs. 11 on the total area settled should have been obtained. The case of the mortgagor plaintiff was that the mortgagee should have obtained as rent something much in excess of this amount. The learned Judge has in the result come to the conclusion that the difference between the rental at which he ought to have settled the lands and that which he in fact has settled them at, is Rs. 11. Capitalized that by twenty the Judge has allowed Rs. 220 in the account; and in addition to that he has allowed Rs. 125 to the mortgagor for cess, which the mortgagor himself has paid between the years 1932 to 1935.

I propose to deal with the sum of Rs. 220 in the first instance. I should have thought that the maxim *de minimis non curat lex* applies to the case although the learned advocate appearing on behalf of the respondent contends that he can support the judgment by showing that the evidence would substantiate the claim he made. That argument, in my judgment, cannot be accepted. It merely amounts to this that the decision of the learned Judge in the Court below was wrong, and how a judgment can be supported by contending that it is wrong I fail to see. In my judgment, this amount is so small, that it should not have been allowed in the account. It will, therefore, be struck out accordingly. As regards Rupees 1299, the question depends upon the construction of the document itself. The passage is :

> appropriate year after year the balance amounting to Rs. 562 besides the entire produce which he may have in excess as profit in lieu of interest.

In my judgment the argument of Dr. Mitter, that the premium which he obtained by the settlement of these bakasht lands was the produce of the land, cannot be supported. It is quite clear that the meaning of the word 'produce' in the deed itself is that which would ordinarily be placed upon it, that is, the produce of cultivation. It is therefore quite clear that the mortgagor would be entitled to have Rs. 1299 set off in the account against him. The Rs. 1911 is somewhat more difficult. The argument put forward by Dr. Mitter was that the settlement by him (the mortgagee) would enure only until such a time as he went out of possession. As I understood the argument, the mortgagor when he came into possession would be entitled to eject the persons that the mortgagee had settled upon the lands. To put the argument in another form, the mortgagor should minimise his damage that is, if he could turn these tenants out (although the rents and the premium obtained for the settlement were both low), he did not in fact and need not suffer any damage, because ejecting the tenants he could re-settle the lands with other tenants. That argument was met by the decision of Adami and Kulwant Sahay JJ. in 8 P L T 31.[1] There, Kulwant Sahay J., in delivering the judgment of the Court distinguished bakasht land by saying that such land is nothing more than raiyati land which had as a result of surrender or abandonment come into the possession of the landlord; and then came to the following conclusion :

> Unless there is a provision in a zarpeshgi lease, restricting the power of the zarpeshgidar as regards the settlement of raiyati lands, the latter is, in the ordinary course of management, entitled to settle raiyati lands with tenants, and such settlement will be binding on the proprietor.

I think it may be pointed out, as has been pointed out on many occasions, that the right of the tenant cannot be determined by a contract between the mortgagor and the mortgagee, but is to be determined by the rule of law. If as in this case, (although there is no decision on the point) these tenants are occupancy raiyats, their right to remain on the land will continue in spite of the mortgagor going into possession, and it must be held in my judgment that the tenants' possession or right to possession did not come to an end at the time the mortgagor came back into possession. In my judgment, therefore, the point as regards Rs. 1911 apart from the merits of the case, which has not been argued, is unsustainable, and the mortgagor was entitled to have the Rs. 1911 taken into account as between himself and the defendant. The

1. Bhairo Nath v. Shanke Pahan, (1926) 13 A I R Pat 605=97 I C 491=6 Pat 129=8 P L T 31.

question that remains is the question of cess. That in my judgment is determined by the provision of S. 76, T. P. Act:

> If the mortgagee fail to perform any of the duties imposed upon him by this Section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss (if any) occasioned by such failure.

The first cl. (a) of S. 76 provides:

> He must manage the property as a person of ordinary prudence would manage it if it were his own.

The principle of law there laid down by S. 76 applies in my judgment both to the case of Rs. 1911 and to the question of cess, and as regards the question of cess the matter is concluded by the decision in 51 I A 157.[2] In that case (as in this case) there was a usufructuary mortgage of May 1869, prior to the passing of the Transfer of Property Act in 1882, and their Lordships of the Judicial Committee of the Privy Council held that

> as the mortgages did not provide otherwise the mortgagee was bound to pay the enhanced revenue and cesses as part of his duty to manage the property with prudence, and was not entitled to recover the payments upon redemption.

Clause (c) of S. 76, T. P. Act, reads:

> He must in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof.

Although S. 76 does not apply in terms to the mortgage in this case nor did it apply in terms to that in 51 I A 157,[2] yet their Lordships applied the principle there laid down and made this observation:

> In British India a mortgagee in possession of immovable property under a mortgage made before the Transfer of Property Act of 1882 came into force was under the ordinary law then in force bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property.

Their Lordships held that cess was one of these charges of public nature payable by the mortgagee. In the result the mortgagor will be entitled, in the taking of the account, to set-off Rs. 1299, Rs. 1911, Rs. 125 and Rs. 66 for cutting down trees with regard to which I have heard no argument. The decree is modified to the extent of striking out Rs. 220 and Rs. 1299 which have been charged twice over. The appellant is entitled to proportionate costs of this appeal. In working out this proportion Rs. 1299 must not be taken into account because this amount could have been corrected by an application to the Judge in the Court below.

Manohar Lall J. — I agree.

D.S./R.K. *Decree modified.*

2. Abid Husain Khan v. Kaniz Fatima, (1924) 11 A I R P C 102=80 I C 1019 = 51 I A 157 =27 O C 72=46 All 269 (P C).

A. I. R. 1940 Patna 629

VARMA AND MANOHAR LALL JJ.

People's Co-operative Bank Ltd., Patna — Appellant.

v.

Shyam Narain and another — Respondents.

Appeal No. 111 of 1939, Decided on 9th May 1940, from original order of Sub-Judge, Patna, D/- 23rd February 1939.

(a) Evidence—Fact that witnesses giving evidence on behalf of a party happen to be his employees is no ground for discarding their evidence.

Simply because witnesses giving evidence on behalf of a litigant happen to be employees of that litigant, their evidence should not be discarded. [P 630 C 2; P 631 C 1]

(b) Appeal — Court refusing to record compromise on ground that there was no ground or consideration for it—Order is appealable.

Where the Court after having found that there was no ground for a compromise and also that there was no consideration for the compromise, has refused to record the compromise the order is appealable: *A I R 1927 Lah 546, Rel. on.* [P 631 C 1]

Hareshwar Prasad Sinha—*for Appellant.*

Girija Nandan Prasad—*for Respondents.*

Varma J.—This is an appeal against an order of the lower Court refusing to record a compromise in an appeal by the appellant before us. The appellant happens to be the People's Co-operative Bank Ltd., Patna. It appears that there was a family consisting of one Raja Lal who had a son, Ram Chandra Chaudhuri. Ram Chandra Chaudhuri had two sons, Ram Narain and Shyam Narain. On 19th May 1930, the Bank obtained an award for Rs. 3872-5-6 against Raja Lal and Ram Chandra and one Ishwari Prasad. In the year 1935, the award was executed before the First Subordinate Judge's Court at Patna. The Bank got holding Nos. 138 and 139 within the Patna Municipality attached. The sons of Ram Chandra filed a petition with regard to holding No. 138 under O. 21, R. 58, Civil P. C., but no claim was preferred with regard to holding No. 139. The claim was rejected with the result that holding No. 139 was sold for Rs. 50 and holding No. 138 for Rs. 100 and purchased by the Bank. A suit was filed with regard to holding No. 138 by Shyam Narain and Ram Narain and another suit was filed by

one Sheo Shankar Kumhar with regard to holding No. 139. The suit filed by Shyam Narain and Ram Narain was decreed in favour of the plaintiffs of that suit, and the appeal, in connexion with which the present compromise was filed, was numbered 41 of 1938/39. The suit filed by Sheo Shankar was dismissed in connexion with holding No. 139. Sheo Shankar also preferred an appeal which was numbered 52 of 1938.

Both the appeals were pending before the District Judge of Patna but while the appeal filed by Sheo Shankar remained before the District Judge, the appeal filed by Shyam Narain and Ram Narain was transferred to the Court of the Subordinate Judge. The case of the appellant was that both the cases were compromised. The compromise petition in Sheo Shankar's case, which was Appeal No. 52 of 1938, was filed before the Judge, but although a compromise petition was prepared and faircopied the case of the Bank is that the respondents took the faircopy to have it signed by their pleader and file it on 31st August 1938, which was the date fixed in the appeal. They however did not file the petition on that date and when they did not file it for some time the present petition, out of which this appeal arises, was filed. The Bank relied upon Ex. 1 which is a draft of the aforesaid petition of compromise. The respondents however deny any compromise as alleged by the appellant. They contended that there was no occasion for a compromise in the appeal to agree to pay Rs. 200 to the appellant, i. e. the Bank.

On behalf of the appellant, it is contended that the two appeals were compromised as part of one transaction, and if this appeal had not been compromised they would not have compromised the other appeal No. 52 of 1938 by Sheo Shanker Kumhar. The Court below has not relied upon the evidence of the witnesses on behalf of the present appellant and, after having found that there was no ground for a compromise on terms so favourable to the Bank, and also that there was no consideration for the compromise, has refused to record the compromise. Mr. Hareshwar Prasad Sinha, appearing on behalf of the appellant, has drawn our attention to the fact that the only reason given by the Court below for disbelieving the appellant's witnesses is that they are

> all men of the appellant and must speak for them and I am not inclined to attach much weight to their oral evidence.

The witnesses for the appellant are : Bhagwat Prasad Karan (witness 1), Law Agent of the Bank, Bateshwar Jha (witness 2), manager of the Bank, Bhagwandhari Singh (witness 3), a peon of the Bank, among other witnesses. The reason given by the lower Court does not appeal to me. In a case of this nature who else but the servants of the Bank can be the witnesses to the transaction, and simply because they happen to be connected with the Bank their evidence should not have been discarded altogether. The Assistant Secretary of the Provincial Co-operative Bank was examined in this case on commission. He said that the compromise was arrived at with his approval, and his evidence has been held to be insufficient because it did not appear from his statements that the respondents were parties to the compromise and agreed to its terms. Appellant's witness 4 is Sukhdeo Prasad. He has been disbelieved because he happens to be a bhagina of the Law Agent of the Bank (witness 1).

What has weighed mostly with the Court below is that the learned pleader appearing on behalf of the Bank was not examined and also that the respondents having won in the lower Court were not likely to enter into a compromise so favourable to the Bank. When this point was pressed by Mr. Girija Nandan Prasad on behalf of the respondents we adjourned the hearing of this appeal to give an opportunity to them to examine that pleader in the case on payment of costs, and 6th May 1940 was fixed for getting the information from the learned advocate for the respondents. We are informed that the respondents will abide by the decision of the Court without any examination of the pleader. Moreover, we are informed that Mr. Satchidanand was personally conducting the case in the lower Court. Mr. Girija Nandan Prasad has further pointed out that in Exs. 3 and 3 (a), the notes submitted by the office as well as the remarks of the officer, there is no mention of the draft. But these were submitted on 29th August 1938, and the petition for recording the compromise was filed on 22nd September 1938, and the date fixed for filing the petition of compromise was 31st August 1938. In the note Ex. 3 (a) it is noted as follows :

> According to the terms of compromise the amounts must be realised on due dates in "Aghan and Magh" 1346 Fasli.

From this it is clear that some sort of compromise was actually hinted at; the

actual draft may not have been placed before the office. Mr. Girija Nandan Prasad also pointed out that Title Appeal No. 45, i. e., the appeal filed by Sheo Shankar has nothing to do with the appeal out of which this appeal arises. But from the trend of events mentioned above, it is clear that it was in execution of the same award that holding Nos. 138 and 139 were attached, and although different parties objected to the execution of the award the Bank's attitude was to finish the litigation as soon as possible. On the whole, it appears to me that the reason given by the Court below for not relying upon the Bank's witnesses simply because they happen to be employees of the Bank is not sufficient; and the question of consideration does not seem to have much bearing in this case because the results of litigations are after all uncertain and parties enter into compromise with the object of escaping from the worries and anxieties of continuing a litigation. I am therefore of opinion that the appeal should be allowed, the compromise should be recorded and a decree passed in terms of the compromise.

Mr. Girija Nandan Prasad also urged a preliminary point that no appeal lay in this case. He has relied upon a Single Judge decision of the Lahore High Court in 73 I C 177: A I R 1924 Lah 248,[1] where it was held that no appeal lay when it was found that there was no compromise. But a later Division Bench decision of that very Court in A I R 1927 Lah 546[2] has not accepted that view. In Mulla's Civil P. C. (Edn. 10, p. 903) a number of authorities has been mentioned in support of the proposition that an appeal lies in the circumstances existing in the present case. I am of opinion that there is no force in this preliminary objection. I would therefore allow the appeal with costs.

Manohar Lall J. — I agree.

D.S./R.K. *Appeal allowed.*

1. Shanti Sarup v. Jahangir Mal Bansi Mal, (1924) 11 A I R Lah 248=73 I C 177.
2. Nand Lal v. Ram Sarup, (1927) 14 A I R Lah 546=103 I C 80.

A. I. R. 1940 Patna 631

DHAVLE J.

Manlayak Singh—Petitioner.

v.

Ramkirit and others—Opposite Party.

Criminal Misc. Case No. 71 of 1939, Decided on 14th March 1940.

(a) Criminal trial — Undue pressure—Magistrate's suggestion to settle matter by arbitration is not undue pressure.

There is a distinction between the Magistrate's asking a party to settle a matter by arbitration and his exercising undue pressure, or indeed any pressure at all, in asking a party to accept arbitration. [P 633 C 1]

(b) Penal Code (1860), S. 199 — Affidavit filed in High Court — Reckless allegations—Applicant having no real knowledge about them nor indicating sources of his knowledge—Case held fit for enquiry into offence under S. 199 — Tendency to make reckless allegations in affidavits deprecated.

The tendency on the part of applicants to make reckless allegations in affidavits filed in the High Court must be deprecated. Where the applicant prima facie has no knowledge of them at all, even though that does not prevent him from swearing the affidavit, nor attempts to indicate the sources of his knowledge of the allegations, the case is a fit one for enquiry into an offence under S. 199. [P 633 C 2]

Nirsu Narayan Sinha, Krishna Chandra and R. K. Sahay — *for Petitioner.*

Assist. Govt. Advocate, Avadesh Nandan Sahay, D. L. Nandkeolyar and S. Barmeshwar Prasad—*for Opposite Party.*

Order.—This is a rule calling upon one Manlayak Singh to show cause why he should not be prosecuted under S. 199, I. P. C., in respect of certain statements contained in his application of 16th October last to this Court for a transfer of certain proceedings under S. 145, Criminal P. C., from the file of the Sub-Divisional Magistrate of Dinapur. The application was supported by an affidavit sworn by Manlayak Singh, saying that the facts stated in the petition were true to his knowledge.

The first statement to notice is the allegation in para. 8 of the petition that on 24th August 1939, when certain ijaradars who like Manlayak Singh were members of the second party in the proceedings before the Magistrate applied to him for an adjournment, the Magistrate in the presence of their advocate and others made an observation to the effect that the ijaradar is a mere farzidar of the Sehra Babus (the maliks), that even if this case be transferred, "Sehra Babu has to remain in the same subdivision" etc. Mr. Nirsu Narayan Sinha who appears for Manlayak Singh has stated that Manlayak is a gomasta of the Sehra Babus on Rupees 5 a month and is entirely innocent of English. It is not claimed that the Magistrate made his observations in any language but English. The allegation now in question is a repetition of what was stated in Manlayak's application to the District Magistrate for a transfer of the

proceedings before the matter was brought to this Court; and in showing cause on that occasion, as on the present occasion, the Magistrate says that the petitioner's allegation is a hopeless distortion of what he had said. I do not wish to say anything more on the present occasion than can be helped, having regard to the fact that I am now merely considering the question whether an inquiry ought not to be made into an offence under s. 199, and not the question whether there are sufficient materials before me for Manlayak's conviction. I will therefore content myself with saying that on present materials Manlayak's statement in para. 8 of his application, which he swore was true to his knowledge, appears to be false and could not have been believed by him to be true. What leads me to this conclusion is the circumstance that Manlayak made his application to the District Magistrate after the ijaradars of the Sehra Babus had applied to the District Magistrate for a transfer on grounds which were evidently felt to be inadequate, coupled with the fact that there is no pretence that Manlayak could understand English, besides the Magistrate's report and the probabilities of the situation.

In para. 9 of his application Manlayak stated that the Magistrate did not prepare any note of his local inquiry or inspection of 2nd July 1939. The learned advocate who appears for him has referred to S. 148, Criminal P. C., which speaks of a local inquiry and to S. 539-B which speaks of a local inspection; and he has pointed out that the latter requires the Court without unnecessary delay, to record a memorandum of any relevant facts observed at such inspection. But the inquiry or inspection in the present case was not held under either of these provisions of the law, and nothing really turns on such distinction as may be made between the two sections. That the Magistrate made a local inquiry in connexion with the proceeding (which, it is to be noted, was then a proceeding under S. 144), and made it in the presence of Manlayak among others is not disputed; and the inquiry report is on the record. Mr. Nirsu Narayan Sinha has, however, been able to point to several circumstances indicating that Manlayak may have believed that there was no such note on the record. It appears that two days after the inquiry Manlayak filed an urgent application for a copy of the note, but that this application was refused by Maulavi S. S. Zaffar Hossain, the Second Officer of Dinapur, on the ground that the records were not available. This might not unreasonably give the impression that the note was not on the record, for, it is hardly to be supposed that the second officer would refuse a copy merely because the Sub-Divisional Officer might have kept the whole record with himself. Nor did subsequent happenings help to displace such an impression or remove what confusion there may have been. The allegation that no note was prepared was made in Manlayak's application to the District Magistrate for transfer; but this was not one of the grounds on which the District Magistrate called for an explanation, with the result that in dealing with that ground the District Magistrate did not notice the inspection note and only said that there was in fact no local inspection under the Criminal P. C. What appears to have happened is that the learned Magistrate visited the village in his executive capacity.

This observation could only help to confirm the impression of Manlayak, whose urgent application for a copy had been rejected on palpably inadequate grounds, that no inspection note had been prepared. It has also been brought to my notice that when last month an application was made in this Court on Manlayak's behalf for a copy of the inspection note, what was supplied to him was a copy not of the inspection note of 2nd July 1939, but of a note of the Magistrate dated 4th September which is found in the record of the District Magistrate though it is not at all clear how it came to be there. Manlayak's allegation that the Magistrate did not prepare any inspection note is wrong in fact, but the circumstances placed before me by Mr. Nirsu Narayan Sinha do suggest that not only did he not know or believe it to be false but that he may well have believed it to be true.

In para. 12 Manlayak Singh speaks of undue pressure being brought to bear on his malik by the Magistrate for accepting arbitration. This again is said to be true to Manlayak's knowledge. The allegation was made in the application to the District Magistrate but was not among the grounds on which the District Magistrate called for an explanation from the Sub-Divisional Magistrate. In his explanation to this Court the Magistrate says that he had asked the landlord to settle the matter by arbitration "which, as a matter of policy, a S. D. O. is required to do these days." The District

Magistrate says on the same point that every Magistrate tries to settle such matters amicably, and with reference to Manlayak's contention that the refusal of the malik to accept arbitration has caused great annoyance to the Sub-Divisional Magistrate, observes that if the Magistrate were to be annoyed by the reluctance of any party to accept an arbitration, he will have to be annoyed practically every day. The learned advocate for Manlayak has contended that the Sub-Divisional Magistrate has not explicitly denied putting any pressure upon Manlayak's malik to accept arbitration, and that it should therefore be taken from the Magistrate's mention of "a matter of policy" and his reference to the fact that "executive and judicial functions are unfortunately vested in the Sub-Divisional Magistrate" that pressure was exercised on Manlayak's maliks. I am not impressed by this contention, for it ignores the distinction between asking a party to settle a matter by arbitration and exercising undue pressure, or indeed any pressure at all, in asking a party to accept arbitration. I cannot, on present materials, believe that the Magistrate exercised any pressure on Manlayak's maliks at all, especially as the petitioner has carefully refrained from explaining what the "undue pressure" was, and as there is no reason to think that anything was done through this low paid agent of the maliks.

The only other matter that it is necessary to refer to is the allegation in para. 13 of Manlayak's petition regarding the formation of a conciliation board by the Sub-Divisional Magistrate, with its first sitting at Bikram on 13th August 1939 at which the Magistrate delivered a speech from which

it is apparent that he holds the view that the original tenants are in cultivating possession of the lands over which even possession had been delivered by the Civil Court by means of the writ of delivery of possession.

The Magistrate states the composition of the conciliation board including three landlords, two Congress workers, two Kisan workers, one big cultivator and Rai Bahadur Brijnandan Singh of Maner, a Government Official, and says that at the meeting which he called at Bikram four or five other persons were present. It is not pretended that Manlayak was among the persons called, and the affidavit does not say that he was present. The Magistrate adds that

the idea in forming the committee is to help the tenants and landlords as well, so that disputes may be settled without litigation or resort to direct action.

In the circumstances it is inconceivable that the Magistrate said anything of the kind that Manlayak has put forward on oath in para. 13 of the application regarding the Magistrate's views. It has been contended on Manlayak's behalf that the Magistrate has not expressly denied the petitioner's allegation and that therefore his reply should be taken to be a tacit admission of the matter charged by Manlayak. In my opinion, the Magistrate has said enough to warrant one in holding that he emphatically denies the allegation. I am not prepared to deal with the Magistrate's explanation like the counter-affidavit of a party in answer to an affidavit filed by an applicant; and we have in Manlayak a man who in order to obtain a transfer, is making allegations on oath relating to matters, several of which were conducted in English, a language which he does not pretend to know. He could, prima facie, have no real knowledge of them himself at all, even though that did not prevent him from swearing the affidavit, nor has he attempted to indicate the sources of his knowledge of such matters.

The rule was supported by the Crown which, on instructions received from the Magistrate, is willing to prosecute. In my order of 29th January, I referred to the tendency I have been noticing recently on the part of applicants to make reckless allegations in the affidavits filed in this Court. Having taken into consideration all the circumstances, I am of opinion that it is expedient in the interests of justice that an enquiry should be made into an offence under S. 199, I. P. C., that would appear, on the materials at present before me, to have been committed by Manlayak Singh in respect of the allegations contained in paras. 8, 12 and 13 of his transfer application of 16th October last. Let a complaint be made accordingly over the signature of the Registrar and forwarded to a Magistrate of the first class having jurisdiction.

G.N./R.K. *Order accordingly.*

*** * A. I. R. 1940 Patna 633**

SPECIAL BENCH

HARRIES C. J., FAZL ALI AND MANOHAR LALL JJ.

Commissioner of Income-tax, Bihar and Orissa — Assessee.

v.

Kumar Kamaksha Narain Singh.

Misc. J. C. No. 2 of 1939, D/. 6-9-1940.

(a) Precedent — Principle set up by cases covering long period of years — Courts are reluctant to dissent.

Courts in India will naturally be reluctant to dissent from the decision of cases which cover a long period of years. [P 638 C 2]

(b) Income-tax Act (1922), S. 6 — Royalty on mines is not 'income from property.'

Royalty on mines cannot fall within the heading "income from property" in S. 6 because such income is defined in S. 9. [P 638 C 2]

* * **(c) Income-tax Act (1922), S. 6 — Coal mining lease — Lessee given all rights of entering upon his land, sinking shafts, erecting colliery and taking away coal — In return of these rights lessee covenanting to pay premium and minimum of royalty annually irrespective of what coal was produced —Coal mining lease held must be regarded as lease and not sale of coal and payment of royalty was income.**

By the various mining leases the assessee transferred to the various lessees certain rights of entering upon his land, sinking shafts, erecting colliery buildings and such like and winning and taking away the coal. In return for those rights, he obtained covenants from the lessees by which they bound themselves to pay annual sums for those rights depending upon the amount of coal removed and the amount of coke manufactured and with a minimum of royalty which was always payable irrespective of what coal was produced or coke manufactured. By these covenants the assessee, in return for the rights and privileges granted, assured for himself an annual sum which was never to be less than the minimum royalty :

Held that the mineral leases must be regarded as leases and not as sales of coal. The annual payments of royalty in such case must be regarded as a rent in the hands of the assessee. They were therefore assessable to income-tax as they constituted income from other sources : *Case law discussed.* [P 640 C 1, 2; P 641 C 1]

(d) Income-tax Act (1922), S. 6 — Sale — Vendor, by terms of sale, securing income for himself —Such income is assessable to income-tax.

A sale may be made for a price which could properly be regarded as a capital receipt and therefore not assessable to income-tax. Such a transaction would amount to the exchange of one form of capital for another. The consideration for such a sale however need not be in the form of capital. A vendor might secure by the terms of the sale an income for himself, and such would undoubtedly be assessable to income-tax : *A I R 1935 P C 143, Rel. on.* [P 639 C 2]

(e) Income-tax Act (1922) — Interpretation — Cases under — Much reliance should not be placed on English decisions.

In deciding cases under Indian Income-tax Act much reliance must not be placed upon English cases which are decided upon an Income-tax Act which differs in many respects from the Indian Act. [P 640 C 1]

(f) Deed — Construction — Lease or sale — Coal mining lease and sale of coal land — Difference between explained.

One of the essential points of distinction between a mining lease and a sale of coal land is that while in a mining lease the lessor has the right of reversion there is no such right of reversion in a sale. Another point of distinction is that while in a sale the consideration is the price, in a mining lease there is the price otherwise called premium and the royalty which at least outwardly bears a closer resemblance to rent than to price. [P 641 C 2; P 642 C 1]

(g) Transfer of Property Act (1882), S. 105 — Words 'right to enjoy such property' meaning explained *(Per Manohar Lall J.)*.

The 'right to enjoy such property' which is spoken of in S. 105 means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject-matter of the lease is coal land it can only be enjoyed and occupied by the lessee by working it as indicated in S. 108, T. P. Act, which regulates fully the rights and liabilities of lessors and lessees in India. [P 647 C 2]

(h) Income-tax — Income-tax cases — Form in which parties have chosen to express their contract cannot be altogether ignored.

It is true that in income-tax cases the substance of the matter should be looked at. But it is impossible for a Court to ignore altogether the form in which the parties have chosen to express their contract : *Case law referred.* [P 649 C 2]

Sir Manmanatha Nath Mukherji and S. M. Gupta — *for Petitioner.*

P. R. Das, Sir Sultan Ahmed, Dr. Katju, B. P. Sinha, S. K. Mazumdar and Brahmadeva Narain — *for Opposite Party.*

Harries C. J.—This is a reference made by the Commissioner of Income-tax, Bihar and Orissa, under S. 66 (2), Income-tax Act, 1922, at the instance of the assessee, the Maharaja of Padma. The assessee is the owner of minerals and receives large payments by way of royalty for coal leased out of various mineral lessees. The estate had been under the Court of Wards, and during that time the Court of Wards paid income-tax upon sums received as royalty. At the time when the tax return in question in this case was filed the estate was still under the management of the Court of Wards, and in that return a sum of Rs. 5,32,368 is shown as having been received as coal royalty. Before the assessment was made, however, the Court of Wards released the estate and the present assessee assumed the management of his own estate. Apparently the assessee did not at once raise the contention that coal royalties were not assessable, but in the grounds of appeal to the Assistant Commissioner he took the point that coal royalty was not income and therefore not assessable. The Assistant Commissioner of Income-tax allowed the assessee to take this contention, and he rejected it on the merits. When the matter came before the Commissioner he was requested to

state a case for the opinion of this Court on two points :

(1) Whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax ?

(2) What should be the principle on which the cost of management in collection of royalties is to be determined when there is a combined management covering both the zamindari collection of agricultural income and royalties from the mines?

The Commissioner of Income-tax has made a reference to this Court and has expressed his opinion that the sums received by way of royalty were rightly held by the Assistant Commissioner to be annual income and not capital instalments of purchase price. As to the second question, the Commissioner points out that it is a pure question of fact and that no legal question whatsoever is involved in it. He therefore recommended that this second question should not be answered by the Court. The royalty received by the assessee is in respect of minerals or mineral rights leased out to various lessees. Three mineral leases have been put in evidence, and we are told that they are typical of all the leases granted by the assessee's predecessors to the various lessees. The three leases which are printed in the paper-book are very similar in terms. The two leases to Bokaro and Ramgarh, Ltd., are made in consideration of a salami or premium, whereas the lease to the Karanpura Development Co. Ltd., is made in consideration not only of salami, but all the rents and royalties reserved in the said lease. All the leases, however, contain covenants to pay royalties, and it appears to me that there is no real difference in the three leases. It is a mere difference in drafting. The leases to Bokaro and Ramgarh, Ltd., purport to grant and demise unto the lessees all and singular the underground coal-mining rights specified in the schedules to the leases and all the estate right, title, interest, claim and demand of the lessor into and upon the same and every part thereof with full liberty and power to the lessees to search for work, make merchantable and carry away the coal there found and also liberty and power for the purposes aforesaid and all other purposes connected therewith with power to dig, sink, drive, make, repair and use all such pits, shafts, drifts, levels, etc., and to erect engines, machinery, dressing floors, buildings, workshops, store houses, cottages, godowns, coke ovens, furnaces, brick-kilns, lime-kilns and other erections and to make such railways and tramways and other roads and communications as are required and to make spoil heaps and other conveniences as may be necessary upon the said land.

The lease in favour of the Karanpura Development Company Ltd. actually demises the mines, beds, veins and seams of coal lying within and under land described in part 1 of the schedule annexed to the lease together with liberties, powers and privileges mentioned in part 2 of the said schedule and those rights and privileges are very similar to the rights conferred in the other leases. All the leases contain covenants for the payment of royalty, namely four annas per ton on steam coal, three annas per ton on rubble coal, two annas six pies per ton on dust coal or slack coal, eight annas per ton on hard coke, and six annas per ton on soft coke. There is a further provision as to payment of a sum by way of minimum royalty in the event of the royalty calculated on the coal raised and coke manufactured not amounting to that sum. All the leases further contain provisions giving the lessor a right to re-enter in case of failure to pay the rent or royalties reserved. This case first came before a Bench, and when it was opened it was apparent that counsel for the assessee desired to challenge the correctness of a number of Bench decisions of this Court. That being so, it was thought desirable that the case should be heard by a larger Bench, and this Special Bench of three Judges has been constituted in consequence. It will be convenient to deal firstly with the first question which is :

Whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax?

This is framed rather too widely, because the question which has to be determined is whether the royalty payable to this assessee under the various leases granted by him or his predecessors is assessable to income-tax, and in this judgment I shall confine myself to the facts of this particular case. It has been strongly urged by counsel for the assessee that the sums received as royalty by the assessee do not constitute income but are in fact capital receipts. He has contended that a mining lease is not a lease at all but is in fact a sale of the minerals, and the royalties reserved in the socalled lease are nothing but the prices of the various types of coal sold under the terms of the so-called lease. Counsel admits that there are a number of Indian decisions,

and particularly, of this Court, to the effect that royalty on coal payable in circumstances similar to those existing in this case is income and, therefore, taxable; but it has been urged that all these cases are wrongly decided and should be overruled or dissented from. Great reliance has been placed upon certain dicta of distinguished English Judges upon the question whether coal royalties are to be regarded as income or repayment of capital. The earliest case relied upon is (1873) 2 H L Sc 273.[1] The question which has to be determined in this case was not the question in issue in that case ; but reliance is placed upon an observation of Lord Cairns at p. 283, which is in these terms :

> But without pursuing the question with respect to agricultural leases further, I should doubt extremely whether dicta of this kind apply at all to leases of mineral subjects; for although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil. It is very difficult to apply to a case of that kind dicta which evidently relate to the ordinary process of agriculture.

A very similar view was expressed by Lord Blackburn in (1881) 6 A C 315.[2] At p. 335 the learned Lord observed:

> It was said by Lord Cairns in (1873) 2 H L Sc 273[1] that a lease of mines "is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit ; that is to say, there is no sowing and reaping in the ordinary sense of the terms, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land." I think this is a perfectly accurate statement. But the argument that no income-tax should be imposed on what is, perhaps not quite accurately, called rent reserved on a mineral lease, because it is a payment by instalments of the price of minerals forming part of the land, any more than on the price paid down in one sum for the out and out purchase of the minerals forming part of the land, is I think, untenable.

Here again Lord Blackburn points out that a mineral lease is not a lease in the sense in which that term is used in connexion with agricultural property and that the rent reserved is really a payment by instalments of the price of minerals leased. He, however, states that the argument that no income-tax should be imposed on these payments is untenable. The matter was again referred to in (1903) A C 299,[3] a case not concerning coal royalties. At p. 303 Earl of Halsbury L. C. observed :

> Where you are dealing with income-tax upon a rent derived from coal, you are in truth taxing that which is capital in this sense, that it is a purchase of the coal and not a mere rent. The income-tax is not and cannot be, I suppose from the nature of things, cast upon absolutely logical lines, and to justify the exaction of the tax the things taxed must have been specifically made the subject of taxation . . . . .

A similar view was expressed by Cozens Hardy L. J. in (1902) 2 Ch 46.[4] At p. 63 the learned Lord Justice observed :

> The use of the word 'rent' in the case of a mining lease is somewhat misleading. It is really purchase money for coal worked. . . . . .

Counsel for the assessee has also relied upon two decisions of their Lordships of the Privy Council, the first being 45 Cal 87[5] in which it was held that the expression "mai haq haquq" (with all rights) in a mukarrari lease of land did not add to the true scope of the grant nor cause mineral rights to be included within it. Reliance has been placed on an observation of Lord Shaw, who delivered the opinion of the Board, which appears at p. 92 :

> It is said that minerals must be included because of the use of the expression "mai haq haquq" in this pottah. On the assumption that the expression means "with all rights" or may be properly amplified as "with all right, title, and interest," such expressions, in their Lordships' opinion, do not increase the actual corpus of the subject affected by the pottah. They only give expressly what might otherwise quite well be implied, namely, that the corpus being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water or the like, which enure to the subject of the pottah and may even be derivable from outside properties. It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specialty to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased.

It has been urged that this case establishes that minerals cannot be the subject-

1. (1873) 2 H L Sc 273, Gowan v. Christie.
2. (1881) 6 A C 315=51 L J Q B 626=45 L T 145 =29 W R 717 = 46 J P 20, Coltness Iron Co. v. Black.
3. (1903) 1903 A C 299=72 L J K R 617=89 L T 1=51 W R 675=4 Tax Cas 618=19 T L R 550, Secy. of State in Council of India v. Scoble.
4. (1902) 2 Ch 46=71 L J Ch 552=86 L T 510= 50 W R 500=18 T L R 579, In re Aldam's Settled Estate.
5. (1917) 4 A I R 1917 P C 163=42 I C 651=44 I A 246=45 Cal 87 (P C), Thakur Giridhari Singh v. Megh Lal Pandey.

matter of a lease because the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. Lord Shaw however points out that minerals may be made part of the subject-matter of a lease, and in such a case the lease would permit the idea of the partial consumption of the subject-matter leased. This decision of their Lordships of the Privy Council can in no way assist the assessee in this case, and it appears to me that the case is against the present contention, because it is expressly stated that minerals may form part of the subject-matter of a lease if it is so stated in the lease itself. Counsel for the assessee also relied on a later case of their Lordships of the Privy Council, 56 Cal 1.[6] In that case their Lordships held that a patni grant of zamindari lands including all interest therein, and jalkar, bankar, falkar, beels and jhils at an annual jama did not give to the patnidar any right to excavate the soil for the purpose of making bricks. In my view this case also does not assist the assessee, because all that is laid down is that brick, earth or minerals would not pass to a lessee without words in the lease making it clear that such was intended to form part of the subject-matter of the lease. In fact, this like the previous cases, is against the assessee's contention. In all these cases the question, which is now before the Court for decision, was not the question considered. Certain receipts may be in one sense in the nature of capital, but that does not conclude the matter. The question which has to be decided is, whether, as the result of the arrangement made between the lessor and the lessee; payments, which might in one sense be regarded as capital, have become income in the hands of the lessor and assessee.

As early as 1907 it was held by the Calcutta High Court that coal royalty received by the lessor was income and assessable to income-tax. Such was the decision in 34 Cal 257[7] in which it was held that an owner of mines (whether worked by himself or lessees) is liable to pay both income-tax and road-cess on the same net profits derived, or royalty received by him from the mines.

6. ('28) 15 A I R 1928 P C 234 = 111 I C 345 = 55 I A 320 = 56 Cal 1 (P C), Bejoy Singh v. Surendra Narayan.
7. ('07) 34 Cal 257=5 C L J 148, Manindra Chandra Nandi v. Secretary of State.

Mookerjee J. discussed some of the English cases to which I have made reference, but eventually came to the conclusion that royalty was income within the meaning of the Income-tax Act then in force, namely, Act 2 of 1886. It has been strongly urged by Mr. P. R. Das on behalf of the assessee that this case was wrongly decided, and he has contended that Mookerji J. misunderstood the position in England. He has argued that the learned Judges held that royalty was income within the meaning of the Indian Income-tax Act, because coal royalties were taxable in England. Mr. Das has pointed out that royalties formed the basis of taxation of minerals in England because of the provisions of Sch. A and R. 3 of that Schedule. But for those provisions, it is contended that royalty would not be taxable because it is in fact the purchase price of coal and not income as observed by the learned lords in the English cases to which reference has already been made. In my judgment, Mookerjee J., did not hold that royalty was income within the meaning of the Indian Income-tax Act then in force because royalty formed the basis of taxation in England. He came to the conclusion that royalty from its nature, though in one sense repayment of capital, was received by the lessor or owner of the minerals as income. There was an appeal in this case to His Majesty in Council but not on the question whether royalty was income.

In 6 Pat L J 62[8] the question whether royalty was income was discussed by the learned Judges, who formed the Special Bench which heard that case, and it was held that income derived from rents and royalties of collieries does not fall within income derived from business under S. 5 (iv), Income-tax Act, 1918, but within income from other sources under cl. (vi) of that Section. Mr. Das has contended and rightly that this case, though decided by three Judges, is not binding on the present Bench, because the question to be decided in this case was really not in issue in the previous case. In that case it appears to have been conceded that royalties were income and the issue was whether they were income derived from business or were income from other sources. At page 67 Dawson Miller C. J. dealt however with the nature of royalties. He observed :

8. ('21) 8 A I R 1921 Pat 103 = 60 I C 357 = 6 Pat L J 62=2 P L T 188=1 I T C 103 (F B), In re Jyoti Prasad Singh Deo.

But I can see no reason why royalties received from mines should be regarded as anything other than income in the ordinary sense. There is no definition of the word income in the Act itself but its meaning as there used can, I think, be determined with sufficient accuracy from a perusal of the Act. Without giving an exhaustive definition it may be described as the annual or periodical yield in money or reducible to a money value arising from the use of real or personal property or from labour or services rendered, bearing in mind that in some cases, e.g., income derived from house property, the yield must be taken as the bona fide annual value and not necessarily as the actual yield.

The question next came for consideration in this Court in 4 Pat 73[9] in which it was held that in so far as a lease is a transaction by which a lump sum is paid under the name of salami for the granting of the lease, the transaction is in the nature of an out and out sale of property and the sum received by the lessor as salami is not income within the meaning of S. 4 of the Act. At page 83 Dawson-Miller C. J. observed :

> Royalties paid to the lessor although they may be regarded in one sense as instalments of the purchase price of the minerals forming part of the land are treated in England as income and have been so treated in this Court. . . . . They are nonetheless income merely because they are paid for rights the exercise of which involves a waste of the capital. As was pointed out by Lord Halsbury, L. C. in (1903) A C 299[3] 'where you are dealing with income-tax upon a rent derived from coal (and the same would apply to royalties) you are in truth taxing that which is capital in this sense that it is a purchase of the coal and not a mere rent', but he adds 'the income-tax is not and cannot be, I suppose, from the nature of things cast upon absolutely logical lines'.

Here is a clear statement by the learned Chief Justice that royalties payable under a mining lease must be regarded in this country as income. A similar view was expressed by this Court in 6 Pat 29[10] in which it was held that income derived from nimak sair (i. e. income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre) is indistinguishable from the rents or royalties arising from the letting of coal or other minerals in the earth, and, therefore, is income from "other sources" within the meaning of S. 12, Income-tax Act. The same view was taken in a more recent case of this Court, 10 Pat 275,[11] in which it was held that sums received on account of royalties for preparing bricks are assessable to income-tax just as royalties on quarries or royalties on coal. Dealing with the observation of Lord Halsbury in (1903) A C 299,[3] Courtney-Terrell C. J. at p. 277 observed :

> That part of the passage which relates to the taxation of rent derived from coal together with the contention that coal is as far as income is concerned the subject of special legislation in England is what is relied upon by the assessee. But an examination of the English Income-tax Act shows that the only justification for saying that coal is the subject of special legislation is that coal is mentioned in that part of the Schedule to the Act which deals with the special method of dealing with certain classes of income derived from land and it is not a specific enactment that coal rents are to be specially taxable. And when Lord Halsbury dealt with income-tax upon the rent derived from coal he was not in that passage dealing with income derived from coal as a matter of special legislation.

It will thus be seen that over a long period of years it has been held in India that coal royalty is income and assessable to income-tax. The contention, however, is that all these cases were wrongly decided ; but Courts in India will naturally be reluctant to dissent from these cases which cover a long period of years. It is to be observed that there is a very material difference between the English Income-tax Act and the Indian Income-tax Act. By Sec. 1, English Income-tax Act of 1918, the tax is charged in respect of all property, profits and gains described or comprised in the schedules and in accordance with the rules applicable to those schedules. What is taxed is all property, profits and gains. By S. 6, Indian Income-tax Act, what is taxed are the following heads of income, profits and gains, namely salaries, interest on securities, income from property, profits and gains of business, profession or vocation, and income from other sources. This last head "income from other sources" has been held to mean income from sources other than those specified previously in that Section. Royalty cannot fall within the heading "income from property" because such income is defined in S. 9, Income-tax Act ; but what has to be decided is whether it is "income from other sources."

These royalties are payable under covenants contained in the various leases granted by the assessee. As I have stated earlier, these leases give to the lessees very wide powers. They have the right to enter on the land, sink pits, win and remove the coal, erect buildings on the surface, make

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9. ('24) 11 A I R 1924 Pat 679 = 82 I C 653 = 4 Pat 73 = 5 P L T 497 = 1 I T C 384, Shiva Prasad Singh v. Emperor.
10. ('27) 14 A I R 1927 Pat 133=100 I C 897=6 Pat 29=8 P L T 359, Mahadeo Ashram Prasad v. Commr. of Income-tax, B. & O.
11. ('31) 18 A I R 1931 Pat 264=133 I C 38=10 Pat 275=13 P L T 14, Janki Kaur v. Commr. of Income-tax, B. & O.

railways, erect coke ovens and manufacture coke. For the sum total of these rights the lessee pays a sum by way of salami or premium and an annual sum computed on the amount of coal raised and the amount of coke manufactured subject always to minimum annual sum fixed in the respective leases. In one sense a part of this annual sum may be regarded as the price of the coal actually removed; but what is paid to the lessor is paid not only for the coal and the right to remove it but also for the other rights granted to him by the lease. No attempt is made in the lease as regards annual payments to differentiate between what is paid merely for the coal or what is paid for the other rights such as the rights to erect buildings, make railways, erect coke ovens and manufacture coke. What is paid is paid for the whole of the rights granted and that is salami and an annual sum payable year after year until the lease comes to an end by effluxion of time or by any other means. It would be very difficult to argue that the minimum royalty payable under these leases is the price of coal, because such would be payable even if no coal was gotten and would be payable even if the royalty calculated on the amount of coal gotten did not amount to the sum fixed as the minimum royalty.

Counsel for the assessee conceded that where no coal was raised the minimum royalty would have to be regarded as income and assessable to income-tax. He however contended that the moment any coal was raised the actual royalty paid on that coal was the purchase price of that coal and if the amount of such royalty did not amount to the minimum royalty then the difference only would be income and chargeable to income-tax. Counsel found it difficult to explain what the minimum royalty was paid for when no coal was raised unless it was paid as rent reserved under the lease. Where the royalty on the coal raised does not amount to the minimum royalty the lessee has to make good the difference to bring the total up to the amount of the minimum royalty. In such a case, counsel contended, that the royalty computed on the actual coal raised was price but he could not explain satisfactorily what the difference between that sum and the minimum royalty represented and what it was paid for. Again a royalty is charged on all hard and soft coke manufactured, and it is impossible to regard this royalty as merely the price of the coal sold to the lessee. The royalty for hard and soft coal is at a higher rate than the royalty paid for coals gotten and sold, and obviously part of this royalty is payable for the right not only of winning the coal and bringing it to the surface but also for converting it on the surface into coke.

Though a portion of the royalty paid may in one sense be regarded as a payment for the coal yet it is, in my view, quite impossible to regard the annual payment as anything else but income in the hands of the assessee. By the various mining leases the assessee transferred to the various lessees certain rights of entering upon his land, sinking shafts, erecting colliery buildings and such like and winning and taking away the coal. In return for those rights he obtained covenants from the lessees by which they bound themselves to pay annual sums for those rights depending upon the amount of coal removed and the amount of coke manufactured and with a minimum which was always payable irrespective of what coal was produced or coke manufactured. By these covenants the assessee in return for the rights and privileges granted assured for himself an annual sum which was never to be less than the minimum royalty and in my judgment such annual sum is income and not a periodic return of capital.

Even if these leases can be regarded in a sense as a sale or transfer of the coal to the so-called lessees that does not conclude the matter. A sale may be made for a price which could properly be regarded as a capital receipt and therefore not assessable to income-tax. Such a transaction would amount to the exchange of one form of capital for another. The consideration for such a sale, however, need not be in the form of capital. A vendor might secure by the terms of the sale an income for himself, and such would undoubtedly be assessable to income-tax. Such was the case in 14 Pat 552.[12] In that case the assessee transferred an estate in consideration of (a) the payment of a lump sum, (b) the discharge of certain debts and (c) the payment to him for life of an annuity of Rs. 2,40,000. By a separate deed the payment of the annuity was made a charge on the lands transferred. The taxing authorities held that this annuity was income and assessable to income-tax. It was held by their Lordships of the Privy

12. ('35) 22 AIR 1935 PC 143=156 IC 856=62 I A 207=14 Pat 552 (PC), Gopal Saran Narain Singh v. Commr. of Income-tax, B. and O.

Council that this annuity was not a capital sum payable in instalments, but income in the hands of the vendor. In that case it had been strenuously argued that these yearly payments were in the nature of payments by instalments of the purchase price; but their Lordships upholding the view of this Court held that the transaction amounted to a transfer of the estate in consideration, inter alia, of the payment of an annual income to the vendor. In short, the vendor by this transaction, secured for himself not only a lump sum payment and payment of debts but an annual income. Similarly, by these mining leases however, they are regarded, the lessor has secured for himself an annual income which is never to be less than the minimum royalty payable under the various leases.

This case must be decided according to the law in force in India, and it has been frequently pointed out by their Lordships of the Privy Council that much reliance must not be placed upon English cases which are decided upon an Income-tax Act which differs in many respects from the Indian Act. I have dealt with the English cases at length in deference to the able argument which has been addressed to us by Mr. P. R. Das, Sir Sultan Ahmed and Sir Manmatha Nath Mukerji. In my view, these mineral leases must be regarded in India as leases and not as sales of coal. The matter was considered in 59 Cal 1314.[13] It had been urged before the Bench in that case that a mining lease was not a lease of immovable property under S. 105, T. P. Act. At page 1329 Mukerji J. observed:

> For certain purposes therefore and in order to consider whether some particular principle or dictum, applicable to leases strictly so called, apply to mining leases, a distinction may have to be drawn since such a distinction undoubtedly exists. But settlements of this character are everywhere regarded as leases and indeed the mortgagor, as well as the appellants, have, as the documents show, dealt with the subject-matter on the footing of its being a leasehold. We are not prepared to regard the settlement as anything else than as a lease though not falling strictly within the definition contained in S. 105, T. P. Act, or partaking of the essential character of a lease within the meaning of the statute.

The question whether a mining lease was a lease within the meaning of Ss. 105 and 108, T. P. Act, expressly arose for decision in 59 Cal 699[14] the facts of which are as follows: By a contract in writing, the appellants were to take a lease for 999 years of the underground coal rights in two mauzas within the respondent's zamindari, and if within two months they failed to do so, "except for the reason of the want of the lessor's title to the said mauzas," a salami of Rs. 34,440 which they had paid, was to be forfeited. After the contract, it appeared that, at some unknown date, an ancestor of the respondent had made brahmottar grants of the mauzas. The appellants called for production of copies of the grants in order that they might be satisfied that they did not include the minerals. The respondent being unable to produce copies, the appellants refused to take the lease, and sued to recover the salami. There was no evidence that the brahmottardars had ever claimed subsoil rights. It was held that, under the contract, the appellants could recover the salami, upon proof that the title to the subject of the lease was not free from reasonable doubt, the test being the same as under S. 25 (b), Specific Relief Act, 1877, upon a suit by a lessor for specific performance, and that the suit failed as they had not discharged that onus; it was not shown that respondent had failed, or was not in a position to perform any of the obligations incumbent upon a lessor under S. 108, T. P. Act, 1882. In that case, Mr. Raikes, K. C., arguing for the appellants, contended that the right of mining contracted for was not a "lease" within S. 105 or S. 108, T. P. Act, 1882; it was really a sale of property out and out. The respondent was, therefore, under the obligations laid down by S. 55, T. P. Act, and not those laid down by Ss. 105 and 108 of the Act. Lord Macmillan, who delivered the opinion of the Board, at p. 708 observed:

> The rights and liabilities of lessor and lessee are defined in the Transfer of Property Act, 1882 (4 of 1882), S. 108. These contrast markedly with the rights and liabilities of buyer and seller as defined in S. 55, particularly in the matter of the requirements as to title which the seller must satisfy. The appellant company has not shown that the respondent has failed, or is not in a position to perform any of the duties incumbent on a lessor under S. 108.

This case clearly holds that a person in the position of the assessee in the present case is a lessor and the duties incumbent on him are those imposed under S. 108, T. P. Act. However these transanctions may be regarded in England, it is, in my view, clear that they are in India leases properly so called. Counsel for the assessee has argued that even if the transactions be

13. ('32) 19 A I R 1932 Cal 775=140 I C 788=59 Cal 1314=36 C W N 709=56 C L J 187, Falakrishna Pal v. Jagannath Marwari.
14. ('31) 18 A I R 1931 P C 299=135 I C 632=59 Cal 699=58 I A 392 (P C), H. V. Low & Co., Ltd. v. Jyoti Prasad Singh Deo.

regarded as leases the royalties paid are nevertheless not rents but the price of coal actually obtained by the lessees. Annual payments which have to be made by the lessee to the lessor constitute rent (*see* S. 105, T. P. Act), and, in my judgment, the annual payments of royalty in this case must be regarded as a rent in the hands of the assessee. If these payments are regarded as rent, then, in my view, they are assessable to income-tax as they constitute income from other sources. It is impossible, having regard to the nature of the transactions, to regard the payments as price of coal, particularly as in each of the leases in the present case large payments have been made as salami or premium. Such payments, as has been done in this case, might be treated as capital payments, and when they are so treated, it is quite impossible to regard the annual payments as other than rent or income payable under the various leases.

For the reasons which I have given, I am satisfied that the royalties received by the assessee in this case constitute income and were rightly assessed to income-tax by the taxing authorities. I would, therefore, answer the first question accordingly. The second question raises no point of law as pointed out by the Commissioner, and should be answered accordingly. I may point out that no argument of any kind was addressed to us upon this question. The assessee must pay the costs of this reference which I would assess at 20 gold mohurs. The Commissioner will also retain the sum of Rs. 100 deposited in this case.

Fazl Ali J.—This is a reference made by the Commissioner of Income-tax, Bihar, under S. 66 (2), Income-tax Act, and the question of law which he has formulated for our decision is as follows :

> Whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax.

The question has arisen with reference to a sum of Rs. 5,32,368-2-10 said to have been received by the proprietor of Ramgarh Raj, on whose application this reference has been made, on account of royalty on coal under certain mining leases held by a number of persons from him during the years of assessment. All these leases were given for a period of 999 years and contain a number of clauses which are usually to be found in a mining lease. Before the Assistant Commissioner of Income-tax the assessee contended that the royalty on mines was in fact the value of the corpus and therefore should not have been taken into account in computing income-tax, super-tax and surcharge leviable on him. The contention being negatived the assessee moved the Income-tax Commissioner under S. 66 (2) and persuaded him to make this reference. In the Transfer of Property Act a lease of immovable property is defined as the transfer of right to enjoy such property. It is contended by Mr. P. R. Das, the learned counsel for the assessee, that the leases under which the royalties are payable to the assessee are in the nature of sale, because they confer upon the lessee not merely the right to occupy the coal lands but to take out coal therefrom. In support of this argument he relies, on the favour, observations of Lord Cairns in (1873) 2 H L Sc 273[1] at p. 284 which are to the following effect :

> Although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is the liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them and to take them away, just as if he had bought so much of the soil.

The other cases cited by Mr. Das in support of this observation were (1881) 6 A C 315,[2] (1883) 8 A C 641[15] and (1903) A C 299.[3] Reliance was also placed by him upon the observations made by the Judicial Committee in 44 I A 246[5] and 55 I A 320[6] to the effect that the essential characteristic of a lease is that the subject is one, which is occupied and enjoyed and the corpus of which does not, in the nature of things and by reason of the user, disappear. The first question to be considered is whether a mineral lease is not in fact a lease but a sale and whether royalty merely represents the price of the coal taken out by the lessee. In my opinion even though the distinction drawn by Lord Cairns between agricultural and mineral leases is by no means to be overlooked, it will be going too far to say that a mineral lease does not at all partake of the character of a lease as that term is ordinarily understood and that there is no difference between a mining lease and a sale of minerals. One of the essential points of distinction between a

15. (1883) 8 A C 641, Campbell v. Wardlaw.

mining lease and a sale of coal land is that while in a mining lease the lessor has the right of reversion, there is no such right of reversion in a sale. The leases which have been printed in the paper-book of this case also contain certain clauses such as the forfeiture clause and the clause as to the surrender of the land which are not found in a deed of conveyance. Another point of distinction is that while in a sale the consideration is the price, in a mining lease we have the price otherwise called premium and the royalty which at least outwardly bears a closer resemblance to rent than to price.

Therefore notwithstanding the fact that the view of Lord Cairns has been re-affirmed in a number of cases the expression "mining lease" is still in common use and has been adhered to in several important English statutes: see the Law of Property Act, 1925, S. 205 and Settled Land Act, 1925, Sec. 117. Under the Roman law, minerals and stones obtained from pits and quarries were regarded as of the character of fruits or profits though not falling within the ordinary comprehension of these words: see observations of West J. in 7 Bom 425.[16] They undoubtedly bear some resemblance to fruits and profits, because it usually takes a long time for a mine to be exhausted and until it is exhausted, it produces a regular and recurring income by the application of labour and capital which is essential for the production of all income including agricultural income. Therefore before Lord Cairns emphasized the distinction between a mining lease and an agricultural lease, no one considered that the expression mining lease was not an appropriate one on the whole; and up to this day numerous documents are drafted in form of a lease and not in the form of a conveyance and in many respects the relationship between the so-called lessor and lessee is governed by the law relating to leasehold property. In 44 I A 246[5] their Lordships of the Privy Council held that a mukarrari lease of lands "with all rights" does not carry a right to the subjacent minerals and then proceeded to observe as follows :

> It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter speciality to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased.

This observation has been greatly relied upon by Mr. Das but in my opinion there is nothing in it to suggest that a lease of lands in which minerals are expressly denominated will not operate as a lease. On the other hand, it implies that a mukarrari lease may carry with it a right to subjacent mineral if adequate words are used therein to cause the mineral rights to be included within it. In (1911) A C 140[17] Lord Atkinson, while recognizing that Lord Cairns had described the true nature of a mining lease, proceeded to hold that a document which purported to be a mining lease "was a lease within the meaning of the Natal Statute XIX of 1884." In discussing the question whether the document required registration in the Deeds Registry he observed as follows :

> The objects of all registration are, among other things, to afford to the public the means of knowing to whom the ownership of the land of a country belongs, what are the interests carved out of it, and what are the charges upon and incumbrances affecting it, so that these owners may discharge the liabilities ownership entails, that those who deal with them may be protected, and in many cases that the transfer to others of their proprietary interests may be easily and inexpensively effected. All these considerations apply as directly and as forcibly to mining leases as to leases of the surface above the mines and there does not therefore seem to be any reason why the Legislature should necessarily exclude mining leases from the operation of the Statute. The words used are general "any lease."

The case however which seems to be more directly in point is that in 59 Cal 699.[14] In that case the appellants had contracted to take from the respondent a lease of the underground coal rights in two mauzas and one of the terms of the contract was that if within a certain period they failed to do so except for the reason of the want of the lessor's title to the mauzas, they would forfeit a sum of money which they had paid as salami. Subsequently they refused to take the lease on the ground that the appellants had previously made Brahmottar grant of the mauzas and sued to recover the salami. It was conceded that there was no evidence that the Brahmottardars had ever claimed sub-soil rights and it was also established that though the appellants had called for production of copies of the grants to Brahmottardars in order to satisfy themselves that they did not include the minerals, the respondent was unable to produce them. One of the grounds which was urged on behalf of the appellants before the Privy

16. ('83) 7 Bom 425, Faki Ismail v. Umabai Bivalkar.

17. (1911) 1911 A C 140=80 L J P C 65=103 L T 682=27 T L R 176, Munro v. Didcott.

Council was that as laid down in (1873) 2 H L Sc 273[1] the mining right contracted for was really a sale of the property and the respondent was under the obligations laid down in S. 55, sub ss. (1) (a) (b) and (2), T. P. Act, 1882. Their Lordships of the Privy Council, however, negatived this contention and pointed out that the rights and liabilities of lessor and lessee are defined in S. 108, T. P. Act, and the appellants had not shown that the respondent had failed or was not in a position to perform any of the duties incumbent on a lessor under S. 108. In my opinion, this decision fully supports the view that the rights and liabilities of the parties to a mining lease will be those of a lessor and a lessee and not those of a vendor and purchaser.

Therefore, on the whole, I am inclined to agree with the view taken by the learned Judges of the Calcutta High Court in 59 Cal 1314[13] that a mining settlement to take coal on payment of royalty is a lease notwithstanding the fact that logically it may also be regarded as a sale in certain respects. The question which still remains to be considered is whether royalty is not essentially the price of the coal taken out, because S. 105, T. P. Act, states that the consideration for a lease also may be "price" as well as "rent." It appears that as long ago as in 116 E R 69[18] Lord Denman expressed the view that royalty "was a sum which, after all such expenses were paid, the occupier could afford to render to the landlord." His observations on this point were these :

> When the case is thus laid bare, there is no distinction between it and that of the lessee of coal mines, of clay pits, of slate quarries : in all these the occupation is only valuable by the removal of portions of the soil : and whether the occupation is paid for in money or kind, is fixed beforehand by the contract, or measure afterwards by the actual produce, it is equally in substance a rent : it is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows.

It appears to me that whatever may be the true nature of royalty, what has been observed in this passage represents the proper view upon which mining leases are based. Besides, as was pointed out in the course of his argument by Sir Manmatha Nath Mukherjee, who appeared for the Income-tax Department, a mining lease is a somewhat complex transaction which confers upon the lessee not only the right to take out coal, but a number of other rights which are incidental to his so doing such as the right of entering upon the surface, digging pits, constructing buildings, etc. etc. What portion of royalty is charged in consideration of these rights being exercised and what portion of it in essence represents the price of coal is often difficult to define. The expression "price" may not also be quite appropriate in every case; because in many instances what is charged as royalty does not represent the actual market-value of the coal extracted. The matter however need not be pursued because in my opinion the problem before us admits of a simpler solution. Let us suppose that the parties to a mining lease meet together and say to themselves as follows : "Whatever may be the true nature of the royalty and whatever may be the correct legal view about it, it suits us that it will be payable as rent and we shall treat it as a rent." I take it that any two businessmen knowing their requirements are free to put their transaction in any form they like and if they do so, it will be idle to say that royalty should still be regarded as the price of the land or minerals.

The leases to which the assessee is a party mention a premium which in some cases at least amounts to a large sum of money. This is undoubtedly in the nature of the "price" referred to in S. 105, T. P. Act. The minimum royalty which is also chargeable under all the leases relied on by the assessee is unquestionably a payment in the nature of rent. If, therefore, the view which we are asked to take on behalf of the assessee is taken by us, the position becomes a somewhat anomalous one. The minimum royalty is chargeable in every case whether the lessee works the mine or not. It is also chargeable where the lessee works the mines but extracts coal below a certain limit specified in the lease. It is only after that limit is exceeded that a royalty other than the minimum royalty is chargeable. The learned counsel for the assessee conceded that where a mine is not worked and minimum royalty is paid, it is "rent"; but he says that if the mine is worked and coal is not extracted beyond the limit fixed in the lease for the payment of the minimum royalty, the minimum royalty becomes partly rent and partly price of the coal taken out. The royalty other than minimum royalty, however, is according to him always price for the coal taken out. In my opinion it is difficult to accept this view, because the leases before us nowhere state that where

18. 116 E R 69, Queen v. Westbrook.

the coal is extracted within the limits for which only the minimum royalty is payable, the minimum royalty shall include the price of the coal, nor does it state at what rate the so-called price is to be charged in such cases. In my opinion the more logical view seems to be that the royalty which is payable over and above the minimum royalty is to all intents and purposes a payment of the same nature and category as the minimum royalty. I am also of the opinion that it is difficult for anyone to find how much of "royalty" represents "price" in the true sense of the term and how much is "money rendered to the landlord" in consideration of the lessee's occupation of the land and exercising the manifold rights without exercising which mining operations cannot be successfully carried out.

I have discussed these points because the learned counsel for the assessee had argued them at considerable length but truly speaking the real question to be considered is whether the payments made in the shape of royalty represent income within the meaning of the Indian Income-tax Act. I think that there is ample authority for the proposition that where a person while selling his property arranges to receive consideration in such a manner as to secure "an income" for himself, the payment made to him will be chargeable to income-tax. In 14 Pat 552[12] Captain Gopal Saran Narayan Singh had transferred an estate to another person in consideration of (a) the payment of a lump sum (b) the discharge of certain debts and (c) the payment to him for life of a sum of Rs. 2,40,000 a year. This payment was to continue as long as Captain Gopal Saran Narayan Singh was alive. It was not denied that the transaction was a sale and logically speaking the payments to Gopal Saran Narayan Singh were in a sense the price of the property sold, but notwithstanding these facts it was held by the Privy Council that the payments made under the document were income in the hands of the vendor. Their Lordships dealing with the contention of the assessee that the sums payable to him in that case were nothing but instalments of the price observed as follows:

> This is clearly no ordinary bargain and sale by a vendor and purchaser at arms length, for the money consideration bears no relation to the actual value of the property. The amount ultimately payable by the purchaser depends upon the life of the vendor. It is, their Lordships think, clearly a case where the owner of the estate has exchanged a capital asset for (inter alia) a life annuity which is income in his hands. It is not a case in which he has exchanged his estate for a capital sum payable in instalments.

Income literally means what comes in and as was observed by Jessel M. R. in a well-known case "it is as large a word as can be used to denote a person's receipts." For the purpose of this case, however, it is sufficient to refer to the following observations of the Privy Council in 59 Cal 1343[19]:

> Income, their Lordships think, in this Act connotes a periodical monetary return "coming in" with some sort of regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. This income has been likened pictorially to the fruit of a tree or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as "capital." But capital though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production.

In my opinion royalty is income, because it is a periodical monetary return coming in with some sort of regularity from a definite source. The mere fact that if the transaction is minutely dissected by a student of political economy, he may say that royalty is merely a form of capital, will not conclude the matter. In fact the distinction made in S. 105, Transfer of Property Act, between premium (otherwise called the price) and rent is also a somewhat artificial one, because in one sense the premium may be regarded as advance rent and rent may similarly be regarded as deferred price. It must be admitted that if royalty is to be regarded as income, then in producing this income a portion of the property is destroyed. That is also not conclusive because capital "is hardly more than an element in the process of production." As was remarked by Farewell L. J. in (1905-11) 5 Tax Cas 424[20] at p. 437,

> the income is not the less income for the purposes of income-tax because it is produced by embarking capital in a wasting subject-matter, for example in buying and working the mines.

In 4 Pat 73[9] Sir Dawson-Miller dealing with the question as to whether royalty is chargeable with income-tax or not observed as follows:

> Royalties paid to the lessor although they may be regarded in one sense as instalments of the purchase price of the minerals forming part of the land are treated in England as income and have

19. ('32) 19 A I R 1932 P C 138 = 136 I C 742 = 59 I A 206 = 59 Cal 1343 = 6 I T C 178 (P C), Commr. of Income-tax, Bengal v. Shaw Wallace & Co.
20. (1905-11) 5 Tax Cas 424, Hudson's Boy Co. Ltd. v. Steven.

been so treated in this Court. They are none the less income merely because they are paid for rights the exercise of which involves a waste of the capital. . . . . At the same time, there is a vast difference between a sum paid once for all for the lease of mineral rights and a rent or royalty paid annually to the lessor. The lessor in this case who holds an unfettered right of disposal would appear, in granting these leases, to have had two objects in view which are distinguishable. In so far as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successors, but with regard to salami it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated out-turn but is paid in exchange for the long term transferred. Possibly it may be objected that the distinction is one of degree rather than of kind, recurring payments at short periods being treated as income and a single payment of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledged in S. 4 of the Act itself and as has been observed, the Income-tax Acts are not cast upon absolutely logical lines.

Again in 6 Pat 29[10] the same learned Chief Justice dealt with the question as follows :

It was further argued with regard to this part of the case that the income derived from the source is really not income at all, but in the nature of a sale of a part of the earth appertaining to assessee's zamindari, in other words, that it was a transfer of one kind of capital into another, namely, the transfer of this particular sort of earth into money. It is, however, of a recurring nature and it is not casual and in such cases it seems to me it is quite impossible to distinguish the rents or royalties, whatever they may be called, arising from the source, from the rents or royalties arising from the letting of coal or other minerals in the earth, or income which arises from the produce of the earth whether it be that on the surface or whether it be that beneath the surface, provided that it is not non-recurring or casual, and provided that it is not in the nature of a sale.

I respectfully agree with these observations and would like to emphasize that if we apply the rough and ready test which has to be applied in the administration of the Income-tax Act which is by no means cast on logical lines, it is difficult to hold that royalty is not income. It must be pointed out that notwithstanding the observations made by Lord Cairns and other Judges in England as to the true nature of a mining lease and royalty, royalty has always been assessed to income-tax in England. It has been contended on behalf of the assessee that this is due to the use of express words in certain rules set out in one of the Schedules of the English Income-tax Act. This argument overlooks the fact that what is taxed in England as well as in India is income and the Schedules merely provide the mode of taxation. This is clear from the following observations made by Lord Macnaghten in (1901) A C 26[21] :

Income-tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income-tax assessed under Sch. D and those assessed under Sch. A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. Sch. A contains the duties chargeable. . . . . In every case the tax is a tax on income, whatever may be the standard by which the income is measured.

Even however if we ignore the practice prevailing in England, there can be no doubt that in this country royalty has always been charged to income-tax and the view which has so far prevailed in the Calcutta High Court and in this Court is that they are properly assessable under the Income-tax Act : *see* 34 Cal 257,[7] 6 Pat L J 62,[8] 4 Pat 73,[9] 6 Pat 29[10] and 10 Pat 275.[11] It is true that in some of these cases the point was not raised strictly in the form in which it has been raised here, but the learned Judges who decided them did express the view that royalty is assessable to income-tax and have given good reasons in support of their view. I would therefore answer the question formulated by the Commissioner of Income-tax as follows:

Royalty on mines upon the terms of the leases relied on by the assessee must be regarded as income and is as such liable to be taxed. In India "royalty on mines" must be regarded as "income from other sources" within the meaning of that expression as used in S. 6 of the Act, because though properly speaking it is income received in relation to property, yet S. 9 of the Act suggests that the tax levied under the head "property" must be confined to property "consisting of any building or lands appurtenant thereto." In this respect there is a distinction between the English and the Indian Income-tax Acts, but as I have already indicated, under both the Acts royalty is income. I thus find myself in complete agreement with my Lord the

21. (1901) 1901 A C 26=70 L J K B 77=83 L T 605=49 W R 686=65 J P 227=17 T L R 131 =4 Tax Cas 265, London-County Council v. Attorney-General.

Chief Justice and I also agree to the proposed order as to costs.

Manohar Lall J. — This is a reference made by the Commissioner of Income-tax, Patna, on 23rd December 1938 under the provisions of S. 66 (2), Income-tax Act (11 of 1922), hereinafter referred to as the Act, asking for the opinion of the Court on the two questions formulated in the letter of reference, namely (1) whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax, and (2) what should be the principle on which the cost of management in collection of royalties is to be determined when there is a combined management covering both the zamindari collection of agricultural income and royalties from the mines? The second question, it will be noticed, is purely a question of fact and the parties did not address any argument on this question. The answer suggested by the Commissioner is correct. It is necessary to give the facts of the case in brief in order to answer the first question. The assessee was assessed to income-tax for the year 1937-38 by the Income-tax Officer by an assessment order dated 10th August 1937, on a total income of Rs. 5,78,817 including a sum of Rs. 5,32,368-2-10 being the amount of royalty received by him from certain mica, coal and limestone quarries from his lessees after giving certain deduction of expense out of this amount of royalty. In appeal the Assistant Commissioner of Income-tax confirmed the assessment by an order dated 14th February 1938. The assessee raised the contention before that appellate authority that as the royalty on the mines was capital revenue the amount should have been excluded in computing his total income for income-tax and super-tax purposes. The contention was overruled and the Commissioner of Income-tax upon being so requested made the reference to this Court under S. 66 (2) of the Act as already stated.

Three leases which were granted by the assessee in the years 1919, 1925 and 1927 are printed in the record; the covenants contained therein are the foundation of the royalty received by the assessee which was made the subject of taxation. The learned counsel for the assessee drew attention to the terms of one of these leases in order to substantiate his argument. As the terms of the leases are similar it is enough to make reference to the relative provisions in one of the leases, namely the lease of 3rd April 1919. In that lease (so far as is relevant to the present controversy) it is stated that

> in consideration of the salami or premium rupees thirty-seven thousand and forty (being at the rate of rupees forty per standard bigha on nine hundred and twenty-six bighas) in respect of the premises the assessee granted to the lessee the underground coal mine rights under the lands specified therein in order that the lessee may "search for work, make merchantable and carry away the coal there found" on paying therefor by monthly payments in each year a royalty on all coal and coke raised and despatched at the rate of four annas per ton with the provision for the payment of a minimum royalty at the rate of Rs. 5 per annum per standard bigha of land whether coal shall be raised or not.

The argument advanced before this Court was that what is called a lease of coal land is in reality the sale of coal belonging to the assessee and therefore the royalty thus received by the assessee under the terms of these leases is merely the purchase price of his coal and not income which can be assessed to income-tax. It was admitted that the authorities in the Calcutta High Court and this Court ever since the case in 34 Cal 257[7] have taken a contrary view but Mr. P. R. Das, who appeared for the assessee, seriously challenged the correctness of those decisions on grounds which will be examined hereafter. This Full Bench has been constituted to consider this question. In arguing the case before this Court Mr. Das ignored the warning given by Sir George Lowndes when delivering the judgment of their Lordships of the Judicial Committee in the well-known case in 6 I T C 178=59 I A 206[19] and let loose in this Court a flood of decisions which were based upon the construction of the English Income-tax Statutes and of the English and Scotch laws relating to coal mining leases. I refer to the passage at page 180 :

> Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-tax Statutes, both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board.

It was pointed out in that case as well as in other decisions of their Lordships that the Indian Income-tax Act is not in pari materia with the English Income-tax Act, and that

> it is less elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal.

This practice of referring to the English decisions and ignoring the Indian law on the subject was also severely condemned by their Lordships of the Judicial Committee

in 57 I A 110.[22] Sir John Wallis in delivering the judgment of the Board made this observation at page 114 :

The question having arisen in India, it has, of course to be decided in accordance with the law, not of England, but of India; it does not however seem to have occurred to anyone in the Courts below to see, in the first place, before resorting to English decisions, whether under the law of landlord and tenant in India a sublease by a lessee for the unexpired residue of the term operates as an assignment of the term. That law is to be found in the Transfer of Property Act, 1882, which has now been in force for nearly half a century. Though founded on English law, and drafted in the first instance by eminent lawyers in England, it has only applied the English law in so far as it was considered applicable to India. It is not surprising to find that the rule, arising out of the special conditions of land tenure in England, that a conveyance to operate as a lease must reserve a reversion to the lessor finds no place in the Act.

And then his Lordship proceeded to refer to Ss. 105 and 108, T. P. Act, and applied the provisions stated in those Sections to decide the question in controversy before their Lordships. I therefore propose to answer the question without any reference to the English and the Scotch decisions but by reference to the Indian Statutes only. It cannot be denied that the object of the Indian Act is to tax income, a term which it does not define. It would be useful to bear in mind the observations made by Sir George Lowndes in 59 Cal 1343[19] that

an income in this Act connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The course is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as "capital". But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production.

In India we are governed by the provisions of the Transfer of Property Act, 1882. In S. 105 a lease of immovable property is defined to be a

transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms;

and then in the following clause it is expressly stated that the price so paid in consideration of the transfer is called the premium and the money, share, service, or other thing to be so rendered is called the rent. The coal mining lease of 1919 in the present case satisfies all the requirements of this section. The assessee has received a salami or premium and has also provided for a periodical payment to him of money which is rent as defined by S. 105. But Mr. Das argued that as the subject-matter of the lease is coal and as the lessee cannot enjoy this property but must in the very nature of things destroy it, there cannot be any lease of coal mines in India within the meaning of the Transfer of Property Act and submits that, call it by whatever name you will, the transaction called the lease of 1919 is nothing more than a sale of or an agreement to sell coal. He relies upon the well-known Scotch case in (1873) 2 H L Sc 273[1] and certain other cases decided in England. In my opinion this argument is fallacious. The "right to enjoy such property" which is spoken of in S. 105 means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject-matter of the lease is coal land it can only be enjoyed and occupied by the lessee by working it as indicated in S. 108, T. P. Act, which regulates fully the rights and liabilities of lessors and lessees in this country. That this is so appears to be supported by the observation of their Lordships of the Judicial Committee in a number of cases. In 58 I A 29[23] a dispute arose between the zamindar and a coal company who held a mukarrari lease of a certain village and believed that they were entitled to the subjacent minerals in which they openly carried mining operations for 12 years. The zamindar on the other hand contested this claim on the ground that the lessor of the coal company had no right to grant a lease authorising the company to work coal. Lord Macmillan who delivered the judgment of their Lordships made this observation at p. 35 which is very germane to the present discussion :

In considering the character and effect of acts of possession in the case of a mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth, it is not possible to take actual physical possession at once of a whole mineral field: it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must necessarily be partial.

The question in the form in which it was argued by Mr. Das was argued boldly by

22. ('30) 17 A I R 1930 P C 59 = 122 I C 20 = 57 I A 110=57 Cal 1176 (PC), Hunsraj v. Bejoy Lal Seal.

23. ('31) 18 AIR 1931 P C 186=130 I C 315 = 58 I A 29 = 10 Pat 407 (P C), Nageshawar Bux v. Bengal Coal Co.

the learned counsel for the appellants in 58 I C 392[14] a case not cited at the bar. The facts of that case were-that by a contract in writing the company were to take a lease for 999 years of the subjacent coal rights in two villages within the zemindary of the respondent and if within two months they failed to do so except on account of want of title of their lessor in these villages, the salami which they had deposited was to be forfeited. The lessees refused to take the lease upon the ground that they were not satisfied with the title of their lessor owing to certain transactions which had taken place with some brahmottardars. In these circumstances the question arose whether the contract should be treated as a contract for lease within the meaning of Ss. 105 and 108, T. P. Act, or as a sale within the meaning of the English and Scotch decisions so as to make S. 55, T. P. Act, applicable. Mr. Raikes, the learned counsel for the appellant, actually argued that the mineral right contracted for by the company was not a lease within the meaning of Ss. 105 and 108, T. P. Act, but was really a sale of property out and out and relied upon the case in (1873) 2 H L Sc 273,[1] the Scotch case referred to above, and the House of Lords' case in (1883) 8 A C 641.[15] He, therefore, argued that the proprietor was under the obligation laid down in S. 55, T. P. Act, and relied upon sub-s. 1 (a) (b) and sub-s. 2 of that section. Mr. Upjohn for the respondent replied to this argument in these words:

> There is no ground for the suggestion that S. 55 and not S. 108 applied. The cases cited for the view that the contract was for a sale, not a lease, related to the law in Scotland. Even a mukarrari pottah is not to be regarded as a conveyance of the fee simple.

Lord Macmillan who delivered the judgment of their Lordships expressly held at page 401 that

> the rights and liabilities of lessor and lessee are defined in the Transfer of Property Act (4 of 1882), S. 108. These contrast markedly with the rights and liabilities of a buyer and seller as defined in S. 55, particularly in the matter of the requirements as to title which the seller must satisfy. The appellant company has not shown that the respondent has failed, or is not in a position, to perform any of the duties incumbent on a lessor under S. 108.

In my opinion, this decision is a clear answer to the argument which Mr. Das was painfully evolving by relying upon the English and Scotch decisions and the dictum of several other eminent Judges in England based upon the view that what is called a coal-mining lease in England is really in the nature of an out and out sale. However attractive this description of the coal mining lease may be in England and in Scotland or in the language of economists, I am content to rely upon the decisions of their Lordships of the Judicial Committee where they have authoritatively held that a coal-mining lease in India is governed by Ss. 105 and 108, T. P. Act, 4 of 1882. In 36 I A 148[24] the question which arose inter alia for decision was whether the suit which was instituted to eject the defendants from the possession of under-ground rights of a village which was granted in mokarrari by the preceding mahant was or was not barred by limitation. Sir Andrew Scoble in delivering the judgment of the Board made this important observation at p. 166:

> Statutes of Limitation, like all others, ought to receive such a construction as the language, in its plain meaning imports: 13 Beng L R 177[25] at p. 182.

Now, what is the plain meaning of the words "purchased for a valuable consideration"? They mean that the ownership of the property sold has been absolutely transferred from the vendor to the purchaser in consideration of a price paid or secured by the purchaser to the vendor. Sir Robert Finlay, in his able argument for the respondents, contended that a mokarrari lease is tantamount to a conveyance in fee simple, and that the lessee must, therefore, be treated as a purchaser within the meaning of the Limitation Act. But the distinction between the two transactions has been well pointed out by Jenkins J., in his judgment in 24 Cal 440.[26] "Because at the present day" says the learned Judge,

> a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in a perpetuity here has any such result . . . . . The law of the country does undoubtedly allow of a lease in perpetuity . . . . . A man who, being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest. This result is to be inferred by the use of the word lease, which implies an interest still remaining in the lessor.

This quotation was cited with approval by Sir Lancelot Sanderson in 55 I A 320,[6] a case involving the construction of a patni lease. In that case it was pointed out by Sir Lancelot Sanderson who delivered the judgment of their Lordships at p. 328, that the

24. ('09) 36 Cal 1003=4 I C 449=36 I A 148=14 C W N 1=10 C L J 284 (PC), Abhiram Goswami v. Shyama Charan Nandi.
25. ('74) 13 Beng L R 177=20 W R 375=2 Suther 897 (PC), Luchmee Buksh Roy v. Runjeet Ram.
26. ('97) 24 Cal 440=1 C W N 321, Kally Dass v. Monmohini Dassee.

grant of 18th July 1853 was clearly a lease, and the intention of the parties is to be gathered from the terms of the grant, and if it be found that the grantee or his assigns is using the subject of the lease in a way not contemplated by the grant, the fact that it was made in accordance with the terms of Regn. VIII of 1819 is not sufficient to prevent the plaintiff from suing for the purpose of obtaining an injunction to restrain such user. The question still remains, what was the subject of the lease?

Mr. Das relies upon the passage towards the end of this page where his Lordship in referring to the case in 44 I A 246,[5] stated that:

> In that case attention was drawn to the point that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear.

But the fallacy of this argument of Mr. Das becomes apparent if the succeeding lines are perused where it was stated that the intention of the parties as to what was the subject and extent of the lease must depend upon the true construction of the terms of the grant and that it did not contain any reference to minerals or to the subsoil or to the right to excavate for making bricks and there was nothing to suggest in the lease that the land included therein was to be put to any use other than that to which the zamindari lands were subject at the time of the lease. Upon a consideration of all the terms of the lease his Lordship came to the conclusion that

> it was not intended by the parties that the grantee should be entitled to use the lands for the purpose of making bricks.

It will be seen, therefore, that a lease can be granted where a lessee intends to use the land for the purpose of making bricks. Now the use of the land for the purpose of making bricks must in the very nature of things result in the destruction of the thing used and would cause subsequent damage and deterioration to the property leased. In this view it will be perhaps unnecessary to refer to the other cases but as Mr. Das strongly relied upon the case in 44 I A 246[5] it is but right that I should deal with this case. In 44 I A 246[5] the question which arose for decision was whether a mokarari lease of lands "mai hak hakuk," that is, with all rights, carries a right to the subjacent minerals. Lord Shaw who delivered the judgment of the Board observed at p. 250:

> It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specially to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased.

It will be noticed that his Lordship points out that the subject "leased" can be permitted to be partially consumed if it is so expressly stated in the document. In my opinion this decision negatives the argument of the assessee. The case in 37 I A 136[27] is also a case of coal mining lease. The truth of the matter as was pointed out by Lord Collins, who delivered the judgment of their Lordships, is that the rights of mining, fishing, and other incorporeal rights are included in the proprietorship of the zamindar and he is at liberty to grant leases of those rights. Before referring to the Indian income-tax cases which were cited before us it is necessary to clear the ground by pointing out what is the true import of the rule that in income-tax cases the substance of the matter should be looked at and that its form should be disregarded because Mr. Das strongly relied upon this rule and asked us to hold that the substance of the matter in the present case was that the assessee was receiving money as the purchase price of the coal, the right to extract which he had parted with temporarily in favour of the lessee. Pollock M. R. thus expressed himself as to this rule in (1928) 12 Tax Cas at p. 690[28]:

> It is a well-recognized principle that, in revenue cases regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty, and that the form may be disregarded.

Similarly, Lord Hanworth M. R. in (1930) 14 Tax Cas 608[29] at p. 619 observed:

> For the purposes of the revenue the substance of the matter must be regarded. It matters not whether in the contract it is, or is not, called as annuity. If in truth and in fact it is an annuity no dressing of the transaction can alter its character. Stripped of its form, the transaction is a method of saving up money for future use.

But it is impossible for a Court to ignore altogether the form in which the parties have chosen to express their contract. In (1895) A C 471[30] at p. 475 Lord Herschell L. C. stated:

> My Lords, it is said that the substance of the transaction evidenced by the agreement must be

27. ('10) 37 Cal 723=6 I C 785=37 I A 136=11 C L J 653=14 C W N 746 (P C), Hari Narain Singh v. Sriram Chakravarti.
28. (1928) 12 Tax Cas at p. 690, Westleigh Estates Co. Ltd.
29. (1930) 1 K B 107=14 Tax Cas 608=98 L J K B 683=45 T L R 621=142 L T 29, Perrin v. Dickson.
30. (1895) 1895 A C 471=64 L J Q B 465=11 R 232=72 L T 841=43 W R 561=60 J P 20, Helby v. Matthews.

looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement.

In 14 Tax Cas 34[31] Lord President Clyde made this important observation at page 41:

A great deal has been said about form and substance. I think that, in a question of this sort, both form and substance must be considered; because the form of the transaction by which the respondent acquired the right to dump waste soil may bear very materially on the question of the capital or revenue character of the outlay made to acquire it.

Lords Sands agreed at p. 42 in these words:

In a matter of this kind one cannot altogether ignore form. When parties contract in certain forms different results may flow according to the form of the contract, however, little difference there may be in substance. Here the parties have chosen to contract in a certain way which in certain relations and particularly as regards the consequences of breach of contract or liability for local rates might have a result different from that of a contract for an annual payment without any reference to a capital sum. I think that we must take the contract as we find it to be a contract for a lump sum payable by instalments.

Lord Tomlin in delivering his opinion in the now famous case in (1935) 19 Tax Cas 490[32] protested against the limit to which this doctrine of the substance of the matter was being pushed and observed at p. 520:

Apart, however, from the question of contract with which I have dealt it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter" and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages and that, therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight mete wand of the law" (4 Inst. 41).

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

The principal passages relied upon are from opinions of Lord Herschell and Lord Halsbury in your Lordships' House. Lord Herschell L. C. in (1895) A C 471,[30] observed at p. 475: "It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree," but he went on to explain that the substance must be ascertained by a consideration of the rights and obligations of the parties to be derived from a consideration of the whole of the agreement. In short, Lord Herschell was saying that the substance of a transaction embodied in a written instrument is to be found by construing the document as a whole.

Support has also been sought by the appellants from the language of Lord Halsbury L. C. in (1903) A C 299[3] at p. 302. There Lord Halsbury said, "Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), this is not the case of a purchase of an annuity." Here again Lord Halsbury is only giving utterance to the indisputable rule that the surrounding circumstances must be regarded in construing a document.

Neither of these passages in my opinion affords the appellants any support or has any application to the present case. The matter was put accurately by my noble and learned friend Lord Warrington of Clyffe when, as Warrington L. J. in (1921) 1 Ch 475[33] at p. 489, he used these words: "It is said we must go behind the form and look at the substance. I do not look at the substance, but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into." It is unnecessary to state that there may, of course, be cases where documents are not bona fide nor intended to be acted upon but are only used as a cloak to conceal a different transaction and it is in those cases that the Court will look to the substance of the transaction and not the form in which the transaction is dressed.

Singleton J. in (1935) 19 Tax Cas 455[34] put this matter very clearly at p. 465: "If I had been free to form my own opinion as to what was contemplated at the time of entering into the agreement, I am by no means satisfied that I should have arrived at the same conclusion; but I am not at liberty to deal with the matter on my conception of what the parties intended. I must look at the documents; and I cannot, under the plea of looking at the substance of the matter, rewrite the contract between the parties."

The Courts have not hesitated to tear down deeds if they are cloaked to shield a wholly different arrangement but only where the deeds are not genuine and are attempted to hide different transactions. The quotations from the judgment of the Master of the Rolls in (1935) 19 Tax Cas 490[32]

31. (1928) 14 Tax Cas 34 = 1928 S C 738 = 1928 S C L T 476, Inland Revenue Commrs. v. Adam.
32. (1935) 19 Tax Cas 490=104 L J Q B 383=153 L T 223=79 S J 362=51 T L R 467, Inland Revenue Commrs. v. Duke of Westminster.
33. (1921) 1 Ch 475=90 L J Ch 335=124 L T 681 = 65 S J 291=37 T L R 308, In re Hinckes, Dashwood v. Hinckes.
34. (1935) 19 Tax Cas 455, Earl of Carnarvon v. Inland Revenue Commissioners.

given by Singleton J. at page 466 are instructive:

> Certain definite considerations arise and must be stated upon these deeds. It is not suggested that they are all part of a device or stratagem improperly entered into for the purpose of defeating a proper charge under the Income-tax Act. Their genuine nature is not impugned.

And a little later he observed:

> It appears to me that the only way in which you can reach the conclusion adopted by the Commissioners is by throwing aside the deeds, and I see great difficulty in throwing them aside temporarily during the time when services are rendered to the appellant, and recognizing them as valid and subsisting during all other times, whether present or future. It seems to me that, unless you are able to tear down these deeds as a cloak to shield a wholly different arrangement, you must accept them and, when you have accepted them, you have got a case in which the covenantor has bound himself to make these annual payments to the covenantee, and the covenantee, being the recipient, is bound, etc.

In the same case Slesser L. J. stated:

> But yet, as Mr. Greene has pointed out, when you have looked at the whole of the substance, you are still to look at it from the point of view of the law and see what the effect is as a legal relation;

and Romer L. J. said:

> The legal effect of the contract as it stands must be ascertained and not what would or might be the legal effect if the words of the contract be disregarded and the substance of the matter be considered.

It is unnecessary to multiply references to other English decisions. It may be noticed that I have not hesitated to refer to English decisions on this topic because the principle that the form and not the substance of the matter should or should not be disregarded is not a principle which is to be found in the English Income-tax Act alone but is a principle which is common to all system of jurisprudence. If then the substance of the matter as laid down by the cases which I have been just considering is looked at it is clear that the lessee has covenanted with the assessee to pay him an annual sum by way of rent for the lease of his materials, a minimum is fixed and the mode of calculation of the annual sum is provided in circumstances in which the minimum is to be exceeded. The assessee in the present case like the assessee in 4 Pat 73[9] holds an unfettered right of disposal and in granting these leases so far as rent and royalty are served, he is founding an annual increment to the income of the Raj for himself and his successors for a period of 999 years.

Mr. Das, when the question was put to him as to whether a minimum royalty would be taxable if no coal was extracted by the lessee, conceded that it would be taxable; but he argued that in case the minimum royalty was paid on the extraction of a small amount of coal then income-tax would be payable on this amount less the price of the coal extracted—the price of coal, it may be noticed, is not the price at the date of the extraction but it is fixed for all times at 4 annas a ton. He also argued that where the royalty received exceeds the minimum royalty, the Income-tax Officer should be directed to find out the value of the coal extracted and deduct it from the royalty received in the year. It seems difficult to accept this argument and as Sir Manmatha Nath Mukherji, who appeared for the Commissioner of Income-tax, argued if once it is conceded that a minimum royalty was taxable the whole argument of Mr. Das seems to disappear. How could the character of the amount paid by the lessee for the use of the mines change so violently the moment the minimum limit is exceeded?

I now briefly refer to the Indian cases upon this topic. The earliest case is the case in 34 Cal 257[7] which has been considered up to now to be the leading case on the taxability of royalties on coal mines so far as it decided (sic) the liability of the proprietor for cesses (the view has been affirmed by the Judicial Committee on an appeal from the decision.) Mr. Das argued that this decision was erroneous because Mookerjee J. failed to notice that in England royalty is made taxable expressly by statute or by the schedules of the various Income-tax Acts that have been passed from time to time. I do not wish to embark upon an investigation of the English law for the reason already stated but I am unable to hold that Mookerjee J. based his decision merely upon the English law and the English decisions. There are a number of cases of this Court which negative the argument advanced by Mr. Das. In 1 I T C 103=6 Pat L J 62[8] it was held that income derived as rents and royalties is not income derived from business within the meaning of S. 5 (iv), Income-tax Act. The case in 34 Cal 257[7] was followed.

In 1 I T C 384,[9] already referred to, the question which arises in the present case was directly decided in favour of the income-tax department. In 6 Pat 29[10] one of the questions which arose for decision was whether income received from Nimak sair, that is income from the settlement of

the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre was taxable. It was held that this income was in no way distinguishable from the rents or royalties arising from the letting of coal or other minerals in the earth and was therefore taxable under the heading "other sources" within the meaning of S. 12 of the Act.

In 10 Pat 275[11] the assessee was held to be taxable on the income which he received as royalties for preparing bricks as this income is similar to royalties on quarries or coal and it was pointed out that the lessee who was in the nature of a licensee had the right to go upon the land to erect brick kilns and make bricks there and to take all the materials that he wants for the making of his bricks from his land and in respect of that license he is only liable to pay rent which is to be calculated at a specific rate which bears relation to the extent of his user of the licence; and if the brick-maker carries on his business until all the earth is exhausted, the land will still remain in the ownership of the licensor, possibly diminished in value, possibly unaffected in value and possibly even increased in value according to the special circumstances which may prevail at the termination of the period and it is in no sense a capital sale of the land itself. So here. The lessee of the coal mine has a right to go upon the land to search for and extract coals from there and in respect of that license he pays rent or royalty which is to be calculated at a specific rate which bears relation to the extent of the user of the license and it may be that during the course of the license all the coals may be exhausted. But this is what the parties has actually contemplated.

Lastly reference should be made to the well-known Tikari case of this Court which was affirmed by their Lordships of the Judicial Committee in 14 Pat 552.[12] In that case the assessee had transferred his zamindary to Rani Bhubaneshwari Kuar in consideration of the payment of a lump sum, the discharge of certain debts, and the payment to him for life of an annuity of Rupees 240,000, the annuity being made a charge on the lands transferred. It was contended on behalf of the assessee that the substance of the transaction and not the mere form in which it was dressed should be looked at and that the assessee had expressly sold the zamindary and, therefore, what he was receiving in return was nothing more than the purchase price which, he had agreed with the vendee, should be paid to him in return for his zamindary. Lord Russell who delivered the judgment of their Lordships decided the case upon the construction of the indenture of the sale dated 29th March 1930 and refused to ignore its plain language and held that the transaction clearly shows that the owner of the estate had exchanged a capital asset for (inter alia) a life annuity which is income in his hands and that it is not a case in which he has exchanged his estate for a capital sum payable in instalments. From the judgment at p. 559 it appears that reference was made before the Board to various decisions upon the taxing Acts of other countries which are couched in different terms and framed upon different lines but it was observed that their Lordships

> content themselves with repeating the view expressed in the judgment of the Board above referred to namely the case in 59 Cal 1343,[19] that little can be gained by trying to construe an Income-tax Act of one country in the light of a decision upon the meaning of the income tax legislation of another.

Having considered the case anxiously I am satisfied that what the assessee receives as royalty from his lessees is not the purchase price of his coal but is rent paid by the lessees under the covenants of the leases. For these reasons, I am of opinion that the first question should be answered in the way suggested by the Commissioner of Income-tax. I would allow the Commissioner twenty gold mohurs as the costs of this Court. The Commissioner will be entitled to retain the sum of Rs. 100 which had been deposited with him by the assessee.

By the Court. — The questions are answered as follows: (1) The royalties received by the assessee in this case constitute income and were rightly assessed to income-tax by the taxing authorities. (2) This question raises no point of law, and we answer it in the manner suggested by the Commissioner. The costs of this reference will be paid by the assessee, and we assess the same at twenty gold mohurs. In addition the Commissioner will retain the sum of Rs. 100 which has been deposited in this case.

D.S./R.K. *Answer accordingly.*

* A. I. R. 1940 Patna 653

HARRIES C. J. AND MANOHAR LALL J.

Ramrup Rai —*Defendant*— Appellant.

v.

Firm Mahadeo Lal Nathmal —

Plaintiffs — Respondents.

Appeal No. 73 of 1937, Decided on 23rd January 1940, from original decree of Sub-Judge, Bhagalpur, D/- 31st March 1937.

*** (a) Civil P. C. (1908), O. 21, Rr. 58 and 63 — Decree-holder realising hopelessness of resisting claim in summary proceeding under O. 21, R. 58 consenting to claim being allowed — He is not precluded from bringing suit under O. 21, R. 63.**

A party who makes an admission for certain purposes in summary proceedings does not necessarily admit the correctness of the claim of the other party. He may be compelled in summary proceedings to admit the claim, but that does not mean that he admits it for all purposes. A party who realizes the hopelessness of resisting a claim in summary proceedings and consents to the claim being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under O. 21, R. 63. The fact that a party actually invites an order to be made against him does not render him any less a party against whom an order is made: *AIR 1915 Mad 1128, Approved; A I R 1926 Lah 348, Disapproved.* [P 654 C 2; P 655 C 1, 2]

(b) Estoppel — Statute.

There can be no estoppel against a statute. [P 658 C 1]

S. M. Mullick and Nawal Kishore Prasad II — *for Appellant.*

Dr. D. N. Mitter, G. C. Mukharji and Prem Lall — *for Respondents.*

Harries C. J. — This is an appeal by defendant 1 from a decree of the learned Subordinate Judge of Bhagalpur decreeing the plaintiffs' claim that certain property was liable to attachment and sale in execution of a decree held by the plaintiffs against defendants second party. The plaintiffs obtained a decree against the defendants second party on the original side of the Calcutta High Court, and the decree was transferred to the Court at Bhagalpur for execution. The plaintiffs then filed Execution Case No. 173 of 1933 in the Court at Bhagalpur against the defendants second party for realisation of Rs. 24,004 odd and attached the properties now in suit. After the attachment defendant first party filed a claim case No. 63 of 1934 alleging that the said property had been purchased by him, and on 14th July 1934, this claim of defendant first party was allowed. There appears to have been no contest and the present plaintiff agreed that the claim should be allowed apparently without any investigation. The plaintiffs then instituted the present suit under the provisions of O. 21 R. 63, Civil P. C., claiming a declaration that the purchase by defendant first party was a farzi, fraudulent and colourable transaction and that the property really belonged throughout to defendants second party and as such was liable to attachment and sale in execution of the decree held by the plaintiffs against defendants second party.

The learned Subordinate Judge came to the conclusion that the properties in suit really belonged to defendants second party and decreed the plaintiffs' claim with costs. The facts of the case can be shortly stated as follows: The defendants second party were persons of substance owning considerable properties. They defaulted in payment of road cess, and on 7th March 1932, an eight annas share in touzi No. 3074 in mauza Gobindpur Kosli was put up for sale and purchased by defendant first party. On 7th May 1932, this sale was confirmed, and on 13th February 1933, defendant 1 obtained delivery of possession. On 24th February 1932, a twelve-annas share of tauzi No. 3495 of mauza Gobindpur Kosli was also put up for sale for default by the defendants second party in payment of the road-cess, and this share was also purchased by defendant 1. On 25th April 1932, the sale was confirmed, and on 13th February 1933, defendant 1 obtained delivery of possession of the same.

In 1933 the plaintiff obtained his money decree against the defendants second party and attached the two shares which had been the subject-matter of the rent cess sales. As I have stated, defendant first party preferred a claim under O. 21, R. 58, Civil P. C., alleging that he was the owner in possession of the shares in question, and his claim was allowed on 14th July 1934. It has been contended by the appellants that this suit is not maintainable. It is urged that as the claim of the defendant under O. 21, R. 58, Civil P. C., was allowed by consent, the plaintiff cannot maintain a suit under O. 21, R. 63. The actual order allowing the claim of the defendant first party is in these terms :

> The opposite party in case No. 63/34 asks the Court to allow the claim petition and the claimant also does not press for costs. Claim case No. 63 is allowed without costs.

There can be no doubt that the present plaintiff who was the opposite party in the claim case did not contest the claimant's claim and in fact invited the Court to allow it, and for that reason the claimant gave

up his right to costs. It has been argued that a suit under O. 21, R. 63, Civil P. C., is in the nature of an appeal to set aside the summary order passed in the proceedings under O. 21, R. 58, Civil P. C. As the summary order was passed by consent, it has been strenuously contended that no proceedings in the nature of an appeal to reverse such an order can be entertained. It is important to consider the position of the parties in the summary proceedings under O. 21, R. 58, Civil P. C. The present plaintiffs had attached certain properties which undoubtedly stood in the name of defendant 1. They could only maintain their right to attach and sell those properties if they could show that defendant 1 was merely a benamidar for defendants second party. It has however been laid down rightly or wrongly by this Court that an executing Court cannot go into the question as to whether a transaction is benami or not in summary proceedings under O. 21, R. 58. In 5 P L T 107[1] Das J. held that a Court was not entitled to go into a question of benami in a case arising under O. 21 R. 58 or R. 100. At page 108 the learned Judge observes :

The question raised in Civil Revision No. 219 of 1923[1] is, whether the learned Subordinate Judge was entitled to consider the question of benami in an application under O. 21, R. 100. It has been held in a series of cases that in a claim case arising under O. 21, R. 58, the Court is not entitled to go into a question of benami. The finding of the learned Subordinate Judge in this case that the applicant was the benamidar of Kali Prashad is based on reasons which are entirely speculative. In my opinion, the learned Subordinate Judge was not entitled to go into a question of benami in order to determine whether the applicant was in possession of the disputed property in his own right.

A similar view was expressed by Fazl Ali J. in A I R 1929 Pat 273.[2] At p. 274 the learned Judge observes :

Now it is contended by the learned advocate for the petitioner that it was necessary for the learned Subordinate Judge to have gone into the question as to whether the sale deed was genuine or collusive, because without going into the question he could not have properly decided as to whether the claimant was in possession of the property on his own account or in trust for the judgment debtor. The contention of the learned advocate is not without some force, but at the same time it must be remembered that it has been repeatedly held that in a claim case arising under O. 21, R. 58, the Court is not entitled to go into the question of benami.

It has been argued by counsel for the respondents that these cases and others preceding them are wrongly decided, but it is unnecessary for me to express any opinion in this case. One thing, however, is clear and that is that this Court has laid down that in proceedings under O. 21, R. 58 of the Code the executing Court is not entitled to go into the question as to whether a transaction is or is not benami. These cases are binding on the lower Courts and are well known to all the practitioners and Judges of those Courts. That being so, it is clear that the plaintiffs in the present case could not hope successfully to resist the claim of defendant 1 in the claim case. He could only resist that claim by inviting the Court to go into the question as to whether the purchases were benami, and this the Court could not do by reason of the law as laid down by this Court. In such circumstances, the plaintiffs might well have asked the Court to allow the claim in order to enable him to contest the correctness of the decision in a suit instituted under O. 21, R. 63, Civil P. C. No evidence was adduced in this case as to what transpired in the execution Court; but the form of the order strongly suggests that all that happened was that the plaintiffs, realizing the impossibility of contesting the claim in those proceedings, asked the Court to pass the order which it would be bound to pass to enable them to bring proceedings under O. 21, R. 63, Civil P. C., without delay. There is nothing in the form of the order passed to suggest that the plaintiffs ever gave up their right to contest the matter by means of a suit.

The admission of the plaintiffs appears to me to be merely an admission for the purposes of the summary proceedings under O. 21, R. 58, Civil P. C. He was anxious that the claim should be allowed in that Court so that he could bring appropriate proceedings to challenge the nature of the transactions. Such a course is frequently followed in Appellate Courts where an appellant knows that he cannot succeed in a particular Court by reason of a decision binding on that Court. He frequently mentions his point and informs the Court that it is useless arguing and invites the Court to dismiss his appeal in order that he can appeal to a higher Court to challenge the correctness of the decision binding on the lower Court. In my view a party, who makes an admission for certain purposes in summary proceedings, does not necessarily admit the correctness of the claim of the

1. ('24) 11 A I R 1924 Pat 506=83 I C 599=5 P L T 107, Ram Kishun Singh v. Damodar Prasad.
2. ('29) 16 A I R 1929 Pat 273=119 I C 909, Ganesh Lal v. Mahabir Sahu.

other party. He may be compelled in summary proceedings to admit the claim, but that does not mean that he admits it for all purposes. In my view the admission in this case must be confined to the proceedings in which such admission was made, and as there is nothing to show that the plaintiffs ever gave up their rights to question the decision of the claim case, they can maintain the present suit under O. 21, R. 63.

Counsel for the respondents strongly relied upon the case in 7 Lah 235.[3] In that case the property in dispute was attached in execution of a decree, and the attachment was objected to by the judgment-debtor's brothers. Before the executing Court could give its decision on the objection decree-holder applied for release of the property, stating that he would bring a regular suit to have it declared liable to attachment and sale and then brought the suit. It was held that when an objection was made under O. 21, R. 58, it was not open to the decree-holder to refrain from contesting the objection, to withdraw the attachment and then to bring a suit under O. 21, R. 63, Civil P. C. The rule contemplates that the objector's claim is accepted or disallowed by the executing Court and it is only the party against whom the order was made who may institute a suit to establish the right he claims to the property. It was further held that the rule precluded all suits except the one allowed by the rule and therefore the suit was not competent under any other provision of the law. At p. 237 Zafar Ali J. observes :

> The question therefore is whether it is open to a decree-holder to withdraw the attachment and then to bring a suit under R. 63. We are of opinion that it is not. R. 63 contemplates that the attachment was objected to and that the objector's claim was accepted or disallowed by the executing Court. If the claim is once accepted by the decree-holder himself he is evidently precluded from bringing a suit to contest it because the suit should be brought by the party against whom the order is made and not by the party who himself sought that order and obtained it.

In my view a party who realizes the hopelessness of resisting a claim in summary proceedings and consents to the claim being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under O. 21, R. 63. The fact that a party actually invites an order to be made against him does not render him any less a party against whom an order is made. A contrary view was taken by a Bench of the Madras High Court in 28 I C 536.[4] In that case the decree-holder agreed that the claim petition of the claimant should be allowed but without costs, and an order was made accordingly. Nevertheless, the Court held that the decree-holder was entitled to maintain a suit under O. 21, R. 63, Civil P. C., to contest the order of the executing Court. Some of the reasons given by the learned Judges for coming to this conclusion have been criticized by counsel for the respondents: but in my view the Madras decision is to be preferred to that of the Lahore High Court. Unless the facts show that the decree-holder gave up his right to contest the matter under O. 21, R. 63 a consent order or an order passed without objection by the executing Court in summary proceedings can be challenged and a suit is maintainable. Upon the merits I am satisfied that the learned Subordinate Judge was right in holding that defendants second party were the real owners of the properties attached. The plaintiffs called a number of witnesses to prove that throughout the defendants second party had been in possession of this property and the evidence called by the plaintiffs is strongly corroborated by the circumstances of the case and documents adduced in evidence. The defendant's description of how he came to purchase these two properties is extraordinary. In his evidence at page 32 he stated :

> I had no information prior to the sales that the shares are going to be sold but I had gone to D. B. office to take Rs. 35 which had been sanctioned for the repair of the Hariho School of which I am Secretary and while going there heard the Collectorate peon calling out bid T. No. 3495 in the Certificate Office. I deposited the earnest money on the date of the sale and the balance within 29 days. On the day I came to deposit the balance of the purchase money I learnt in the office that T. No. 374 was also going to be sold and so I purchased it also. I did not engage any pleader or mokhtear for purchasing these shares. I did not make any inquiry regarding this village before bidding at these sales.

If defendant 1 is to be believed, he accidentally heard of these two sales and immediately decided to purchase. It was indeed a most fortunate purchase for him, because he bought properties valued at Rs. 10,000 for under Rs. 200. The defendant's version as to how he came to purchase these properties cannot, in my view, be possibly accepted. It is clear that these

3. ('26) 13 AIR 1926 Lah 348=93 I C 997=7 Lah 235=27 P L R 408, Mulkh Raj v. Ralla Ram Rao Mal.

4. ('15) 2 A I R 1915 Mad 1128=28 I C 536, Venkatarama Aiyar v. Narayana Aiyar.

valuable properties were sold to realise very small amounts of road-cess. The twelve-annas share in tauzi No. 3495 was sold to recover about Rs. 110 of road-cess, whereas eight-annas share of tauzi No. 474 was sold to recover a sum of Rs. 58-3-0 for road-cess. No effort apparently was made by defendants second party to pay these small amounts, and even when the properties had been sold and purchased by defendant 1 the defendants second party could have recovered the properties by paying just a little more than the amounts for which they were sold. According to defendant 1, Atul Prasad alias Tulo, who represented the defendants second party, did not approach him for some two or three months after these sales to buy back the property, and this is difficult to believe. The learned Subordinate Judge has pointed out that the defendants second party, though heavily indebted were men of considerable substance and he found it impossible to believe, and I agree with him, that defendants second party would have allowed these valuable properties to go out of the family for such small arrears of road cess.

The evidence also shows that defendant 1 was a servant of defendants second party though this was strenuously denied by the defendant 1 himself. Bhothri Mahto (P.W.1) stated that he had been told by Ramrup that he was in the service of Tulo and he had also learnt from Ramrup's father that the latter had also been in Tulo's service. Santokhi Mahto (P. W. 3) stated that Ramrup sometimes lived in Kharia village near the witness and sometimes at Pakra and that Ramrup was in the service of Tulo and had been in such service for the last ten years. He also said that Ramrup's father who had died about ten years previously had also been in the service of Tulo. Chanchal Rai (P. W. 4) gave similar evidence and so did Awadh Narain Missir (P. W. 18). Ramrup himself admitted that he had attended the Pakra school which was in the village of defendant 2 and a long way from his ancestral home. He stated that he went to Pakra as his father had lands in village Sapardah; but he had to admit that that village was about seven koses from Pakra and that one had to cross a river at Kadwa in order to get to Pakra from Sapardah. It appears to me that the circumstances show that Ramrup had connexion with Pakra which strongly suggests that the evidence of the plaintiffs' witnesses that he was a servant of Tulo is true. I see no reason whatsoever for rejecting the plaintiffs' evidence that Ramrup was a servant of Tulo; and that being so, he must have been acting for Tulo when he made the purchases at these certificate sales.

Another striking fact is that within eight days of Ramrup obtaining possession of the properties which he had purchased in the certificate sales defendants second party executed a mukarrari patta in his favour giving a mukarrari settlement of four other tauzis in village Gobindpur Kosli and of their 8 annas share in another village at a total jama of Rs. 3. The mukarrari patta is Ex. 1, and from this document it would appear that defendant 1 paid a salami of Rs. 900. Defendant 1 said that he had paid this sum; but there is no other evidence to support him. The annual jama of Rs. 3 is an absurdly small amount for such a mukarrari and it is impossible to believe that this was a genuine transaction. Why should defendants second party have given this mukarrari to defendant 1 within a few days of the latter obtaining possession of the properties purchased in the certificate sales? Ramrup says that he would not give up the properties purchased unless he was paid Rs. 4000 and yet defendant 2 made practically a gift of valuable property for a nominal annual jama. The learned Subordinate Judge has pointed out that the properties comprised in this mukarrari were valuable and the transaction is inexplicable unless defendant 1 was being used to shield defendants second party. It is an admitted fact that at this time defendants second party were heavily indebted. Ex. 15 is an insolvency petition filed by Atul Prasad alias Tulo, dated 2nd January 1933, and this shows that at that time Tulo was indebted to the extent of about Rs. 93,000. The learned Subordinate Judge was of opinion that Ramrup was allowed to buy the two properties in suit in the certificate sales and was later granted a mukarrari of five other properties in order to place these properties out of the reach of the creditors. In my view the facts clearly show that such was the case.

A number of witnesses were called on behalf of defendant 1 to show that rent was paid to him and that he made settlements of property in this village as the owner thereof. If defendant 1 was a benamidar, it is only natural that his name should be mutated in place of defendants second party and that receipts for rent and such like should be given in his name. The fact that

outwardly defendant 1 appeared to be the owner is in no way conclusive. There are certain other transactions which are very difficult to understand unless defendant 1 was a benamidar of defendants second party. It appears that Tulo and others purchased the holding of one Tejnarain Singh in June 1933, that is four months after defendant 1 had obtained possession of the properties in suit. These purchases are proved by Exs. 22 and 22 (a) which are printed at pp. 28 and 29 of part 3 of the paper-book. Though the interest of Tejnarain Singh was purchased by Tulo and others, it is clear that the property was settled by defendant 1 as will be seen from kabuliats B (1), B (2), B (3) printed at pp. 45, 39 and 42 respectively of part 3 of the paper-book. It is impossible to explain how Ramrup came to settle these lands which had been purchased by Tulo and others if he was entirely independent of them and not a mere tool in their hands. There is another significant fact in this case, namely that sufficient cattle were attached in each certificate case to satisfy the amount of cess due from defendants second party. Why these cattle were not sold is not explained, and it is inconceivable that zamindars of substance would allow a village near their ancestral home to be sold if the road-cess could have been satisfied by the sale of some of their cattle. The facts show that the defendants second party were anxious that the properties now in suit should be sold and purchased by some one on their behalf. No other explanation is possible having regard to the facts of this case. The learned Subordinate Judge who saw and heard the witnesses in this case came to the conclusion that Ramrup had never been in possession of the properties alleged to have been purchased by him and that he had acted throughout as benamidar of defendants second party. In my judgment, it is impossible to say that the learned Judge was wrong in so holding and accordingly I would dismiss this appeal with costs.

Manohar Lall J.—I entirely agree and wish to make only a few observations with regard to the argument advanced by the appellant that the present suit is not maintainable because of the effect of the order passed in the claim case at the suggestion of the respondent. That order is Ex. J at p. 35 of Part III of the paper-book. The order has been quoted in extenso in the judgment delivered by my Lord the Chief Justice. The order, as I pointed out in the course of argument, is equivocal. It may mean that the plaintiff agreed that the claimant was a benamidar or that the plaintiff asked the Court to allow the claim petition because he thought that the question of benami could not be properly gone into by the executing Court in summary proceedings. In these circumstances it was the duty of the defendant who relied upon the order as a bar to the maintainability of the suit to show the circumstances under which that order was passed and in particular he ought to have alleged and proved the agreement, if any, into which the plaintiff entered with him. Strange as it may seem the pleadings and the evidence are entirely silent upon this point. The plaintiff merely stated in para. 6 of the plaint that

> the Court was pleased to allow the said claim case by its order dated 14th July 1934 without recording any evidence in the case.

The whole of this allegation is true. It was next asserted in para. 11 of the plaint that the order passed was wrong. The defendant merely stated in para. 7 of the written statement that because the defendants were in possession and occupation of the land which had been illegally attached the plaintiffs got the costs remitted thinking it unnecessary to contest the case. The parties did not adduce any evidence at all as to the circumstances under which the Court came to allow the claim petition. The result is that this Court is exactly in the same position as in 15 Cal 521[5] where it was pointed out, in answer to the argument that S. 280 of the Act of 1877 (which corresponds to the provision which we are now considering) did not contemplate that any order should be made until after an investigation which is directed by S. 278, that

> in the first place we do not know what took place before the Subordinate Judge who made this order. It may have been that the parties who were before him agreed so far upon facts that he was enabled to deliver his opinion off-hand. But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him.

I, therefore, agree that when it has not been proved in this case that the plaintiff

5. Sardhari Lal v. Ambika Pershad, (1888) 15 Cal 521=15 I A 123=5 Sar 172 (P C).

has contracted himself out of his statutory rights which are given to him in clear terms under O. 21, R. 63, he cannot be debarred from instituting a suit like the present to obtain the appropriate relief. But reliance was placed upon the case in 7 Lah 235.[3] In that case the decree-holder himself applied for release of the property from attachment before the executing Court, after the objectors had put forward their claim to be the owners in their own right, stating that he would bring a regular suit to have it declared liable to attachment and sale. The learned Judges of the Lahore High Court held that in these circumstances the decree-holder was precluded from instituting a declaratory suit under O. 21, R. 63, because

if the claim is once accepted by the decree-holder himself he is evidently precluded from bringing a suit to contest it because the suit should be brought by the party against whom the order is made and not by the party who himself sought that order and obtained it.

With great respect I am unable to agree with the proposition which is thus broadly stated. If an investigation of the circumstances under which the decree-holder applied for the release of the property from attachment discloses that the decree-holder has accepted the claim of the claimant, he is obviously debarred from instituting another suit; but, if the claim is accepted only for the purposes of the summary enquiry as appears to have been the position in the Lahore case, I am of opinion that the decree-holder was not precluded from bringing a suit. There can be no estoppel against a statute. Again the order passed by the executing Court is none the less an order passed against the decree-holder even though he asked that such an order should be passed. I find that the view which I have expressed is supported by the decision of the Madras High Court in 28 I C 536[4] where the facts were almost similar. In that case, it was argued that there was an agreement between the parties that the claim petition should be allowed with costs and that the plaintiff should, in consideration of the defendant giving up his costs, refrain from instituting such a suit as the present. The agreement which was relied upon as a bar was held to be not proved upon the facts and the learned Judges took the view that the indications of the agreement were that the claim petition was allowed to succeed on the understanding that the plaintiff was to institute a suit under O. 21, R. 63. I respectfully adopt the following observations of the learned Judges to be found at p. 537 :

In the present case, it is because the order on the claim petition is binding on the plaintiff that he can institute a suit to get rid of the effects of the order (O. 21, R. 63, Civil P. C.). This is also an answer to the objection that there was no order against the plaintiff, an objection which we have some difficulty in understanding. It is quite clear that when it was decided that the plaintiff was not entitled to attach the property which he had purported to attach, there was an order against him. The fallacy of the argument is caused by assuming that because a party does not object to an order being passed against him therefore the order that is passed is not against him.

In the case before us the agreement is not only not proved but is not even alleged in the pleadings. For these reasons I agree that the appeal fails and should be dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 658

FAZL ALI AND MEREDITH JJ.

Pandey Ishwar Nath Roy and another — *Defendants* — Appellants.

v.

Maharaja Pertapudai Nath Saha Deo, Plaintiff and others, Defendants — Respondents.

Appeal No. 1052 of 1938, Decided on 23rd February 1940, from appellate decree of Addl. Judicial Commissioner, Chota Nagpur, D/- 30th June 1938.

(a) Chota Nagpur Tenure-holders' Rent Account Act (1 of 1929), S. 11—"Tenure" in S. 11, and wherever used in Act without qualification means whole tenure.

When the Act of 1929 prescribed a fee of two per centum on the rent of the tenure, it meant the rent of the tenure as a whole as the word "tenure" in the Act of 1929 without qualification means the whole tenure. Therefore the annual maintenance fee is to be calculated on the rent of the whole tenure and not merely on the rent of the share of the tenure for which a separate account has been opened. [P 659 C 2 ; P 660 C 2]

(b) Chota Nagpur Tenure-holders' Rent Account Act (1 of 1929), S. 11 — "Rent" includes cess.

Wherever the expression "rent" is used in the Chota Nagpur Tenancy Act and consequently in Act 1 of 1929, it is to be read not in the limited sense of primary rent but as such rent plus other dues recoverable as if they were rent. Under S. 47, Cess Act, cess is recoverable as if it were rent. Cess is therefore one of the dues referred to, and where the expression "rent" is used, it must be taken to include cess. [P 660 C 2]

(c) Chota Nagpur Tenure-holders' Rent Account Act (1 of 1929), S. 11 — Registration fee—Mode of calculation.

The registration fee under S. 11 (a) should be calculated not on the whole rent plus cess but on the rent of the separated portion for which the separate account has been opened as in the case of S. 11, Chota Nagpur Tenancy Act. [P 660 C 2 ; P 661 C 1]

Rai Paras Nath — *for Appellants.*

B. C. De — *for Respondents.*

Meredith J. — This appeal first came before a Judge sitting singly and has been referred by him to a Division Bench. It is a defendant's appeal and arises out of a rent suit in respect of a resumable jagir tenure in which the following claims were made : (1) Rent for the four years 1989 to 1992 Sambat at Rs. 75-12-6 per annum. (2) Cess at Rs. 582-0-2½ pies per annum. (3) Landlord's registration fee for opening a separate account under S. 11, Chota Nagpur Tenure-holders' Rent Account Act (1 of 1929), at Rs. 13-6-0. (4) Landlord's annual fee under the same section of that Act for maintenance of a separate account at Rs. 53-8-0 for the four years.

The case was decreed by the first Court for the rent and for the cess at a reduced amount of Rs. 560-12-4½ pies. The landlord's registration fee and maintenance fee for separate account were claimed against defendant 2 on whose behalf a separate account had been opened by the landlord. The first Court held that the amount claimed on these two heads by the landlord was not correct, for reasons which I shall presently state, and held that whatever was payable had been paid. The suit was therefore decreed only as against the remaining defendants 1, 3 and 4 and was dismissed against defendant 2. The landlord appealed in the Court of the Judicial Commissioner. In appeal the reduced figure for cess was accepted as correct by the landlord, and no question of the amount of cess now arises. The other two points taken in appeal were with regard to the registration fee and maintenance fee; and whereas the first Court had decided in favour of the defendant on both these points, the learned Additional Judicial Commissioner decided in favour of the landlord with regard to both of them. Hence the present appeal by the defendants in which the same two points have been raised. They involve the interpretation of S. 11 of Act I of 1929, which runs as follows :

> When any separate account has been opened the landlord shall be entitled
>
> (a) to levy a fee on the scale laid down in S. 11, Chota Nagpur Tenancy Act 1908, for registration, and
>
> (b) to levy an annual fee for the maintenance of the additional establishment at the rate of two per centum on the rent of the tenure.

The two points raised with regard to the interpretation of this section are : (1) whether the word 'tenure' as used in S. 11 means the whole tenure or the share of the tenure for which the separate account has been opened; and (2) whether the word "rent" as used in that section, namely in prescribing a fee at two per centum on the rent includes also the cess; that is to say whether the fee is to be two per centum on what might perhaps be called the "primary rent" alone or two per centum on the amount of rent plus cess. Taking first the meaning of the word "tenure,' as used in the section, it is pointed out that S. 11 of Act 1 of 1929 has been amended by Act 14 of 1939 which provides that for S. 11 of the said Act the following section shall be substituted, namely, 11 (1):

> When any separate account has been opened, the landlord shall be entitled to levy —
>
> (a) a registration fee of two per centum on the annual rent of the share in respect of which such account has been opened; and
>
> (b) an annual fee for the maintenance of additional establishment at the rate mentioned in clause (a).

This Act is of course not applicable to the present case; but it is said that it clarifies the Act of 1929 and makes clear what was intended in S. 11 in that Act. It certainly does make it clear that since the passing of the Act of 1939 these fees will be estimated not on the rent of the whole tenure, but on the rent of the share in respect of which the separate account is opened. But I am unable to hold that that is a mere clarification of the old section. On the contrary, it appears to me clear that when the Act of 1929 prescribed a fee of two per centum on the rent of the tenure, it meant the rent of the tenure as a whole. No doubt S. 3 (xxvii), Chota Nagpur Tenancy Act, defines "tenure" as "the interest of a tenure-holder," and S. 4 (c) of Act 1 of 1929 provides that words and expressions used in this Act and not otherwise defined have the same meaning respectively as in the Chota Nagpur Tenancy Act of 1908. Nevertheless it seems to me clear that where the word "tenure" is used in the Act of 1929 without qualification it means the whole tenure. That is clear from the fact that wherever reference is made to the portion of the tenure in respect of which a separate account has been opened, that separate portion is spoken of in clear terms as the share of the tenure as for example in S. 12 of the Act of 1929. The same inference is to be derived from the definition of "fractional share" and "registered cosharer" in S. 4 of the Act. S. 4 (a) defines fractional share as

a share consisting of a fraction of a whole tenure. S. 4 (b) says that registered co-sharer means a cosharer in a tenure whose name has been registered in the office of the landlord under S. 11, Chota Nagpur Tenancy Act, 1908. It is quite clear here that where the word "tenure" is used, it is used as meaning the whole tenure. Again S. 6 (1) of the Act plainly shows that where the word "tenure" is used, it means the whole tenure. Our attention has been drawn to the terms of S. 11, Chota Nagpur Tenancy Act, the material portion of which runs as follows:

Section 11 (1). When any tenure or portion thereof is transferred by succession, inheritance, sale, gift or exchange, the transferee or his successor-in-title shall cause the transfer to be registered in the office of the landlord to whom the rent of the tenure or portion is payable.

(2) The landlord shall, in the absence of sufficient reason to the contrary, allow the registration of all such transfers.

(3) Whenever any such transfer is registered in the office of the landlord, he shall be entitled to levy a registration fee of the following amount, namely:

(a) when rent is payable in respect of the tenure or portion—a fee of two per centum on the annual rent thereof: provided that no such fee shall be less than one rupee or more than one hundred rupees, and

(b) when rent is not payable in respect of the tenure or portion—a fee of two rupees.

It is argued that in sub-s. 3 (a) of the above section the words "a fee of two per centum on the annual rent thereof" must be taken as referring either to the rent of the tenure or the rent of the portion transferred as the case may be; and therefore in the case of the transfer of a portion of a tenure for which a separate rent is payable, the fee payable under this section is two per centum of the annual rent not of the whole tenure but of the portion transferred. That contention appears to me quite correct. S. 11 does seem to contemplate that where rent is payable separately for a portion of a tenure, and only that portion is transferred, then the fee shall be paid on the annual rent of that portion. The argument however will apply only to sub-s. (a) of S. 11 of the Act of 1929. I do agree with the learned advocate for the appellants that when S. 11 (a) states that a fee is to be levied on the scale laid down in S. 11, Chota Nagpur Tenancy Act, that must mean that the fee will be levied on the rent of the portion of the tenure in respect of which a separate account has been opened. But the position is quite different as regards sub-s. (b). Sub-s. (b) says that the annual fee is to be paid at two per centum on the rent of the tenure and that in my view can only mean the rent of the whole tenure. The position has of course now been altered by the Act of 1939; but, for the present case, as I have said, we are concerned only with the Act of 1929. I would therefore hold that with regard to the registration fee under sub-s. (a) it is to be calculated on the rent of the separated portion as in the case of S. 11, Chota Nagpur Tenancy Act, but in the case of the annual maintenance fee, it is to be calculated on the rent of the whole tenure.

I come now to the second question—whether rent includes cess. I have already pointed out that under S. 4 (c) of the Act of 1929 words and expressions not defined are to have the same meanings as in the Chota Nagpur Tenancy Act. In S. 3 (xxiii), Chota Nagpur Tenancy Act, rent has been defined as follows:

> Rent means whatever is lawfully payable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant, and includes all dues (other than personal services) which are recoverable under any enactment for the time being in force as if they were rent.

In other words, wherever the expression "rent" is used in the Chota Nagpur Tenancy Act—and consequently in Act 1 of 1929, it is to be read not in the limited sense of primary rent, but as such rent plus other dues recoverable as if they were rent. Under S. 47, Cess Act, cess is recoverable as if it were rent. Cess is therefore one of the dues referred to, and where the expression "rent" is used, it must be taken to include cess. That really disposes of the question. This interpretation of the section involves nothing absurd or inequitable. The landlord is expressly given the fee to compensate him for having to employ extra establishment for extra clerical and collection work. That work is equally involved whether he is collecting rent or cess. It is therefore only reasonable to assume that when compensation is provided to him for this extra work, it was intended to be given to him whether the extra work was involved by the collection of primary rent or of other dues such as cess which involve just the same trouble and expense. Where both stand on the same footing in these respects, as rent and cess do, there can be no equitable reason for discriminating between them. Here also an argument has been based on the terms of S. 11, Chota Nagpur Tenancy Act. It is pointed out that under sub-s. 3 (b) of that section, a fee

of two rupees is prescribed where rent is not payable in respect of the tenure or portion of the tenure; and, it is argued that this implies that the word "rent" was used as not inclusive of cess, which is payable even in the case of a rent free land. We are not, however, entitled to assume that there are no cases where no cess is payable by a tenure-holder. There are no materials before us on which such a conclusion could be based. The argument is therefore inconclusive.

Having regard both to the definition of rent and the equities of the matter, I have no doubt that the word "rent", as used in S. 11 of the Act of 1929, was intended to include cess and the fee of two per centum is to be calculated upon the amount of rent plus cess. These are the only two points which arise in this appeal, and the appeal fails except with regard to the registration fee, which should be calculated not on the whole rent plus cess, but on the quarter share of defendant 2 for which the separate account has been opened. The appeal, in my opinion, should be allowed only to that extent, and having regard to all the circumstances of the case, the parties should pay their own costs.

Fazl Ali J.—I agree.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 661

HARRIES C. J. AND MOHAMAD NOOR J.

Gunduchi Sahu, Plaintiff — Appellant.

v.

Balaram Balabantra and others — Defendants — Respondents.

Appeal No. 101 of 1937, Decided on 24th August 1939, from appellate decree of Sub-Judge, Puri, D/- 17th May 1937.

(a) Minor—Mortgage of minor's property by guardian—Mortgage found not for minor's but for guardian's benefit — Mortgage is void — No question of ratification arises.

Where a guardian mortgages the minor's property for his own purposes the mortgage cannot be regarded as one for the benefit of the minor and must be treated as a mortgage of the minor's property for the benefit of the guardian, and therefore is void. No question of ratification by the minor on attaining majority arises in such a case.

[P 662 C 1]

(b) Minor — Repudiation — Mortgage of minor's property by guardian found to be voidable at minor's option—Subsequent sale by guardian free from incumbrance for minor's benefit — Sale amounts to repudiation of mortgage on behalf of minor and vendee takes property free of incumbrance.

Where a mortgage of the minor's property executed by a guardian is found to be voidable at the minor's option, a subsequent sale of the mortgaged property free from incumbrance for the minor's benefit amounts to a repudiation on behalf of the minor of the earlier mortgage and the vendee takes the property free of prior incumbrance : *AIR 1915 Mad 296, Not approved; A I R 1918 Cal 166 and AIR 1931 Cal 131, Rel. on; AIR 1938 Pat 337, Ref.*

[P 662 C 2; P 663 C 1]

R. V. Ramanamurty and H. Sen — *for Appellant.*

B. Mahapatra — *for Respondents.*

Harries C. J. — This is a plaintiff's appeal from decree of the lower Appellate Court dismissing his claim for a mortgage decree as against defendant 2. On 26th November 1924, the guardian of defendant 1, who was then a minor, mortgaged certain property in favour of the assignor of the plaintiff. On 28th January 1927 the guardian of defendant 1 sold a portion of the property mortgaged to defendant 2. On 20th November 1931 defendant 1, who had then attained majority, made a payment of Rs. 140 towards the dues under the mortgage. No further payments were made and the plaintiff as assignee of the original mortgagee brought this suit to enforce the mortgage against defendants 1 and 2. Defendant 1 did not contest the suit but defendant 2 contended that the sale to him was free of encumbrance and that the plaintiff could not enforce his mortgage against the property which he held. Both the lower Courts upheld the contention of defendant 2 and dismissed the claim against him. The plaintiff being dissatisfied with these decisions has preferred this second appeal.

Both the Courts below have held that the mortgage of 26th November 1924 executed by the mother of defendant 1, was not executed for the benefit of the minor. It is true that the Courts hold that there was consideration for the mortgage but the consideration was not applied for the minor's benefit. In short, the finding appears to be that the minor's guardian mortgaged the minor's property for her own purposes rather than for the purposes of the minor. Both the Courts below have held that the sale by the guardian of the minor on 28th January 1927 in favour of defendant 2 was a transaction for the benefit of the minor and it is therefore binding upon him. The consideration of that sale was applied for the minor's benefit unlike the consideration of the mortgage of 26th November 1924.

There can be no doubt that on 20th November 1931 defendant 1, who had then

attained majority, made a payment of Rs. 140 towards the mortgage and it is contended on behalf of the appellant that this was a ratification of the mortgage. It was argued on his behalf that at most the mortgage of 1924 was only a voidable transaction and that by paying Rs. 140 towards the dues under the mortgage the minor after attaining majority had expressly ratified the transaction. In any event the appellant contended that the mortgage transaction being voidable only would be good until the minor after attaining majority chose to repudiate it. The minor had never repudiated the transaction and indeed did not appear in this suit. Accordingly it was argued that the mortgage is a good mortgage and the sale to defendant 2 was subject to the mortgage. I am not satisfied that the mortgage in favour of the plaintiff's predecessor was merely a voidable transaction. The Courts below have held that it was not a mortgage for the benefit of the minor and it must be treated as a mortgage of the minor's property for the benefit of the guardian. In fact the guardian mortgaged property which was not her own for her own purposes. Can such a transaction be described as voidable only or is it a void transaction? Considerable authority has been cited that a transaction by the guardian of a minor is merely voidable but in those cases the transaction has been one in which the guardian has exceeded his authority. For example, a number of cases deal with mortgages or transfers made by a guardian appointed under the Guardians and Wards Act without the consent of the Court. These are cases in which a transaction has been entered into for the benefit of the minor but in excess of the guardian's authority. In these cases it has always been held that the transaction is not void but only voidable and therefore remains good until repudiated by the minor on whose behalf the transactions were entered into. The present case is not a case of that kind. It is a case where the act was not an act done on behalf of the minor at all. The minor derived no benefit whatsoever from it and it may well be that a transaction of that kind is void and not voidable. It would be strange that the law should require a minor to requdiate a transaction which was never entered into on his behalf and which may well be entered into in fraud of the minor. If this transaction be a void transaction then the minor could never ratify it. If it was a void transaction it had no legal effect whatsoever when the sale took place on 28th January 1927 to defendant 2 and therefore the latter would take free of the mortgage.

Even assuming that this is a voidable transaction, in the events that happened, defendant 2 has in my view a good title to this property free of encumbrance. As I have stated there was an out and out sale to him and that sale was for the benefit of the minor. It is a sale binding upon the minor. It was a sale by the minor's guardian and in my view the act of the minor's guardian in selling this property free of encumbrance amounted to a repudiation on behalf of the minor of the earlier mortgage. It has been strenuously argued on behalf of the appellant that a guardian cannot repudiate a voidable transaction on behalf of the minor. It is said that repudiation is a matter personally for the minor on attaining majority and reliance has been placed on certain observations made in 38 Mad 867.[1] There is no doubt that this case does support the appellant's contention but there are cases of the Calcutta High Court in which it has been held that a subsequent sale by a guardian may amount to a repudiation of a voidable transaction previously entered into by the guardian on behalf the minor.

In 46 I C 665[2] the plaintiff obtained a mortgage of a minor's property from a certificated guardian without the sanction of the Court. The money lent by the mortgagee was spent by the guardian for the minor's benefit. The property was subsequently sold by the guardian to the defendant with the sanction of the Court. It was held that the second sale was a good sale free from the previous mortgage. In that case the earlier sale without the consent of the Court amounted to a voidable transaction. The second sale with the consent of the Court, it was held, passed the whole interest in the property free of the mortgage. If the first transaction was a voidable transaction it was good until the minor repudiated it. There was no repudiation by the minor other than the act of the guardian in selling the property with the consent of the Court. It appears to me that the Court came to the conclusion that the second sale amounted to a repudiation of the earlier transaction and accordingly the earlier

1. Muthukumara Chetty v. Anthony Udayar, (1915) 2 A I R Mad 296=24 I C 120=38 Mad 867=29 M L J 617.
2. Rajani Kanta v. Manmatha Nath, (1918) 5 A I R Cal 166=46 I C 665.

transaction could not be enforced. The matter was again considered by the Calcutta High Court in A I R 1931 Cal 131.[3] The earlier Calcutta case was followed and Ghose J. on p. 132 observes:

It has been held that when a guardian sells the second time that is enough for a repudiation of the prior sale.

There is a conflict on this point between the Madras High Court and the Calcutta High Court and as there is no express decision of this Court we should, I think, follow the decisions of the Calcutta High Court. It has been argued that the point now before the Court has been decided in 17 Pat 460.[4] In that case Manohar Lall J. appears to have been of the opinion that any transaction entered into on behalf of the minor required to be repudiated by some means or other but it would appear that Wort J. took the opposite view. He held that the transaction was not a transaction of the minor at all and accordingly no repudiation was necessary. There is, in my judgment, no express authority of the Patna High Court upon this point. Even assuming therefore that this is a voidable transaction the transaction was repudiated by the subsequent sale. However, I am not satisfied on the facts of this case that this was a voidable transaction and I leave it open for consideration in some other case as to whether a transaction, such as this mortgage was, cannot be regarded as an entirely void transaction. For the reasons which I have given I hold that this appeal fails and would accordingly dismiss it with costs.

Mohamad Noor J. — I agree.

G.N./R.K. *Appeal dismissed.*

3. Nagendra Nath v. Mohini Mohan, (1931) 18 A I R Cal 131 = 130 I C 273=58 Cal 128=34 C W N 948.

4. Jagdamba Prasad v. Anadi Nath, (1938) 25 A I R Pat 337=176 I C 273=17 Pat 460=19 P L T 594.

*** A. I. R. 1940 Patna 663**

HARRIES C. J. AND DHAVLE J.

Awadhesh Prasad Missir and others — *Plaintiffs* — Appellants.

v.

Widow of Tribeni Prasad Missir and others—Defendants—Respondents.

Appeal No. 558 of 1937, Decided on 8th December 1939, from appellate decree of Sub-Judge, Darbhanga, D/- 30th January 1937.

*** (a) Civil P. C. (1908), O. 32, R. 7—Terms of O. 32, R. 7 are not complied with by merely asking Court to approve of compromise actually entered into.**

A guardian ad litem cannot enter into a compromise without the leave of the Court, and such leave must be expressly recorded by the Court. The terms of O. 32, R. 7 are not complied with by merely asking the Court to approve of a compromise which has actually been entered into. The Court must consider the proposed terms before they are agreed to by the parties and must grant leave to the guardian ad litem to enter into the compromise: *A I R 1937 All 65 (F B) and A I R 1939 Pat 278, Foll.* [P 665 C 1]

*** (b) Civil P. C. (1908), O. 32, R. 7 — Guardian ad litem appointed for minor—Karta of family or father of minor cannot enter into compromise binding on minor unless guardian ad litem is party to it.**

The Rules contained in O. 32 make it clear that where a next friend or guardian ad litem has been appointed he and he alone can represent the minors. Hence, if a guardian ad litem has been appointed for a minor, then the karta of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian ad litem be a party to it: *A I R 1917 Mad 672 and A I R 1920 Bom 37, Rel. on; A I R 1927 Pat 329, Disting.* [P 665 C 2]

(c) Hindu Law—Joint family—Manager can receive what is due to family under decree even if minor member is represented by guardian ad litem *(Obiter).*

A karta of the family is entitled to receive everything due to the family, and he can give a good discharge on behalf of the family. The karta may well be regarded as entitled to receive what is due to the family under a decree even where a minor member of the family is represented by a guardian ad litem. Payment to the karta is payment to the family, and no member of the family can allege that the family has not been paid when the karta has in fact been paid. [P 666 C 2; P 667 C 1]

Dr. D. N. Mitter and B. N. Rai — *for Appellants.*

Harnarayan Prasad, P. Jha and B. K. Prasad Sinha—*for Respondents.*

Harries C. J. — This is a second appeal from concurrent decrees of the Courts below dismissing the plaintiffs' claim for a declaration that a certain compromise decree was not binding upon them and for certain consequential relief. The facts of the case can be shortly stated as follows. One Rajendra Prasad Missir and three others instituted two suits against Ramadhikari Missir and his three sons, Ramchandra Prasad Missir, Jagdish Prasad Missir and Rameshwar Prasad Missir, and his two grandsons, Awadhesh Prasad Missir, minor son of Ramehwar Prasad Missir, and Sant Prasad Singh, minor son of Jagdish Prasad Singh. In these suits the plaintiffs sought recovery of khas possession of some lands on the allegation that they were the bakasht lands of all the maliks and that they had fallen into the plaintiffs' patti in a civil Court partition. The defendants, on the

other hand, contended that the lands were their khiraj tenures held at a fixed rent. The trial Court and the first appellate Court accepted the contention of the defendants and held that the plaintiffs were not entitled to possession. Second appeals were preferred to this Court, and during the hearing of those appeals a compromise was arrived at between the parties. It was agreed that the lands were to be regarded as the khiraj tenures of the defendants, but the rents of the lands were to be enhanced, and the defendants submitted to decrees for arrears of rent at the enhanced rate for six years. By the compromise the parties were to bear their own costs throughout the litigation. The Bench which heard the second appeal approved of the compromise in these terms :

> We are satisfied that the terms settled between the parties are for the benefit of the minor defendants-respondents concerned

and a decree was passed in terms of the compromise. At the date of the compromise decree in this Court Awadhesh Prasad Missir and Sant Prasad Missir were minors and were represented in that litigation by one Ramasrey Prasad who was appointed guardian ad litem of the minors by an order of the Court dated 20th February 1926. Ramasrey Prasad Missir was no party to this compromise and it would appear that the learned Judges hearing the second appeal were under the impression that the two minors concerned were under the guardianship of their respective fathers. In the order-sheet of the High Court the following appears :

> The plaintiffs in both the suits are major. Defendant 6, Awadhesh Prasad Missir, is minor under the guardianship of his father Rameshwar Prasad Missir, defendant 4 and defendant 7, Sant Prasad Missir is minor under the guardianship of his father Jagdish Prasad Missir, defendant 3. One of the defendants Ramchandra Prasad Missir, defendant 2, is present in Court and has taken part in settling the terms of the compromise.

From the above it is clear that this Court was not aware of the fact that the minor defendants were represented through a guardian ad litem who had no connexion with the family. On attaining majority the two minors, Awadesh Prasad Missir and Sant Prasad Missir, brought a suit out of which this present appeal arises for a declaration that the compromise decree of the High Court in the earlier litigation was not binding upon them. They further prayed for a declaration that the defendants were not entitled to recover rent at the enhanced rate and prayed for a decree for Rupees 172.14.0 being the amount of enhanced rent which had been paid under the compromise decree. They also claimed a further sum of Rs. 644.11.0 as costs incurred by them. The plaintiffs alleged that as they were minors at the time of the compromise the compromise decree was not binding upon them, because leave of the Court had not been obtained by their guardian ad litem to enter into the compromise. As a matter of fact the guardian ad litem of the minors did not appear before the Court and was no party to the compromise. It is common ground that the compromise was entered into between the advocates concerned in the case with the assistance of Ramchandra Prasad Missir, defendant 2. The advocates appearing for the adult members of the present plaintiff's family held vakalatnamas from their respective clients; but these vakalatnamas did not in terms entitle the advocates to act on behalf of the minors.

The main defence to the present suit was that the compromise had been entered into by the adult members of the family including the karta, and it was contended that in such circumstances the compromise was binding upon the minors as it had been held by the Court to be for their benefit. The defendants contended that even where minors are represented in a suit by a guardian ad litem the karta of the family may nevertheless compromise the suit provided he is a party to it and the compromise is for the benefit of the minors. Both the lower Courts held that the guardian ad litem of the minors was not a party to the compromise, but as the compromise was for the benefit of the minors it could be entered into by the karta and the adult members without consulting the guardian ad litem. Accordingly, both the Courts held that the compromise decree was binding upon the present plaintiffs and dismissed the present suit in its entirety. It has been argued on behalf of the appellants by Dr. Dwarka Nath Mitter that the compromise decree in the High Court could not be binding upon the plaintiffs by reason of the provisions of O. 32, R. 7, Civil P. C. That Order provides:

> (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. (2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

It is urged that in this case no application for leave to compromise was made by the guardian ad litem and that no leave was granted by the Court to enter into the compromise. It is clear from the order of the Court that the parties first compromised and then placed the compromise before the Court and asked the latter to hold that it was for the benefit of the minors and to approve of it. The actual words used by the learned Judges were :

> We are satisfied that the terms settled between the parties are for the benefit of the minor defendants-respondents concerned.

In my judgment a guardian ad litem cannot enter into a compromise without the leave of the Court, and such leave must be expressly recorded by the Court. The terms of O. 32, R. 7, Civil P. C., are not complied with by merely asking the Court to approve of a compromise which has actually been entered into. The language of the rule makes it clear that the Court must consider the proposed terms before they are agreed to by the parties and must grant leave to the guardian ad litem to enter into the compromise. It has been strongly urged on behalf of the respondents that approving of the terms of a compromise after it has been entered into is sufficient compliance with O. 32, R. 7, Civil P. C., but, in my judgment, approving of something already done is very different from considering the terms of a proposed compromise and granting leave to a guardian ad litem to enter into such a compromise. This matter was considered by a Full Bench of the Allahabad High Court in I L R 1937 All 317.[1] In that case it was expressly laid down that leave to enter into an agreement in a suit must be obtained before the agreement is entered into and leave cannot be given after the agreement has been concluded. A similar view was taken by a Bench of this Court in a recent case, 20 P L T 170,[2] and in my judgment these cases must be followed.

It has been contended, however, on behalf of the respondents that the provisions of O. 32, R. 7 have no application to this case. According to the respondents, the guardian ad litem was no party to the compromise and in the proceedings which terminated in the compromise the minors were represented by their fathers and their grandfather, who was the karta of the family. It is urged that the karta of a family, if he is a party to the litigation, can always represent the minors and may compromise a suit so as to bind them even when there is a guardian ad litem appointed for the minors. In my judgment if a guardian ad litem has been appointed for a minor, then the karta of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian ad litem be a party to it. O. 32, R. 3, Civil P. C., requires the Court to appoint a guardian for a minor who has been made a defendant, and R. 5 of the same Order provides that

> every application to the Court on behalf of a minor, other than an application under R. 10, sub-r. (2), shall be made by his next friend or by his guardian for the suit.

From this Rule it is clear that if a guardian ad litem has been appointed, then no application in the suit on behalf of the minor can be made by the karta or his natural guardian. Such application must in all cases be made by the guardian ad litem. From this it follows that a natural guardian cannot compromise a suit so as to bind a minor defendant without the guardian ad litem of the latter being a party to the compromise. If a compromise is entered into, an application on behalf of all the parties must be made to the Court for an order in terms of the compromise, and no such application can be made on behalf of a minor defendant except by his guardian ad litem. The Rules contained in O. 32 make it clear, in my view, that where a next friend or guardian ad litem has been appointed he and he alone can represent the minors. This matter was considered by their Lordships of the Privy Council in 36 Mad 295.[3] In that case a partition suit was brought by a member of the joint family and the father was made defendant 3 and his minor son made defendant 6. The Court appointed the father guardian ad litem of the minor. The father compromised on behalf of himself and the minor without obtaining the leave of the Court under Section 462, Civil P. C. (now O. 32, R. 7). Their Lordships of the Privy Council reversing the decisions of the Courts in India held that the powers of the father were controlled by the provisions of S. 462 of the Code, and he could not, without leave of the

1. Mariam Bibi v. Amna Bibi, (1937) 24 A I R All 65=167 I C 99=I L R (1937) All 317=1936 A L J 1333 (F B).
2. Kedar Nath v. Basant Lal, (1939) 26 A I R Pat 278=183 I C 422=18 Pat 271=20 P L T 170.
3. Ganesha Row v. Tuljaram Row, (1913) 36 Mad 295=19 I C 515=40 I A 132=25 M L J 150 (P C).

Court, do any act in his capacity of father, or managing member of the joint family which he was debarred from doing as guardian ad litem. To hold otherwise would be to defeat the object of the enactment. In short, it was held that if a father is appointed to act as guardian ad litem of his minor son he must observe the provisions of O. 32, R. 7, Civil P. C., and cannot enter into a compromise by reason of his position as father and natural guardian of the minor son. Their Lordships, however, in this case did not decide whether a father, who was a party to the suit, could compromise on behalf of his minor son, who was represented in the suit by a guardian ad litem. At p. 303 Mr. Ameer Ali, who delivered the judgment of the Board, observed :

The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian ad litem for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a bona fide settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian ad litem, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court.

The precise point came before a Bench of the Madras High Court in 39 Mad 853.[4] In that case a father entered into a compromise on behalf of himself and his minor son, though the latter was represented by his brother as guardian ad litem. It was urged that the provisions of S. 462, Civil P. C., (now O. 32, R. 7) did not apply to the case and that the father had full powers to compromise. The Bench, however, held that the father could not enter into a compromise binding on his son where the latter was represented by a different person as guardian ad litem. At p. 855 the learned Judges observed :

The first point argued for appellant is that as the compromise was entered into by plaintiffs' father and not by their guardian ad litem (who was their brother, the present defendant 2) no sanction of the Court was necessary under S. 462 of the old Civil P. C. Reliance is placed on 6 M L T 325,[5] which however affords no support for such a contention. It is not denied that if plaintiffs' father had been representing the interests of his sons in Appeal No. 504 of 1907 he could not have entered into a valid compromise on their behalf without the leave of the Court so as to bind them. We cannot accept the suggestion that when he had no responsibility for them, and when their interests were entrusted to another person he should have larger powers to bind them. We have no hesitation in rejecting this contention.

The same view was taken by Heaton J. in 44 Bom 574.[6] Dealing with S. 462 of the old Code, the learned Judge at p. 581 observed :

That Section, I think, necessarily implies that during the continuance of proceedings in Court, the dispute between the minor and another party which the Court had to decide could not be compromised except by the guardian ad litem of the minor, and by him only with the leave of the Court.

It is to be observed that Macleod C. J. did not go as far. At page 580 he observed :

My brother Heaton however thinks that on general principles when a minor is represented in a suit by a guardian ad litem other than the natural guardian, the powers of his natural guardian to deal with the minor's interests which are involved in those proceedings are suspended. I am not prepared to go so far as that . . . .

The learned Chief Justice however did not hold affirmatively that in such a case the father could compromise. Counsel for the respondents has strongly relied upon a Bench decision of this Court, 8 P L T 708,[7] where it was held that the karta of a Hindu joint family has free authority to act for the family, and it is not necessary to obtain the leave of the Court before a payment of the amount due under a decree to the joint family is made to him merely because a minor member of the family is concerned. O. 32, R. 6, Civil P. C., provides that no next friend or guardian for the suit shall, without the leave of the Court, receive any money or other moveable property on behalf of a minor either by way of compromise before a decree or order is made, or under a decree or order in favour of the minor. Nevertheless this Court has held that where money is due to a joint family of which a minor is a member under a decree, such decree can be discharged by payment to the karta. In my judgment this case differs very materially from the case now before the Court. A karta of the family is entitled to receive everything due to the family, and he can give a good discharge on behalf of the family. The karta

4. ('17) 4 A I R 1917 Mad 672 = 32 I C 881 = 39 Mad 853=30 M L J 465, Vijaya Ramayya v. Venkatasubbarao.

5. ('09) 21 M L J 1093=3 I C 928=6 M L T 325, Ganesh Row v. Tuljaram Row.

6. ('20) 7 A I R 1920 Bom 37 = 57 I C 417 = 44 Bom 574 = 22 Bom L R 725, Gurmallappa v. Mallappa Martandappa.

7. ('27) 14 A I R 1927 Pat 329 = 103 I C 75=8 P T L 708, Jhakhri Gope v. Phagu Mahto.

may well be regarded as entitled to receive what is due to the family under a decree even where a minor member of the family is represented by a guardian ad litem. Payment to the karta is payment to the family and no member of the family can allege that the family has not been paid when the karta has in fact been paid.

For the reasons which I have given, I am satisfied that the compromise in the High Court was not binding upon the minors and accordingly I am of opinion that the plaintiffs are entitled to a declaration that the compromise is not binding upon them. In my judgment however the minors cannot, in the present proceedings, obtain any relief in respect of enhanced rents actually paid and costs incurred. Such relief may be obtainable in appropriate proceedings but I express no opinion on the matter. I would therefore allow this appeal, set aside the decrees of the lower Courts and grant the plaintiffs a declaration that the compromise decree of the High Court in the second appeal to which I have referred is not binding upon the present plaintiffs. The plaintiffs will have the costs of this appeal and of the proceedings in the Court below.

Dhavle J. — I agree.

D.S./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 667

FAZL ALI AND MANOHAR LALL JJ.

Chaitan Ray and others — *Defendants* — Petitioners.

v.

Padma Charan Roy — *Plaintiff* — Opposite Party.

Civil Revn. No. 119 of 1938, Decided on 5th April 1939, from order of Sub-Judge, Puri, D/- 17th August 1938.

Civil P. C. (1908), O. 33, Rr. 2 and 5—Court-fee in regularly instituted suit being deficient, Court ordering plaintiff to make up deficiency within certain time — Plaintiff making two applications, one for amendment of plaint and another for leave to sue in forma pauperis asking Court to regard his original plaint and application for amendment as parts of his application for leave to sue in forma pauperis — Requirements of O. 33, R. 2 held sufficiently complied with.

Rules of procedure are not made for the purpose of hindering justice : *A I R 1923 P C 128, Foll.* [P 668 C 1]

In a suit the plaintiff was directed to make up the deficiency in the court-fee within certain time. Subsequently the plaintiff filed two petitions : one for the amendment of the plaint and another for leave to continue the suit in forma pauperis. The plaintiff had asked the Court to regard his original plaint and also the petition for its amendment as parts of his application :

Held that the requirements of O. 33, R. 2 were substantially complied with. The mere fact that the Court did not pass an order on the amendment application at once would not necessarily make the application for leave to sue as forma pauperis defective : *AIR 1936 Cal 221, Rel. on.* [P 668 C 1]

B. K. Ray — *for Petitioners.*

B. N. Das and H. Das — *for Opposite Party.*

Fazl Ali J. — It appears that on 18th December 1937, the opposite party instituted a partition suit in the Court of the Subordinate Judge at Puri on payment of a court-fee of Rs. 15. Some time later the petitioners appeared and filed a petition of objection to the effect that the plaintiff being out of possession of the property sought to be partitioned ought to be required to pay ad valorem court-fee on his plaint. This objection prevailed, and the Subordinate Judge on 8th January 1938 directed the plaintiff to make up the deficiency in the court-fee within fifteen days. On 22nd January 1938 the plaintiff-opposite party filed two petitions: one for the amendment of the plaint and another for leave to continue the suit in forma pauperis. The second application being granted by the learned Subordinate Judge, the petitioners have now moved this Court against the order granting the petition under S. 115, Civil P. C. It has been held in numerous cases that a plaintiff may be allowed to continue his suit in forma pauperis although the suit was not originally instituted by him as a pauper. The point however which is raised by Mr. Roy in the present case is that the application presented by the opposite party offends against O. 33, R. 2, Civil P. C., and should have been rejected under O. 33, R. 5. O. 33, R. 2 provides among other things that

> every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits.

Rule 5 provides that the Court shall reject an application for permission to sue as a pauper where it is not framed in the manner prescribed by R. 2. It is contended that as the application of 22nd January 1938 does not contain the particulars required in regard to plaints and, as the plaint of the original suit was defective and the application made by the opposite party for the amendment of that plaint has not been disposed of, it was obligatory on the Court to throw out the application of the opposite party under O. 33, R. 5. It appears however on a reference to the application made by the plaintiff on 22nd January 1938 that he

had asked the Court to regard his original plaint and also the petition for its amendment as parts of his application. If the original plaint and the amendment petition are to be read as parts of the application made on 22nd January 1938, then it will be difficult to hold that the requirements of O. 33, R. 2 were not substantially complied with. The mere fact that the Court did not pass an order on the amendment application at once will not necessarily make the present application defective. In A I R 1936 Cal 221[1] it was held that where a suit has been registered as an ordinary suit and the plaintiff does not pay deficit court-fee within the time prescribed by the Court but applies for permission to continue the suit as a pauper, the application should not be rejected on the ground that the order of the Court requiring the court-fee to be paid within a certain time has not been complied with. This disposes of the only other contention which was raised on behalf of the petitioner before us. As was remarked by the Privy Council in 2 Pat 676[2] "rules of procedure are not made for the purpose of hindering justice," and on the facts already stated I see no ground whatsoever for interfering with the order passed by the Court below. I would therefore dismiss this application with costs; hearing fee one gold mohur.

Manohar Lall J. — I agree.

D.S./R.K. *Application dismissed.*

1. ('36) 23 A I R 1936 Cal 221=162 I C 689=40 C W N 747=66 C L J 78, Muhammad Fateh Nasib v. Saradindu Mukherji.
2. ('23) 10 A I R 1923 P C 128=74 I C 747 = 50 I A 183 = 2 Pat 676 (P C), Indrajit Pratap Sahi v. Amar Singh.

A. I. R. 1940 Patna 668

AGARWALA AND ROWLAND JJ.

Jhari Lal Gope and others — *Defendants*—Petitioners.

v.

Ramdhikari Missir — *Plaintiff* —Opposite Party.

Civil Revn. No. 605 of 1939, Decided on 18th March 1940, against order of Addl. Sub-Judge, Darbhanga, D/- 28th August 1939.

(a) Decree—Preliminary and final—Preliminary decree set aside in appeal from preliminary decree—Final decree is superseded.

Where a preliminary decree is set aside in an appeal from the preliminary decree, the final decree falls to the ground and is superseded by the decree passed by Appellate Court in an appeal from the preliminary decree. That being so, until a final decree in accordance with the appellate decree is passed there is no decree which the decree-holder can execute: *A I R 1916 Pat 370 (F B) and A I R 1930 Pat 177 (F B), Foll.; Case law relied on.* [P 669 C 2]

(b) Practice — Person having by law two remedies can avail himself of either of them.

When the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent: *A I R 1915 Mad 197, Rel. on.* [P 670 C 2]

K. N. Moitra—*for Petitioners.*

Dr. D. N. Mitter, B. N. Rai and K. K. Sinha — *for Opposite Party.*

Agarwala J.—This is an application by some of the defendants to a suit for mesne profits. The facts were that the opposite party as thicadar of mauza Harpur Rewari instituted a suit for 416 bighas of land which he claimed to be the proprietor's bakasht and for mesne profits for the years 1333 and 1334 Fasli, alleging that the defendants had conspired to dispossess him. The claim for possession was subsequently abandoned and the suit tried purely as a suit for mesne profits. On 3rd April 1929, a joint preliminary decree for mesne profits was passed against the defendants. Defendants 1 to 8 and 29 appealed to this Court in First Appeal No. 117 of 1930. Some of other defendants amongst whom were the petitioners before us, preferred First Appeal No. 116 of 1930 against the preliminary decree. On 12th September 1933, the High Court modified the decree of the Court below. The decree of this Court was in these terms:

It is ordered and decreed that this appeal be allowed in part and the decree of the Court below shall be varied to this extent that a decree for mesne profits shall be made in favour of the plaintiff for the years in suit against each of the defendants or group of defendants who were admittedly in possession of lands and for the area over which they admit to be in possession in their written statements. It is further ordered and decreed that in other respects the decree of the Court below shall be affirmed and the appeal shall be dismissed with costs in this Court, the appellants paying to the plaintiff-respondent the full costs and also to the defendant-respondent third party. It is also ordered and decreed that costs in the Court below so far as the defendants appellants and the plaintiff-respondent are concerned shall be proportionate to success, and the order for costs of the lower Court against those defendants who have not appealed shall remain.

In the meanwhile the plaintiff had applied to the trial Court for ascertainment of mesne profits according to the original preliminary decree of the Subordinate Judge. A final decree was drawn up on 10th February 1932, in accordance with the Subordinate Judge's original preliminary decree. The amount of mesne profits was

ascertained to be Rs. 16,000 and odd. Against this final decree there was an appeal by defendants 1 to 8 and 29, being First Appeal No. 67 of 1933, the memorandum of appeal of which was presented to this Court on 3rd May 1932. That appeal succeeded. The High Court directed by its order dated 24th August 1936, that the case should be remanded to the Court below for the purpose of apportioning the liabilities of the then appellants, defendants 1 to 8 and 29. In accordance with this direction the Subordinate Judge apportioned the liabilities of defendants 1 to 8 and 29 by an order dated 14th January 1937. Thereafter the plaintiff applied for execution of the entire final decree of 10th February 1932. As against defendants 1 to 8 and 29 he sought to recover the amount which had been found due from them by the Subordinate Judge after the remand by the High Court in First Appeal No. 67 of 1933. As against the remaining defendants, he sought to execute for the balance of the mesne profits.

Some of the defendants then applied for amendment of the final decree of 1932 in accordance with the direction of the High Court in First Appeals Nos. 116 and 117 of 1930. That application has been rejected. The first question which arises is with regard to the order of this Court in First Appeals Nos. 116 and 117 of 1930. By its terms it was a direction to the learned Subordinate Judge to apportion the mesne profits which had been found due from the defendants against each of them or each group of them in respect of the several areas of which they admitted that they were in possession by their written statements. There is no doubt that under O. 41, R. 33, this Court as an Appellate Court had power to pass an appropriate order affecting the interests of defendants who were not appellants as well as of those who were appellants and there is nothing in the language of the decree which indicates that the Court did not intend to take this course. I am of opinion therefore that the Court did intend to direct an apportionment not only of the liabilities of the defendants-appellants, but of all the defendants. The judgment of the Court proceeded on the ground that in the circumstances of the case a joint decree should not have been passed. That being in my view the proper construction to place on the decree of this Court in the appeal against the preliminary decree the next question is what the effect of that decree is on the final decree prepared by the Subordinate Judge in 1932. In 57 Cal 1013,[1] Sir George Rankin C. J. presiding over a Full Bench of the Calcutta High Court said :

> Where an appeal has been brought from the preliminary decree, before the final decree has been passed, this Court has consistently held that such appeal is competent and that, if the preliminary decree be set aside, the final decree falls to the ground along with it.

Later on in the judgment he said :

> I would add that when a preliminary decree is set aside, the final decree is superseded, whether the appeal was brought before or after the passing of the final decree.

That decision is in agreement with the view taken in this Court in 1 P L J 406[2] and in 11 P L T 61.[3] In that case the referring Judges were Das and Kulwant Sahay JJ. In the order of reference Kulwant Sahay J. referred to a decision of Sharfuddin J. sitting singly in which that learned Judge held that a final decree passed during the pendency of a second appeal ceased to exist since the preliminary decree was modified by the High Court and observed : "The ground work of the final decree having been set aside the final decree became ineffectual." The decision of Sharfuddin J. was taken in appeal under the Letters Patent. In the course of the judgment in the Letters Patent Appeal Sir Lawrence Jenkins said :

> The decree of the High Court of 8th January 1903, though a preliminary decree, must be regarded as decisive of the rights of the parties, notwithstanding the fact that there had been a prior final decree and in the special circumstances of this case we have so to determine.

In the view of this Court and of the Calcutta High Court therefore the final decree passed by the learned Subordinate Judge in this case on 10th February 1932, was superseded by the decree passed by this Court in the appeals from the preliminary decree. That being so, it seems to me that until a final decree in accordance with the appellate decree of this Court is passed there is no decree which the plaintiff can execute against the petitioners. It was argued, however, by Dr. Mitter on behalf of the plaintiff that this Court has in fact passed a final decree in First Appeal No. 67

1. ('29) 16 A I R 1929 Cal 689 = 123 I C 305=34 C W N 66=57 Cal 1013=50 C L J 566 (F B), Telebali v. Abdul Aziz.
2. ('16) 3 A I R 1916 Pat 370=35 I C 873=1 P L J 406=20 C W N 1174 (F B), Wahidunnissa v. Deep Narain Prasad.
3. ('30) 17 A I R 1930 Pat 177 = 127 I C 449=11 P L T 61 (F B), Wajihunnissa v. Banke Behari Singh.

of 1933. As I have already stated the appellants in that case were only defendants 1 to 8 and 29. As between the plaintiff and those defendants the decree of this Court in First Appeal No. 67 of 1933 has finally determined their rights; but the defendants who were not parties to that appeal and who were satisfied with the direction given by this Court in the appeals from the preliminary decree were entitled to refrain from appealing against a decree with which they were satisfied and to wait for the drawing up of a final decree. If that decree had been passed, and had not followed the directions of this Court so far as they were concerned, it would then have been necessary for them to determine whether they would challenge the final decree by appeal or not; but until such a decree comes into existence there was no occasion for them to appeal and in my view, no decree against them capable of execution. The Subordinate Judge will now proceed to draw up a final decree in accordance with the decision of this Court in First Appeals Nos. 116 and 117 of 1930. The application is allowed and the petitioners are entitled to their costs. We assess the hearing fee at three gold mohurs.

Rowland J.—I agree. That an appeal from a preliminary decree is maintainable and that its result is to supersede the preliminary decree seems now to be the concurrent view of all the High Courts in India. I may refer, in addition to the cases cited, to a Full Bench decision of the Allahabad High Court in 36 All 532,[4] and decision which is to the same effect in 37 Mad 29.[5] In principle all these decisions seem to me to be entirely in comformity with the pronouncement of the Judicial Committee of the Privy Council in 6 Pat 24.[6] In this case the question before their Lordships was one of limitation, that is to say, whether an application for a final decree must be made within three years of the date fixed in the preliminary decree for payment when there had been an appeal from the preliminary decree and their Lordships held that time would run from the final order dismissing the appeal from the preliminary decree and their Lordships approved the observation of Banerji J. in 39 All 641[7]:

> The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause.

They also approved of the summary of the position put by Tudball J.:

> If an appeal is preferred, the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed, it is that decree, and only that, which can be made final in the cause between the parties.

The preliminary decree finally effected between the parties was thus the decree of this Court dated 12th September 1933, and that must be read in the light of O. 20, R. 12, sub-r. (2) that where an inquiry is directed under cl. (b) or cl. (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry. In pursuance of the preliminary decree of this Court it was for the Court of first instance to make the inquiry and to prepare the final decree in accordance with its results. Thus I do not find any substance in the contention of Dr. Mitter that it was for this Court and not for the Subordinate Judge to pass the final decree for mesne profits in the suit as between the plaintiff and all the defendants. One other point was raised and that was that the petitioners before us had another remedy, that is to say, they could have appealed from the final decree and not having availed themselves of that remedy they ought not to be heard now to object against its execution. A similar argument was raised in a case to which I have already referred, 37 Mad 29,[5] in which it was pointed out that when the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent. That observation applies to the fact of the present case.

D.S./R.K. *Application allowed.*

4. ('14) 1 A I R 1914 All 380=24 I C 827=36 All 532=12 A L J 876 (F B), Kanhaiya Lal v. Tirbeni Sahai.
5. ('15) 2 A I R 1915 Mad 197=12 I C 664=37 Mad 29=21 M L J 1063, Lakshmi v. Maru Devi.
6. ('26) 13 A I R 1926 P C 93=98 I C 499=53 I A 197=6 Pat 24 (P C), Jowad Hussain v. Gendan Singh.
7. ('17) 4 A I R 1917 All 163=42 I C 93=39 All 641=15 A L J 734 (S B), Gajadhar Singh v. Kishan Jiwan Lal.

A. I. R. 1940 Patna 670

VARMA J.

Lalji Singh and another — Petitioners.

v.

Balbhadra Prasad — Opposite Party.

Civil Revn. Nos. 386 and 387 of 1939, Decided on 21st February 1940, against order of Munsif, First Court, Sitamarhi, D/- 19th April 1939 and 25th February 1939.

(a) Revision—Joint decree in favour of several persons some of them being minors —Revision against decree — Minors' guardian's costs not deposited — Application against them dismissed — Revision is incompetent.

Where a joint decree is passed in favour of several persons some of whom are minors and the revision application against the decree is dismissed against the minors for failure to deposit the costs of their guardian the revision is incompetent as the variation of the decree would result in the passing of two contradictory orders : *A I R 1939 Pat 198, Rel. on.* [P 671 C 1]

(b) Civil P. C. (1908), O. 21, R. 100 — Private purchaser from recorded tenants not recognized by landlord — Execution of rent decree aginst recorded tenants — Private purchaser cannot maintain proceedings under O. 21, R. 100.

Where the private purchaser of an occupancy holding is not recognized by the landlord, the private purchaser cannot maintain proceedings under O. 21, R. 100 in the proceedings by the landlord for the execution of his rent decree against the recorded tenants : *A I R 1918 Pat 483, Rel. on.* [P 671 C 2]

K. P. Sukul — *for Petitioners.*

N. N. Sinha and R. K. Chaudhry — *for Opposite Party.*

Order.—Civil Revision No. 386 of 1939 arises out of Miscellaneous Case No. 498 of 1938. The petitioner claims to be a private purchaser from the recorded tenants. The opposite party obtained rent decrees against the recorded tenants and in execution of those decrees delivery of possession was obtained. The petitioners filed applications under O. 21, R. 100, Civil P. C. In this particular civil revision it is not necessary to go into the details of the case because it appears to be incompetent. The case was decided under O. 21, R. 100, in favour of several persons jointly, some of whom happened to be minors and are opposite party Nos. 5, 6, 9 and 10. They were made parties in this application also but as their guardian's cost was not deposited the application was dismissed against them, with the result that if any interference is made with the order passed by the Court below we shall have two contradictory orders in this case. I accept the contention of Mr. R. K. Choudhry, appearing on behalf of the opposite party, that this application is incompetent : *vide* A I R 1939 Pat 198.[1]

Civil Revision No. 387 of 1939 arises out of Miscellaneous Case No. 314 of 1938. Here also the petitioners were private purchasers from the recorded tenants. Those tenants were not recognized. Before the present application under O. 21, R. 100, was filed the petitioners had filed a title suit for a declaration that their purchase should be recognized but that suit was dismissed by the judgment Ex. E-2 and decree Ex. 4. Even during the pendency of the rent suits the applicants were interveners and this particular point about their title was decided against them in Ex. E-1. The Court below has come to the conclusion that the petitioners had no locus standi to file an objection under O. 21, R. 100. Mr. Sukul, appearing on behalf of the petitioners, has drawn my attention to the wording of O. 21, R. 100 and says that the Court below should have come to a finding whether the petitioners were in actual possession or not and that it was for the Court below to go into the question of title. As against that my attention has been drawn to the decision in 3 P L J 579,[2] where it has been held that the purchaser of the whole or part of an occupancy holding not transferable by custom is a representative of the judgment-debtor and entitled to object under S. 47, Civil P. C., to a sale of the holding in execution of a decree for rent and is not entitled to maintain proceedings under O. 21, R. 100. The reason for this view is not far to seek. When a transfer before the present Tenancy Act came into force was not recognizable by force of law it was not incumbent upon the landlord to recognize a private purchaser from a tenant and could sue the original tenant ignoring the purchaser, and the decree obtained by the landlord, if it happened to be a rent decree (as opposed to money decree) was a charge upon the holding. In the present case the finding of the Court below is that the decree obtained by the landlord was a rent decree. In these circumstances I cannot interfere at this stage with the finding and order of the Court below. In the result both the applications fail and must be dismissed. The opposite party is entitled to costs ; hearing-fee one gold mohur in each case.

G.N./R.K. *Applications dismissed.*

1. Rajeshwari Prasad Singh v. Saheb Singh, (1939) 26 A I R Pat 198=182 I C 740.

2. ('18) 5 A I R 1918 Pat 483=43 I C 969=3 P L J 579, Pancharatan Koeri v. Ram Sahay Singh.

A. I. R. 1940 Patna 671

AGARWALA J.

Sheonandan Gope & another—Appellants.

v.

Shahdeo Khatik & others—Respondents.

Appeal No. 1034 of 1938, Decided on 12th September 1939, from appellate decree of Dist. Judge, Patna, D/- 26th August 1938.

(a) Appeal—Abatement—Suit against certain persons some of whom are minors decreed against plaintiff—Appeal by plaintiff without impleading minor defendants is not abated.

Where a suit against certain persons some of whom are minors is decreed against the plaintiff and the plaintiff appeals without impleading the minor defendants the appeal is not abated if the plaintiff is satisfied with a decree against the major defendants. [P 672 C 2]

(b) Compromise—Joint liability under compromise undertook by minors and majors found to be unenforceable against minors—Majors are not absolved from liability.

The mere fact that a joint bond executed as a part of a compromise is not enforceable against a minor executant of a bond does not absolve the major executant from liability: *A I R 1916 P C 2, Rel. on.* [P 672 C 2]

P. N. Sanyal for S. C. Mazumdar — *for Appellants.*

Mrs. Dharamsilla Lall—*for Respondents.*

Judgment. — This is an appeal from a decision of the District Judge of Patna reversing a decision of the Munsif. The appellants sued for rent of a house occupied by the defendants on a monthly rent of Rs. 10. The defendants remained in occupation of the house in spite of the notice to quit. The suit was for recovery of ten months arrears of rent and for mesne profits from the date of the determination of the tenancy. On 30th April 1937, a petition of compromise purporting to be on behalf of both parties was filed. By this agreement the defendants undertook to vacate the house on 15th May and to pay Rs. 84 to the plaintiffs by 5th May in settlement of the plaintiffs' claim. It was also agreed that if this amount was not paid by the due date the plaintiffs would have a decree for the full amount claimed, which was Rs. 250. The house was vacated on 15th May as agreed, but the sum of Rs. 84 was not paid on the stipulated date. It appears that among the parties was a minor plaintiff and three minor defendants. The guardians of these minors had not been permitted by the Court to enter into the compromise on behalf of their wards. On 5th May, defendant 1 applied to the Court to discharge the guardian ad litem of the minor defendants and to be appointed in his place and to be permitted to compromise the suit on behalf of the minor defendants. The Court directed this application to be heard on 10th May which was the date fixed for considering the compromise petition. No orders however were passed on 10th May but the defendants were permitted on that date to deposit Rs. 84 in spite of the plaintiffs' objection. On 27th May, the Court directed the compromise to be recorded and held that as time was the essence of the contract between the parties and the money had not been paid on 5th May as agreed, the plaintiffs were entitled to a decree for the full amount claimed. Against that decree the defendants appealed to the District Judge. He held that the compromise was not for the benefit of the minor defendants and time was not the essence of the contract and he dismissed the plaintiffs' suit. The plaintiffs have preferred the present appeal without including the minor defendants.

A preliminary objection was taken that the appeal has abated. This objection must be overruled. As the plaintiffs are satisfied with a decree against the major defendants there is no bar to their obtaining such relief. It may be observed that the trial Court had not by the 5th May, which was the date fixed for the payment of the stipulated sum, permitted the guardian of the minor defendants to enter into the compromise and that no such permission had been given to the guardian of the minor plaintiff either. The compromise, therefore, is voidable against all parties other than the minors. The major defendants, however, cannot escape the liability which they undertook. In 39 Mad 409[1] the Privy Council held that the mere fact that a joint bond executed as a part of a compromise is not enforceable against a minor executant of a bond does not absolve the major executant from liability. The proper order that should be passed in this case, therefore, is that, the decree of the Court below is set aside, the plaintiffs' claim for Rs. 120 for rent is decreed against the major defendants and also his claim for mesne profits which will be ascertained when he applies to the Court for that purpose. As this litigation has been prolonged owing to the negligence of the parties in omitting to obtain the permission of the Court to compromise on behalf of the minors, each party will bear his own costs throughout up to date.

D.S./R.K. *Decree set aside.*

1. Jamnabai Mohitai v. Vasanta Rao Anand Rao, (1916) 3 A I R P C 2 = 34 I C 213 = 43 I A 99=39 Mad 409 (P C).

A. I. R. 1940 Patna 673

AGARWALA AND ROWLAND JJ.

Chhatar Singh — Defendant —

Appellant.

v.

Syed Shah Qasim Ghani and another, Plaintiffs and others, Defendants —

Respondents.

Appeal No. 121 of 1938, Decided on 27th March 1940, from decision of Sub-Judge, Gaya, D/- 21st December 1937.

(a) Bihar Tenancy Act (8 of 1934), S. 67 as amended in 1937—S. 67 is not retrospective.

The new S. 67 does not apply to decree passed before 29th December 1937 as it is not expressed to be retrospective. [P 674 C 1]

(b) Bihar Tenancy Act (8 of 1934), S. 169 (1) (c) — Auction-purchaser is not liable for rent for period between date of sale and its confirmation.

According to S. 169 (1) (c) the decree-holder is entitled to receive from the surplus sale proceeds any rent which may have fallen due in respect of the tenancy between the institution of the suit and the date of the confirmation of the sale and no longer. It is quite clear then that from the date of the confirmation of the sale the only person to whom the landlord can look for his rent is the auction-purchaser. He is not liable to pay rent from the date of sale up to its confirmation as the Bihar Tenancy Act must be held to prevail and the more general enactment, that is to say S. 65, Civil P. C., will to that extent not be applicable. [P 674 C 1; P 675 C 1]

(c) Bihar Tenancy Act (8 of 1934), S. 53 — Instalment of rent when falls due stated.

Each instalment of rent is considered to fall due on the last date of the period in respect of which it is payable. Rent is not considered as accruing from day to day. [P 674 C 1, 2]

(d) Civil P. C. (1908), S. 65—Object of S. 65 explained.

Section 65 determines priority as between purchasers at successive sales. It is not meant to confer on a defaulting tenant the privilege of rent free occupation for so long as he or the decree-holder can delay confirmation of the sale. [P 675 C 1]

(e) Bihar Tenancy Act (8 of 1934), S. 169 (1) (c) — On sale decree-holder's charge for rent accruing due up to confirmation of sale is to that extent extinguished.

The ordinary rule as to the consequences of a suit to enforce a charge or a mortgage is that on sale of the charged or mortgaged property the purchaser acquires the rights of both mortgagor and mortgagee, so that the charge or mortgage sought to be enforced is extinguished. Under S. 169 (1) (c) the decree-holder enforces a charge for the rent not only to the date of suit but rent that should accrue due up to the date of the confirmation of the sale and if that is the extent of the charge that he is enforcing that will also be the extent of the charge which is extinguished. [P 675 C 1]

(f) Landlord and tenant — Holding sold in execution of rent decree and passed out of possession of tenant—It cannot be sold in execution of any other rent decree against same tenant.

After a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant, it cannot again be sold in execution of any other decree for rent due by the same tenant : *A I R 1923 Pat 517 and A I R 1935 Pat 118, Rel. on.* [P 675 C 2]

Ganesh Sharma, Braja Kishore Prasad Sinha and Ram Pratap Sinha —

for Appellant.

Syed Ali Khan and Md. Hasan Jan —

for Respondents.

Rowland J. — In this first appeal the defendant-appellant was an auction-purchaser of the rent-claimed tenures and the main question is, from what date he became liable for the rent. The landlord had obtained an earlier rent decree against Deo Bihari, the tenure-holder, in execution of which the tenure was sold and purchased at auction by the present defendant, Chhatar Singh, on 19th June 1933. The landlord brought this suit impleading both the former tenant Deo Bihari and the purchaser Chhatar Singh and claiming rent for all kists (there are nine kists per year) of the years 1341 to 1343. Subsequently, Deo Bihari was discharged from the record and the landlord claimed rent from Chhatar Singh only for the entire period, whereas the defendant contended that he was not liable for rent for the period before October 1934, when he took delivery of possession. Relevant dates are 19th June 1933, auction sale; 19th February 1934, confirmation of sale after disallowing the objection of the decree-holders. This date corresponds to 20th Phagun 1341 Fasli. Again on 19th March 1934, the decree-holders appealed but their appeal was dismissed under O. 41, R. 11, on 20th April 1934. The Subordinate Judge held that the defendant was not liable for instalments accruing due before 19th February 1934, totalling Rs. 734-3-0 but was liable for the kist of Phagun 1341 and all subsequent kists. Another point was raised in this appeal, namely that the lower Court erred in allowing interest on the arrear of rent at 12½ per cent. The latter contention need not detain us long. It is based on the amendment made in 1937 to S. 67, Bihar Tenancy Act. Previous to that amendment the statutory rate of interest was 12½ per cent. per annum. The amendment declares that :

> An arrear of rent shall bear simple interest at the rate of six and a quarter per centum per annum.

The amendment came into force on 29th December 1937 and the decree of the Sub-

ordinate Judge was passed on 21st December 1937, that is to say, it was clearly a correct decree on the date when it was passed. Interest after decree has been allowed at 6 per cent. and no objection is taken to this. The new S. 67 does not apply as it is not expressed to be retrospective.

As to the date from which the plaintiffs are entitled to rent there is an appeal by the defendant as well as a cross-objection by the plaintiffs. The defendant contends that until he obtained delivery of possession he should not be liable to pay rent in the circumstances of this case because the delay in his getting possession of the property was due to the decree-holder having resisted his right as purchaser of the property by preferring an objection under Sec. 173, Bihar Tenancy Act, alleging that the defendant, Chhatar Singh, was only a benamidar for the judgment-debtor and the decree-holder sought to have the sale set aside on this ground. The objection being disallowed the decree-holder appealed and so, it is said, that even if the defendant is not entitled to be excused from paying rent up to October 1934 when he received delivery of possession he should at least be excused from payment up to the date of the dismissal of the plaintiffs' appeal to the District Judge; for, up to that date, even if it was lawful for him to take possession, there was the risk of the sale being set aside. There might be some equity in favour of the appellant if the decree-holder had obtained an order of the District Judge staying delivery of possession, but there was no such order passed and in this state of the facts we can find no legal basis for the argument. The position, it seems, is governed by S. 169 (1) (c), Bihar Tenancy Act. The decree-holder is entitled to receive from the surplus sale proceeds any rent which may have fallen due in respect of the tenancy between the institution of the suit and the date of the confirmation of the sale and no longer. It is quite clear then that from the date of the confirmation of the sale the only person to whom the landlord can look for his rent was the auction-purchaser.

Then it is contended that even on this view the Phagun kist which amounts to Rs. 210-13-0 should be excluded ; but the matter is governed by S. 53, Bihar Tenancy Act, which has been explained in 21 Cal 383.[1] Each instalment of rent is considered to fall due on the last date of the period in respect of which it is payable. Therefore, the kist for Phagun must be considered to have fallen due on the last date of that month. As pointed out in this decision rent is not considered as accruing from day to day. The objection was raised in that case that on this view it might go very hard against the purchaser of the tenure who would be made liable for rent due in respect of the whole of a period of time when he has had possession only for a part of that period, and it may be for a very small part. The answer to this objection was that the purchaser can always protect himself when making his purchase by paying for the property only so much as is equivalent to its value, regard being had to the liability with which it is burdened. In cross-objection the extreme claim that the landlord should get from the purchaser rent for the entire period in suit is manifestly untenable and is not pressed; but it is contended that he should get rent with effect from the date of sale and for this reference is made to S. 65, Civil P. C., under which the property is deemed to have vested in the purchaser at an auction sale from the time when the property is sold and not from the time when the sale becomes absolute. This provision in the present Code is a distinct departure from S. 316 of the old Code of 1882 by which the title to immovable property sold at an execution sale vested in the purchaser from the date of the sale certificate, that is, the date on which the sale became absolute.

Mr. Hasan Jan for the cross-objectors relies on 18 C W N 136.[2] Here it was held that as a consequence of the alteration occasioned by S. 65, Civil P. C., the judgment-debtor is not liable for rent beyond the time when the property is sold and the liability of the surplus sale proceeds under cl. (c) of S. 169, Bihar Tenancy Act, must be similarly limited so as to correspond with this. This decision was followed without comment in a later case of the same High Court in 26 C W N 511;[3] but with great respect to the learned Judges who decided those cases it seems to me that their attention was not drawn to S. 143, Ben. Ten. Act. The Code of Civil Procedure under this section applies to rent suits only subject to

1. ('94) 21 Cal 383, Satyendra Nath v. Nilkantha Singh.

2. ('14) 1 A I R 1914 Cal 785 = 23 I C 101 = 18 C W N 136, Bejoy Chand Mahtap v. Sashi Bhusan Bose.

3. ('19) 6 A I R 1919 Cal 341 = 53 I C 996 = 26 C W N 511, Ramlal Das v. Bandiram Mokhopadhya.

rules made under the Tenancy Act and subject also to the other provisions of the Tenancy Act. The result of this is that where there is a repugnancy between any provision of the Bengal Tenancy Act and anything contained in the Civil Procedure Code the special law, that is to say, the Bengal Tenancy Act, must be held to prevail and the more general enactment, that is to say, the Civil Procedure Code, will to that extent be not applicable. It is stated in the clearest terms in S. 169 (1) (c) that the decree-holder is entitled to draw from the surplus sale proceeds any rent which may have fallen due to him up to the date of the confirmation of the sale. I am at a loss to understand how it can be said that a contrary result can follow without conflict with the express words of this section, and, indeed, without injustice. For the judgment-debtor cannot be ousted from possession till the sale is confirmed. S. 65, Civil P. C., determines priority as between purchasers at successive sales. I cannot suppose it is meant to confer on a defaulting tenant the privilege of rent-free occupation for so long as he or the decree-holder can delay confirmation of the sale.

But it is said that even if the decree-holder retains his charge on the surplus sale proceeds this would not deprive him of the remedy against the auction purchaser. In fact it is suggested that the present procedure is so beneficial to the landlord as to give him a double remedy. There are however difficulties in taking this view. The rent is of course declared by S. 65, Bihar Tenancy Act, to be a first charge on the tenancy. Now the ordinary rule as to the consequences of a suit to enforce a charge or a mortgage is that on sale of the charged or mortgaged property the purchaser acquires the rights of both mortgagor and mortgagee, so that the charge or mortgage sought to be enforced is extinguished. It is true that rent is in a special position because it accrues periodically and a fresh charge is always being created anew in respect of rent freshly accrued; but what we have to see is for what rent was the decree-holder enforcing a charge. I think that the only interpretation we can place on S. 169 (1) (c) is that he was enforcing a charge for the rent not only to the date of suit but rent that should accrue due up to the date of the confirmation of the sale and if that was the extent of the charge that he was enforcing that will also be the extent of the charge which is extinguished. The general rule is as stated in 4 P L T 640[4] and 16 P L T 73[5]:

> It is settled that after a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant, it cannot again be sold in execution of any other decree for rent due by the same tenant.

The rule is not abrogated by the decisions which recognize one special case in which the purchaser may become liable to pay rent accruing due before the date of sale or of its confirmation. That case arises when as in 6 C W N 877[6] notice has been given in the sale proclamation itself that the holding is being sold subject to a liability for earlier arrears of rent. The decisions of this Court which I cited above were considered in 17 Pat 694[7] and with regard to the application of the exception, *Jugal Kishore's case*[4] has not been accepted; but the general rule to which it is an exception has not been questioned and stands good. The result will be that the appeal and cross-objection will both be dismissed with costs.

Agarwala J. — I agree.

D.S./R.K. *Appeal dismissed.*

4. ('23) 10 A I R 1923 Pat 517 = 80 I C 377 = 4 P L T 640 = 2 Pat 720, Jugal Kishore Narayan Singh v. Bhatu Modi.
5. ('35) 22 A I R 1935 Pat 118 = 159 I C 169 = 16 P L T 73, Kamaldhari Lal v. Tarachand Marwari.
6. ('02) 6 C W N 877, Haradhan Chattoraj v. Kartik Chandra.
7. ('38) 25 A I R 1938 Pat 545 = 178 I C 10 = 17 Pat 694 = 19 P L T 723 (F B), Nripendra Nath v. Kuldip Misser.

A. I. R. 1940 Patna 675

MANOHAR LALL J.

Bhajan Singh and another —

Appellants.

v.

Motipur Zamindari Co. Ltd. —

Respondent.

Appeal No. 559 of 1939, Decided on 9th May 1940, from decision of Dist. Judge, Muzaffarpur, D/- 20th February 1939.

(a) Civil P. C. (1908), S. 100 — Question as to area of land in suit and correct rental payable is one of fact—Finding on aforesaid question even though wrong is binding in second appeal.

A finding by the lower Appellate Court as to the area of the land in suit and the correct rental payable by the tenant is a finding of fact and cannot be interfered with in second appeal even if the finding is wrong. [P 676 C 1, 2]

(b) Bihar Tenancy Act (8 of 1934), S. 68, repealed by Act 8 of 1937 — Applicability — Judgment after repeal of S. 68 — S. 68 cannot be resorted to.

Section 68 cannot be resorted to in the case of a judgment delivered after its repeal even though the suit may have been instituted prior to its repeal by the Amending Act. [P 677 C 1]

(c) Bihar Tenancy Act (8 of 1934), S. 67 as introduced by S. 9 of Amending Act 8 of 1937 —S. 67 is not retrospective.

Section 67 as introduced by S. 9, Bihar Amending Act 8 of 1937, is not retrospective: *A I R 1940 Pat 673, Rel. on.* [P 677 C 2]

S. Mehdi Imam and Dasu Sinha — *for Appellants.*

S. M. Saleem and S. Ali Khan — *for Respondent.*

Judgment. — This is an appeal by the defendants in a rent suit brought by the Motipur Zamindari Co., Ltd. The suit was for recovery of arrears of rent for 1341 to 1344 Fasli in respect of certain areas of land with a certain jama after remitting mafi pagri. The only defence which requires notice is that the area and the jama of the holding were not as stated by the plaintiff. The trial Court held that the area and jama of the defendants were as stated in the plaint, namely 15 bighas, 5 kathas and 9 dhurs with jama of Rs. 49-15-6. The matter was then taken in appeal before the learned District Judge of Muzafferpur who held that the area of the suit land was 15 bighas, 5 kathas and 9 dhurs and that the correct rental was Rs. 48-12-3 including cess after deducting one rupee as mafi pagri. This apparently is a finding of fact which cannot be interfered with by me.

But the learned advocate for the appellants vehemently contended that the Courts below having found that there had been an enhancement of more than two annas in the rupee their judgments are vitiated and should be set aside. It was also argued that the Courts below were not justified in holding that the survey entry was incorrect and, therefore, this was a serious error in law which should be corrected by this Court. Mr. Mehdi Imam further argued that the Courts below erred in law in ignoring the admission of the plaintiff or of his witness and suggests some sort of estoppel.

I am of opinion that all these contentions are without any substance. The trial Court pointed out that it was true that the plaintiff's patwari stated that in the survey entry the area increased to 24 bighas, 17 kathas and the jama was increased to Rs. 81-12-0 after survey with the consent of Sheosaran, ancestor of the defendants, but pointed out that this statement was his inference with reference to the village papers as he was not present at the time of survey and so refused to act upon this statement. Now it was open to the learned Munsif not to rely upon the so-called admission and the weight to be attached to that admission was a matter for that Court of fact and in this he has committed no error in law.

An estoppel was sought to be raised on the ground that certain rent receipts for 1327 Fasli showed an area of 24 bighas 17 kathas 7 dhurs with a jama of Rs. 59.15.0 while the receipts for 1328, 1329, 1330, 1343 and 1342 showed an area of 17 bighas 2 kathas 11 dhurs with a jama of Rs. 40-14-0. The trial Court gave reasons as to why these receipts could not assist the defendants. It may be that these reasonings are not sound but that has nothing to do with this Court in second appeal. It is sufficient to say that the Court of fact upon a consideration of all the evidence came to the conclusion, relying upon the jamabandi of 1303, that the original area of the holding was 18 bighas, 11 kathas and 5 dhurs at a rental of Rs. 3-2-0 a bigha and that it was clear that no lump rental was fixed for a certain block of land within defined boundaries. From these facts he came to the conclusion that with the consent of the parties the jama was fixed at Rs. 3-2-0 a bigha. The learned District Judge also considered the matter carefully and points out that the plaintiffs produced their jamabandis from 1303 Fasli with counterfoil receipt books for the year 1316 to 1341 as also the mutation register. He examined the situation as indicated by the survey record of rights and after giving the entry therein a statutory presumption of correctness considers that in the circumstances of this case the error regarding the area or rental was most likely to have crept in because the new settlement alleged by the plaintiffs was in 1303 Fasli corresponding to 1896 A. D. whereas the record of rights was finally published in 1898 and therefore the proceeding must have started about 1895. He agreed with the Munsif in believing the plaintiff's papers as showing the correct situation regarding the rental and transactions relating to this holding and in the end he held :

> I, therefore, believe that the khatian rental in this case was incorrect for the area shown in the khatian.

Now this is a finding of fact. It may be right or it may be wrong, but nonetheless it is a finding of fact which the Court of fact had complete jurisdiction to arrive at. I do not see any error of law which has been committed by either of the Courts in

holding that the area of the land in possession of the defendants was 15 bighas, 5 kathas and 9 dhurs and that the rental thereof was Rs. 48-12-3 including cess. Nor do I see any question of illegal enhancement which arises in view of this case. The learned District Judge gave relief to the defendants on a small point which related to Re. 1-3-3 on account of mankhan.

It was lastly argued that the Courts below were in error in giving damages to the plaintiff at 25 per cent. as S. 68 has been repealed by Act VIII of 1937 which came into force on 10th March 1938. Mr. Syed Ali Khan on the other hand argues that as the present suit was instituted on 23rd September 1937, the plaintiff's right to claim damages was not affected by the latter legislation. He relied upon the decision of this Court in First Appeal No. 121 of 1938[1] disposed of on 27th March of this year where Rowland J., in delivering the judgment of the Bench dealt with the question which arose under S. 67, Bihar Ten. Act. It was pointed out by the learned Judge that:

> Previous to that amendment the statutory rate of interest was 12½ per cent. per annum. The amendment declares that 'An arrear of rent shall bear simple interest at the rate of six and a quarter per centum per annum.' The amendment came into force on 29th December 1937 and the decree of the Subordinate Judge was passed on 21st December 1937, that is to say it was clearly a correct decree on the date when it was passed.

In the present case the decree was passed on 16th July 1938, that is to say after the amendment came into force and therefore the decree was not a correct decree on the date when it was passed. Much reliance was placed by the learned advocate on the next observation in that judgment where it was observed: "The new S. 67 does not apply as it is not expressed to be retrospective". In the present case, however, I find that S. 68 had been repealed on the date when the Court came to deliver this judgment. No litigant had any vested right in the provisions of S. 68. That section only gave a discretion to the Court that:

> If, in any suit brought for the recovery of arrears of rent, it appears to the Court that the defendant has, without reasonable or probable cause, neglected or refused to pay the amount of rent due by him, the Court may award to the plaintiff, in addition to the amount decreed for rent and costs, such damages, not exceeding twenty-five per centum on the amount of rent decreed, as it thinks fit.

In my opinion that discretion has been taken away by the repeal of that Section and the Court in the present case could not resort to it as on the date of the judgment that section was no longer in existence. The Court ought to have proceeded under S. 67. I am bound by the decision of the Division Bench of this Court just referred to where it has been held that "the new S. 67 has no application as it is not expressed to be retrospective". The new S. 67 was introduced by S. 9 of Bihar Act VIII of 1937. It provides in the first sub-clause of S. 67 that:

> An arrear of rent shall bear simple interest at the rate of six and a quarter per centum per annum.

The old S. 67 provided that:

> An arrear of rent shall bear simple interest at the rate of twelve (and a half) per centum per annum from the expiration of that quarter of the agricultural year in which the instalment falls due (to the date of payment or of the institution of the suit, whichever date is earlier).

I, therefore, order that in lieu of damages which have been granted by the trial Court at the rate of 25 per cent. a decree should be given to the plaintiff in terms of the old S. 67 by calculating simple interest at the rate of 12½ per cent. per annum from the expiration of that quarter of each agricultural year for the rental of each of the years which are the subject of the present suit. The office will prepare a modified decree on these lines. As the appellant has substantially failed in this appeal the appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

1. *Reported in* ('40) 27 AIR 1940 Pat 673, Chhatar Singh v. Qasim Ghani.

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* A. I. R. 1940 Patna 677

WORT AND MEREDITH JJ.

Bhishundeo Narain Missir and others —Appellants.

v.

Raghunath Prasad Missir — Respondent.

Appeal No. 241 of 1939, Decided on 12th December 1939, from appellate order of Dist. Judge, Muzaffarpur, D/- 18th May 1939.

***(a) Limitation Act (1908), Art. 182 (5)—Application for transfer of decree to Court of other district—Latter Court for temporary and accidental reasons not having necessary jurisdiction at time of transfer—Application is in accordance with law and is step-in-aid of execution.**

An application for transfer of a decree is a step-in-aid of execution but in order to save limitation, such an application must also be an application in accordance with law. The phrase "made in accordance with law" does not include an application to the Court to do something which either from the decree-holder's direct knowledge in fact or from his presumed knowledge of law he must have

known the Court was incompetent to do. The presumed knowledge of law refers to knowledge of the general law and not to knowledge of any particular orders varying the pecuniary jurisdiction of a particular Court. It cannot be said that an application for transfer of a decree to a Court of any other district, which, for merely temporary and accidental reasons, has not the necessary jurisdiction at the particular time, is not an application in accordance with law. It is a step in aid of execution. [P 680 C 1, 2]

***(b) Limitation Act (1908), Art. 182 (5)—Decree transferred to another Court for execution—Certificate of non-satisfaction not received from transferee Court—Second application made to decree Court for transfer is not step-in-aid.**

Where a decree is transferred by decree Court to another Court for execution, the former Court without receiving a certificate of non-satisfaction from the transferee Court cannot entertain a fresh application for execution. Hence a fresh application for transfer made to the decree Court is not a step in aid: *A I R 1916 P C 16 and A I R 1939 Pat 289, Rel. on.* [P 680 C 2]

***(c) Limitation Act (1908), S. 14 and Art. 182 (5)—S. 14 and Art. 182 (5) deal with distinct matters—For application of S. 14 it is not necessary that proceeding must be in accordance with law—Words of Art. 182 (5) cannot be imported into S. 14.**

Article 182 (5) and S. 14 are dealing with quite distinct matters. The former prescribes the terminus a quo, the point from which limitation shall begin to run ; the latter has nothing to do with this, and relates only to the method to be adopted in calculating the total time that is to be counted after the starting point has been fixed. Cl. (5) of Art. 182 has nothing to do with any period of time; it has only to do with a fixed point of time. Only five conditions have to be satisfied for the application of S. 14 (2), and no condition that the proceeding must be in accordance with law is to be found in them, either expressly or by implication. Nor can the words of Art. 182 (5) be imported into S. 14 (2), since the provisions relate to quite different matters. [P 681 C 1]

***(d) Limitation Act (1908), S. 14 and Art. 182 (5) — Words "any application" in S. 14 (2) include application for execution—Decree-holder prosecuting execution bona fide before Judge believing him bona fide, though erroneously, to have jurisdiction—Time taken by such proceeding can be excluded.**

The words "any application" in S. 14 (2) include an application for execution and a decree-holder is entitled to exclude the time during which he has been prosecuting his execution bona fide and with due diligence before a Judge whom he believed bona fide, though erroneously, to have jurisdiction. Art. 182 (5) cannot in such case bar application of S. 14: *Case law referred.* [P 681 C 1, 2 ; P 682 C 2]

B. C. De and G. P. Shahi — *for Appellants.*

Ganesh Sharma—*for Respondent.*

Meredith J.—This is a judgment-debtor's appeal from an order of the learned District Judge of Muzaffarpur, dated 18th May 1939 affirming an order of the Subordinate Judge of Muzaffarpur, dated 14th February 1939 dismissing an application under S. 47, Civil P. C., in execution proceedings. The point now taken is one of limitation, and the dates material to the determination of the question are as follows :

7-8-1933 : Decree passed in favour of the respondent for Rs. 2264 by the Munsif, Second Court, Darbhanga.

20-7-1935 : Application made to the Munsif, Second Court, Darbhanga, by the decree-holder for transfer of the decree for execution to the Munsif, Second Court, Muzaffarpur.

(20-4-1935 : The Munsif, Second Court, Muzaffarpur, who had powers up to Rs. 4000 was transferred and was succeeded by a new Munsif, having powers up to only Rs. 1000.)

5-8-1935 : The District Judge of Muzaffarpur on receipt of the decree from the Munsif, Second Court, Darbhanga, transferred it for execution not to the Munsif, Second Court, Muzaffarpur (who by that time had not the necessary powers) but to the Munsif, First Court, Muzaffarpur (who also had no special powers).

22-5-1936 : The decree-holder filed his application for execution not before the Munsif, First Court, Muzaffarpur, but before the Subordinate Judge, First Court, Muzaffarpur.

29-5-1936 : Tne Subordinate Judge, First Court, Muzaffarpur, returned the application together with the certificate of non-satisfaction and the order of transfer, to the applicant, on the ground that he had no jurisdiction. The same day the decree-holder re-filed it before the Munsif, First Court. The Munsif also returned the papers for presentation before the proper Court, on the ground that he had no jurisdiction.

4-6-1936 : The decree-holder goes back to the Subordinate Judge, First Court, Muzaffarpur, and refiles his application before him. This time the Subordinate Judge, First Court, accepts it.

11.5.1937 : An objection made by the judgment-debtors to execution is dismissed by the Subordinate Judge.

26.8.1937 : Against this order of dismissal there was an appeal to the District Judge, who, on this date, allowed it and dismissed the execution case on the ground that the Subordinate Judge had no jurisdiction, as the decree had not been transferred to his Court.

13.4.1938 : The High Court in second appeal upheld the order of the District Judge.

18.7.1938 : The decree-holder filed a fresh application before the Munsif, Second Court, Darbhanga, for transfer of the decree for execution to the Subordinate Judge, First Court, Muzaffarpur.

21.7.1938 : The District Judge of Muzaffarpur thereupon passes an order transferring the decree for execution to the Subordinate Judge, First Court, Muzaffarpur.

22.7.1938 : The present application for execution is filed before the Subordinate Judge.

It is contended, first, that the application for transfer, filed on 20th July 1935 before the Munsif of Darbhanga, was not a step-in-aid of execution within the meaning of Art. 182 (5), Limitation Act, because it was not made in accordance with law, as it was for transfer to a Court having no jurisdiction; if this application was not a step-in-aid, giving a fresh start for limitation under Art. 182 (5), then the present application must be barred by limitation. Secondly, even if that application be taken to be a step-in-aid, the second application for transfer filed on 18th July 1938, before the Munsif at Darbhanga, cannot be taken to be a step-in-aid, because it was not made to the proper Court; as the decree had been previously transferred to Muzaffarpur, and no certificate of non-satisfaction had been received by the Munsif, Darbhanga, he had no jurisdiction to entertain a fresh application for execution or for transfer of the decree. If the application of 18th July was not a step-in-aid, then the application for execution dated 22nd July 1938, would, in any case, be out of time, being more than three years after the application of the 20th July 1935. The Court below has held that the application of 20th July 1935 was a step-in-aid. It has recorded no clear finding with regard to the application of 18th July 1938, but it may be presumed that it was its opinion that it could not have saved limitation, because it holds that the application of 22nd July 1938 was in time, as the decree-holder under S. 14, Limitation Act, was entitled to exclude the time spent in prosecuting his application made in 1936 to the Subordinate Judge, this being a proceeding prosecuted with due diligence in good faith in a Court, which, from defect of jurisdiction, was unable to entertain it.

Mr. B. C. De, for the appellants, as regards S. 14, argued, in the first place, that S. 14 must be read subject to Art. 182 (5), and not vice versa: the special provision must control the general provision, and S. 14 cannot be used so as to extend the limitation period of three years fixed under Art. 182. Secondly, even if that could be done, this is not a fit case for its application since the decree-holder was not prosecuting his application with due diligence in good faith. "Good faith," as defined in the Act, involves "due care and attention." It follows then, that there are three questions for decision: (1) Was the application of 20th July 1935, for transfer of the decree to the Court of the Munsif, Second Court, Muzaffarpur, a step-in-aid, was it in accordance with law? (2) Was the application of 18th July 1938, a step-in-aid? and (3) Is the decree-holder entitled to exclude the time spent in prosecuting the application of 20th July 1935, under S. 14, Limitation Act?

Upon the first point, I am of opinion that the application of 20th July 1935 was an application to take a step-in-aid of execution within the meaning of Art. 182 (5), which runs as follows:

> (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court, for execution or to take some step-in-aid of execution of the decree or order.

Article 182 provides three years' limitation from that date. It is, of course, settled that an application for transfer of a decree is a step-in-aid of execution, 3 P L T 422;[1] but in order to save limitation, such an application must also be an application in accordance with law. There are rulings to the effect that an application to a Court having no jurisdiction is not in accordance with law. The application which we are at present considering was not, however, an

1. ('22) 9 A I R 1922 Pat 188=67 I C 538=1 Pat 651=3 P L T 422, Amrit Lal v. Murlidhar.

application of this kind. It was an application for transfer made to the proper Court, that is, the Munsif, Second Court, Darbhanga, which had passed the decree. It was for transfer to a Court which at that time had not the necessary jurisdiction, but which shortly before that had had it. Upto 30th April 1935 the Munsif, Second Court, Muzaffarpur, had the necessary pecuniary jurisdiction to execute the decree. As the learned District Judge has observed, under O. 21, R. 5, Civil P. C., the original Court should not transfer the decree direct to the Second Munsif of Muzaffarpur but was bound to send it to the District Judge of Muzaffarpur under Order 21, Rule 8. The District Judge could then transfer the decree to any Subordinate Court of competent jurisdiction, and was not bound to send the decree to the particular Court mentioned in the original application for transfer. There is nothing to show that the decree-holder had direct knowledge in fact that the Second Munsif of Muzaffarpur had ceased to exercise jurisdiction up to Rs. 4000. The application was not, therefore, an application to transfer the decree to some Court which could never possibly have jurisdiction to execute it, but was an application for transfer to a Court which for temporary reasons, not known to the decree-holder, was at that particular time incompetent to execute the decree.

The District Judge of Muzaffarpur, on receipt of the application, finding that the Munsif, Second Court, had no longer jurisdiction, could and should have transferred the decree to a competent Court. Instead of that, though he did not transfer it to the Second Munsif he transferred it to the Munsif, First Court, who also had no jurisdiction. It may well be that the word "Munsif" was merely a clerical error made in the District Judge's office and what was intended was a transfer to the Subordinate Judge, First Court, which was the proper Court to which to make the transfer. However, that may be, the application for transfer was to a Court which the decree-holder having regard to its previous history might quite reasonably suppose to have the necessary jurisdiction; and the application would have gone to a Court of competent jurisdiction but for a mistake in the office of the learned District Judge. What the rulings state is that the phrase "made in accordance with law" does not include an application to the Court to do something which either from the decree-holder's direct knowledge in fact or from his presumed knowledge of law he must have known the Court was incompetent to do. I agree with the District Judge that the presumed knowledge of law refers to knowledge of the general law and not to knowledge of any particular orders varying the pecuniary jurisdiction of a particular Court. It would be unreasonable to expect the decree-holder to keep track of every change in the pecuniary jurisdiction of Munsif's Courts in other districts dependent upon the transfers of particular officers. In my view it cannot be said that an application for transfer of a decree to a Court of any other district which for merely temporary and accidental reasons, has not the necessary jurisdiction at the particular time is not an application in accordance with law. That disposes of the first point.

I turn now to the second point, that is, regarding the application of 18th July 1938. It must be held, I think, that this was not an application which could save limitation under Art. 182 (5), because it was not made to the proper Court, and that is one of the express requisites of the provision in question. Manifestly, without receiving a certificate of non-satisfaction from the Court to which the decree had been transferred, the Munsif, Darbhanga, could not entertain a fresh application for execution. On this point there is the direct authority of the Privy Council in 39 Mad 640,[2] wherein it was laid down that an application to a Court asking it to do what it has no jurisdiction to do, is not in accordance with law or a step-in-aid of execution. This ruling was followed in 20 P L T 356,[3] wherein it was also held that an application for execution made to a Court, which has already transferred the decree for execution elsewhere is not a step-in-aid. I come now to the third point, whether the application of 22nd July 1938, though more than three years after the application of 20th July 1935, can yet be held to be in time by the application of the provisions of S. 14, Limitation Act.

The argument that S. 14 must be read subject to Art. 182 (5) and cannot be used to extend the period of three years' limitation prescribed by Art. 182, appears to me to be based upon a misconception. There is no question of extending the period of three years. The question is rather of

2. ('16) 3 A I R 1916 P C 16=36 I C 682=43 I A 238=39 Mad 640 (P C), Maharaja of Bobbili v. Narasaraju Peda Baliara Simhulu Bahadur.
3. ('39) 26 A I R 1939 Pat 289 = 180 I C 81=20 P L T 356, Kamakhya Narain Singh v. Kalipada Dutt.

excluding certain periods from the calculation under which the three years period is made up. There is in fact no question of either provision being controlled by or subject to the other. Article 182 (5) and S.14 are dealing with quite distinct matters. The former prescribes the terminus a quo, the point from which limitation shall begin to run; the latter has nothing to do with this, and relates only to the method to be adopted in calculating the total time that is to be counted after the starting point has been fixed. Cl. (5) of Art. 182 has nothing to do with any period of time; it has only to do with a fixed point of time. It is quite conceivable that a proceeding might be started in a Court without jurisdiction by an application not in accordance with law, an application which could not possibly form a fresh starting point for limitation under Art. 182 (5); but that fact would not prevent the exclusion of the period for which the proceeding initiated by the application was being prosecuted, so long as it was being prosecuted in the Court without jurisdiction with due diligence and in good faith. For S. 14 (2), which relates to applications, refers only in wide terms to a civil proceeding, whether in a Court of first instance, or in a Court of Appeal, against the same party for the same relief, and says nothing whatever about the proceeding being in accordance with law or in the proper Court. On the contrary, it does apply in express terms to a proceeding in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

The conditions for the application of S. 14 (2) are five: (1) that there is another civil proceeding; (2) that it is against the same party; (3) that it is for the same relief; (4) that it is prosecuted with diligence and in good faith; and (5) that the Court from defect of jurisdiction or other cause of a like nature is unable to entertain it. Only these five conditions have to be satisfied for the application of S. 14 (2), and no condition that the proceeding must be in accordance with law is to be found in them, either expressly or by implication. Nor, as I have said, can the words of Art. 182 (5) be imported into S. 14 (2), since the provisions relate to quite different matters. That the words "any application" in S. 14 (2) will include an application for execution is well settled, and there are numerous cases where it has been held that a decree-holder is entitled to exclude the time during which he has been prosecuting his execution bona fide and with due diligence before a Judge whom he believed bona fide, though erroneously, to have jurisdiction.

I may refer first to a case under the old Limitation Act of 1859, where S. 20 corresponded to Art. 182 of the present Act. Their Lordships of the Privy Council in 2 All 792[4] laid down that it was the object of the Legislature in the Limitation Act (14 of 1859), S. 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, bona fide and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle should prevail in the construction of S. 20 with regard to executions. That view was taken before the second clause was enacted in S. 14. In a case twelve years later (in 1892), the Calcutta High Court laid down in 20 Cal 29[5] that under S. 14, Limitation Act, the decree-holder was entitled to a deduction of all the time occupied in executing his decree in a Court having no jurisdiction, his application upon the facts of the case having been manifestly made in good faith.

In 1900 the Calcutta High Court again held in 28 Cal 238[6] that a proceeding to enforce a decree taken in a Court, which was erroneously believed by the decree-holder to have jurisdiction, is a bona fide proceeding within the terms of S. 14, Limitation Act (15 of 1877). That was a case where the property at the date of the decree was situated within the jurisdiction of the Munsif's Court at Nawabganj. Subsequently, by order of the Local Government, the local jurisdiction in respect of the thana was transferred to the Court of the Munsif at Malda. After the transfer was notified, the decree-holder, within the time fixed by the law of limitation, applied for execution in the Malda Court. After the sale it was found that the decree-holder had obtained no certificate from the Nawabganj Court transferring the decree for execution by the Malda Court, and the latter had, therefore, no jurisdiction to execute the decree. The decree-holder then applied to the Nawabganj Court for a transfer, and was held to be entitled under S. 14, Limi-

4. ('80) 2 All 792=7 I A 167=4 Sar 157 (P C), Hira Lal v. Badri Das.
5. ('93) 20 Cal 29, Rajballabh Sahay v. Jai Krishna Prasad.
6. ('01) 28 Cal 238=5 C W N 150, Jahar v. Kamini Debi.

tation Act, to a deduction of the time during which the application erroneously made to the Munsif of Malda had been pending, as the proceeding had been taken in good faith. Their Lordships observed that the District Judge had wrongly held that ignorance of law, that is to say ignorance on the part of the decree-holder that his application could only be made in the Nawabganj Court, prevented his pleading good faith within the terms of S. 14, Limitation Act. The case in 2 All 792[4] was, they said, an authority to the contrary. They observed further that in 2 All 792[4] their Lordships of the Privy Council had pointed out that in that case the Judge himself believed he had jurisdiction and acted accordingly, and so also in the case before their Lordships. So also, I should observe, in the present case, for the Subordinate Judge, Muzaffarpur, entertained the application on the second occasion and dismissed the objection of the judgment-debtors. It was only when the case came to the District Judge on appeal that it was held that the Subordinate Judge had no jurisdiction.

In 11 I C 338,[7] where the Sub-Court at Ellore had transferred its decree for execution direct to the Special Assistant Agent instead of to the Agent, Godavari; where that order having been set aside an application was filed in the proper Court, the applicant was held entitled to a deduction of the time spent between the date of order of transfer to the wrong Court and the date of return of the proceedings to the right Court in accordance with an appellate order, and that he must be deemed to have been bona fide prosecuting his application for execution within the meaning of S. 14, Limitation Act, as he was not responsible for the order of the Court transferring the decree to a wrong Court. Here, I may remark that in the present case the decree-holder was not responsible for the fact that the District Judge finding the Munsif, Second Court, Muzaffarpur, no longer had jurisdiction, wrongly transferred the decree to the Munsif of First Court instead of to the Subordinate Judge, First Court.

Coming to the present Limitation Act (IX of 1908), it was held in 14 Lah 106[8] that the wording of sub-s. (2) of S. 14, Limitation Act, is comprehensive enough to cover all applications and is therefore applicable to bona fide applications for execution, if they have been filed and presented in a wrong Court in circumstances described in that section. In 26 Bom L R 470[9] where it was found on appeal that certain proceedings in the Haveli Court were without jurisdiction, it was held that the decree-holder was entitled to exclude the time spent in prosecuting those proceedings under S. 14 (2), Limitation Act 1908, since he ought not to suffer because when the proper proceedings were in the Vadgaon Court, the Judge sitting in the Haveli Court had wrongly entertained the darkhast. In my view, there can be no doubt about the proposition that S. 14 (2), Limitation Act, applies to execution proceedings in suitable cases, and Art. 182 (5) cannot in such cases bar its application.

In support of the contention that S. 14(2) should not be applied in the present case, as the proceedings were not in good faith, reliance is placed on 101 I C 674,[10] a case of this High Court. That was a case where the execution petition had been filed in the Court of the Munsif, First Court, Purnea, though the decree had been passed by the Court of the Subordinate Judge, and there had been two previous execution proceedings, both in the Court of the Subordinate Judge. It was held that the decree-holder was not entitled to exclude the time spent in the Court of the Munsif. It was pointed out that "good faith" for the purposes of the Limitation Act was defined in S. 2(7):

> Nothing shall be deemed to be done in good faith which is not done with due care and attention.

In the case under consideration the decree on the face of it showed that it had been passed by the Subordinate Judge. The decree-holder postponed action till the very last moment and though the decree was staring him in the face as one of the Subordinate Judge, his agent negligently filed the execution application in the Munsif's Court. Clearly they observed, such an act could not be said to be done with due care and attention. The District Judge had found that the decree-holder had acted in good faith; that, however, they held, was a question of mixed law and fact which the High Court could go into in second appeal. In that particular case, therefore, S. 14 was

7. ('11) 11 I C 338, Kakamani Rayappa v. Kotta Venkanna.
8. ('32) 19 A I R 1932 Lah 531 = 138 I C 646 = 14 Lah 106 = 33 P L R 740, Kala Singh v. Gehna Singh.
9. ('25) 12 A I R 1925 Bom 113 = 85 I C 778 = 26 Bom L R 470, Pandu Dagadu v. Jamnadas Chotumal.
10. ('27) 14 A I R 1927 Pat 256 = 101 I C 674 = 8 P L T 561, Fazlul Jamil v. Halal-ud-din.

not applied, though there was clearly an implication that it could have been applied if the decree-holder had acted in good faith. The facts of that case were quite dissimilar to those of the present case. In the present case also, however, the District Judge has recorded an express finding that the decree-holder was prosecuting the proceedings in the Court of the Subordinate Judge in 1936 in good faith. With regard to this finding, I shall only say that, whether it is a correct finding, in so far as it is a finding of fact, is a point which does not concern us in second appeal; and in so far as it may be considered a finding of law, there is nothing in the case upon which it could be held that it is legally wrong.

In my view the decree-holder in the present case is clearly entitled to exclude the time spent in prosecuting his case in wrong Courts. The exclusion of even two days would make the present application of 22nd July 1938, an application within time, always provided that the application of 20th July 1935 was a step-in-aid. I have held that it was so. Even, however, had it not been possible to come to that finding, the present application would still be in time, for a reason which I shall now state. The time to be excluded under S. 14 (2) is from 20th July 1935 to 13th April 1938, the date when the High Court finally affirmed the order of the District Judge holding that the Subordinate Judge had no jurisdiction; that is to say, the decree-holder is entitled to an exclusion of about two years and nine months. If two years and nine months be excluded, the application of 22nd July 1938 was in time, even calculating from the date of the decree, which, as I have said, was passed on 7th August 1933. I would dismiss the appeal with costs.

Wort J. — I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 683

WORT AND MANOHAR LALL JJ.

Karnidan Sarda and another — *Defendants* — Appellants.

v.

Sailaja Kanta Mitra, Plaintiff and another, Defendant — Respondents.

Appeals Nos. 43 of 1937 and 30 of 1939, Decided on 8th March 1940.

(a) Evidence— Cross-examination — Witness not cross-examined — His evidence must be accepted.

It cannot be too strongly emphasized that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to be accepted unless of course there are any inherent improbabilities. [P 685 C 2]

(b) Partnership Act (1932), S. 4 — Contract business—Plaintiff to advance money to defendant and to keep accounts—Plaintiff to receive interest at 12 per cent. on his advances as share of profits and to exercise some control over business—Interest on advance is not share of profits—Transaction held not partnership.

The plaintiff purporting to enter into partnership in contract business carried on by the defendant agreed to make advances for the use of the business. He was to keep accounts, exercise some control over the business and to receive 12 per cent. interest on his advances as the share of his profits of the business. He was also authorized to receive payments of the bills due to the defendant on account of the contracts executed by him and to grant receipts in his own name as agent:

Held that the interest could not be said to be a share of the profits, as it did not depend in any way on whether profits were made and that the fact that the plaintiff was given certain control over the business and specifically authorized to grant receipts as agent did not by itself constitute the transaction as partnership: *I A Sup Vol 86 (P C)*, *Expl.* [P 686 C 1, 2]

(c) Contract Act (1872), Ss. 23 and 28—Claimant under O. 21, R. 58, Civil P. C., withdrawing claim based on hatchitha and agreeing not to file suit under O. 21, R. 63, Civil P. C. —Decree-holder agreeing not to press his petition to Court for enquiry as to genuineness of hatchitha alleged by him to be forged — Agreement falls under S. 23—Its enforcement is not barred by S. 28.

Where a claimant under O. 21, R. 58, Civil P. C., withdraws his objections based on a hatchitha and agrees not to institute a suit under O. 21, R. 63, Civil P. C., in consideration of the decree-holder's undertaking not to press his petition to the Court for enquiry into the genuineness of the hachitha alleged by him to be a forged document, the agreement is void under S. 23, Contract Act *A I R 1917 Pat 454, Ref.; (1892) 1 Ch. 173; A I R 1930 P C 100 and 38 Cal 880, Rel. on.* [P 689 C 1]

Obiter — S. 28, Contract Act, is no bar to the enforcement of the aforesaid contract: *A I R 1934 Pat 644, Rel. on; Case law referred.* [P 689 C 1, 2]

(d) Deed — Construction of.

It is not the description given by the parties to the deed that determines the character of the deed but the provisions contained therein, on a proper construction placed on them. [P 685 C 2]

Sir M. N. Mukherjee and R. S. Chatterjee — *for Appellants.*

P. R. Das, S. C. Mazumdar, S. C. Ghosh, B. C. Ghosh, Prem Lall, P. N. Sanyal and Ramanugrah Narain — *for Respondents.*

Wort J.—This is an appeal by defendants 2 and 3 and arises out of a suit in which a fund, which has been paid into Court by the Bengal Nagpur Railway is in dispute. The fund represents sums of money owing by the Bengal Nagpur Railway to

defendant 1 for contract business done by defendant 1 for the Railway Company. The plaintiff's claim to the fund is based on a deed of hypothecation dated 12th February 1935. The defendant-appellants' right to this money is based upon an attachment obtained by them on or about 3rd April 1935 in execution of a decree for Rupees 43,000 odd.

It will be necessary, in order to indicate the points raised in the Court below as also in this Court, to state the facts briefly. On 13th September 1933, the defendant-appellants brought a suit (Money Suit No. 120 of 1933) and obtained attachment before judgment of defendant 1's immovable properties and the bills passed in his favour for payment. The ad interim attachment was obtained on 14th September 1933 ; but on 6th November 1933, in the presence of defendant 1, these bills were released from attachment, although the attachment of other immovable properties was confirmed. The suit was eventually decreed on 3rd April 1935, and it was upon that date (the actual date is not before me) that this attachment, upon which the defendants-appellants rely, was made. On 12th July 1935, the present plaintiff put in a claim case under O. 21, R. 58, Civil P. C. It was the case of the plaintiff that he had advanced sums of money to defendant 1 to finance his contracting business which he was carrying on for the Bengal Nagpur Railway. The claim case which the plaintiff started was supported by hatchitha representing the sums of money alleged to be advanced by the plaintiff to defendant 1. The case came on for hearing in January 1936, and after evidence had been adduced, the plaintiff (claimant) asked for leave to withdraw his claim and the Court granted the leave asked for on 11th January 1936. Two days later the claimant (plaintiff) withdrew from the Court the hatchitha which as I have stated he adduced in evidence to support his claim case.

The surrounding circumstances are variously stated, but it was quite clearly the case of the defendant-appellants that they were of the opinion (rightly or wrongly) that this hatchitha was a forged document, and that they proposed to petition the Court to make an inquiry with a view to prosecuting the plaintiff. Their case was that it was in consideration of their not proceeding with their petition in this regard that the plaintiff withdrew his claim and agreed not to bring a suit under O. 21, R. 63, Civil Procedure Code. Whether that is so or not has to be determined. In any event the suit out of which this appeal arises was commenced seven days after the withdrawal of the hatchitha from the Court by the plaintiff, i. e., on 20th January 1936.

In the meantime certain transactions had taken place between defendant 1 and the plaintiff. Item 1 of the hatchitha account was on 11th January 1934, that is, four months after the defendants had instituted their suit against defendant 1 for money being Rs. 40,000 odd. Details of the case, apart from those I have already stated, are quite irrelevant for the purpose of this appeal. On 26th February 1934 the plaintiff and defendant 1 entered into a deed, described as the deed of partnership (Ex. 6), and then on 12th February of the following year the deed of hypothecation was executed. It recites amongst other things that

> Whereas the total sum of Rs. 9500 is now due and owing by the mortgagor to the mortgagee as per details hereinbefore mentioned now this indenture witnesseth that the mortgagor in consideration of the premises doth hereby agree and promise to repay the said sum of Rs. 9500 with interest thereon at the rate of Rs. 12 per cent. per annum;

and then later :

> That as security for the said loan the mortgagor doth hereby hypothecate all the bills both final and on account submitted to the Railway Company for the contract works already done and also the bills that will be submitted to the Bengal Nagpur Railway Company Limited for the works at hand as per details given in schedule hereto.

It was recited in that hypothecation deed that the deed of partnership entered into on 26th February had not been carried out. The actual words are :

> WHEREAS BY AN INDENTURE OF PARTNERSHIP executed between the parties hereto on twenty-sixth day of February one thousand nine hundred and thirty-four but it was never carried into effect nor was it acted upon by the mortgagee except for the purposes of advancing money in order to enable the mortgagor to carry on the business and the said partnership has since dissolved, etc. etc.

It was upon this deed of hypothecation that this suit was brought. A number of points were argued in the Court below and they are argued in this appeal. The learned Judge in the Court below overruled the contentions of the defendant-appellants and has given a decree to the plaintiff. Hence this appeal.

The first point argued was that the suit was not maintainable by reason of the relationship of partners which existed between the plaintiff and defendant 1 and by reason of the agreement arrived at in the claim case between the plaintiff and defendants 2

and 3 (appellants). The agreement in the claim case was, as I have said, that the plaintiff undertook not to bring a suit under O. 21, R. 63, Civil P. C. Secondly it is contended that this deed of hypothecation is nothing more than an arrangement to delay and defeat creditors within the meaning of S. 53, T. P. Act. The last question, apart from the question of fact, to which I shall refer, is that the so-called deed of hypothecation gave no rights to the plaintiff whatever, and that unless there was an assignment of these bills the plaintiff would have no right or title to them, and therefore there would be no priority in favour of the plaintiff with regard to them; and indeed the defendant-appellants by reason of their attachment were entitled to them.

One of the main contentions to which I shall refer, before dealing with the points which I just stated, is a question of fact, more particularly relating to the allegation that this was a case of preference of one creditor to the other, or a preference by reason of which the creditors of defendant 1 were delayed, was that these sums of money alleged to be advanced by the plaintiff to the defendant were fictitious; that it was merely an arrangement made between defendant 1 and the plaintiff for the purpose of defrauding defendants 2 and 3, who had obtained an attachment against defendant 1. In my judgment the evidence with regard to this matter is one-sided. Sir Manmatha Nath Mukherjee appearing on behalf of the appellants took us through the hatchitha and pointed out what appeared to be certain discrepancies. He also contended that the Court ought to have drawn the inference from the hatchitha itself that the sums of money alleged to be advanced by the plaintiff to defendant 1 were non-existing. It was pointed out that (as evidenced by the hatchitha) the Bengal Nagpur Railway paid cheques to defendant 1, and therefore it is quite impossible to conclude that there was any reason why the plaintiff should advance the sums alleged to defendant 1. In my judgment the argument may be dismissed by one reason alone. If there was anything in the hatchitha account which was questionable or raised doubt in any sense of the term, the only person or persons who could explain those matters was the plaintiff or his witnesses. Now, although the plaintiff was cross-examined at considerable length, the defendant appellants consistently avoided asking questions on these particular matters. It cannot be too strongly emphasized that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to be accepted unless of course there are any inherent improbabilities. If we were to come to a conclusion that the argument presented to us by the appellants in this matter should be accepted, it would be impossible to support such a judgment by any juristic reasons. In my judgment, so far as the appellants' case depends upon any question of fact, it must be decided in the same sense as the learned Judge in the Court below has decided it, and I must come to the conclusion that these sums of money were in fact advanced by the plaintiff to defendant 1.

Now I come to the question of partnership. The appellants rely upon the decision in 26 I A 32.[1] The substance of that decision is that a Court cannot order partnership moneys recovered from the debtors of the firm to be paid over by the receiver to one partner to the exclusion of the others without taking accounts of the partnership. There can be no dispute in my judgment in regard to that proposition. But the contention that this action cannot be maintained by reason of the existence of the relationship of partnership between the plaintiff and defendant 1 cannot be supported for more than one reason. The first reason and the one which appears to me to be most conclusive is that of the existence of the recital in the hypothecation bond or 'Indenture of Mortgage' (as it is described) of 12th February 1935. It is recited there (as I have already said and do not intend to repeat in detail) that the partnership was not acted upon. The evidence with regard to this matter was one-sided. There is no suggestion by the appellants that there is anything in the case which would lead us to the conclusion that the recital in that bond is anything but true. That would be a complete answer to the plaintiff's contention. But there are other answers. The document of 26th February 1934, on a proper construction, does not disclose the relationship of partners between these parties. It is trite law to state that it is not the description given by the parties to the deed that determines the question but the provisions contained therein, on a proper construction

1. Bhugwandas v. Rivett-Carnac, (1899) 23 Bom 544=26 I A 32=7 Sar 451 (P C).

placed on them. S. 4, Partnership Act (9 of 1932) defines 'partnership' as

the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Section 6 of the Act provides :

In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1: — The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with profits earned by a business, does not of itself make him a partner with the persons carrying on the business.

Clauses (b), (c) and (d) of Expln. 2 are not relevant to the matter before us. The provisions of this so called partnership deed were as follows : the defendant first party undertook to keep accounts; the plaintiff was entitled to supervise the work from time to time ; books of account kept by the first defendant were to be inspected by the plaintiff from time to time; and there were even other provisions which gave the plaintiff a certain control with regard to the business of the defendant first party. Then cl. (v) of the partnership deed says :

That the said Sailaja Kanta Mitra of the second part will keep proper accounts of all moneys advanced by him and the payments received by him on account of the bills,

and cl. (vi) provides :

That the said Sailaja Kanta Mitra of the second part will deduct the amounts advanced by him with interest at rupees twelve per cent. per annum from the amounts that will be collected by him and the amount of interest received will be his share of the profits in the said contract business.

We are not concerned with the other provisions. Looking at this document in the light of the provisions of S. 4 and S. 6, Partnership Act, it is first to be observed that there is no share in the profits as such. The plaintiff was to be paid interest on his advances at 12 per cent. per annum. It was certainly described as his share of the profits. But whatever name the parties gave to it, it could not possibly be said that this was a share of the profits. The defendant might have been insolvent, he might have been carrying on the business at a loss, even so the plaintiff would be still entitled to his 12 per cent. interest, that interest not depending in any way on whether profits were made. To repeat myself, it would be impossible to come to the conclusion in those circumstances that there was a share of the profits and even had there been, a partnership would not have been necessarily brought into existence having regard to what S. 6, Partnership Act, lays down— a section which substantially reproduces the English law with regard to this matter. There was a certain control which the plaintiff was to exercise over the business.

Now in this connexion, and with regard also to another point urged by Sir Manmatha Nath Mukherjee reliance was placed upon the decision in I A Sup Vol 86.[2] There the Rajah who was alleged to be a partner of the firm of British merchants had certain control over the business. Even so, their Lordships of the Judicial Committee of the Privy Council held that no partnership existed. The appellants rely more particularly upon the last two paragraphs of the judgment in that case where reference is made to the question of agency, and it is contended by the learned advocate who appeared on behalf of the appellants that as the plaintiff here was an agent for the first defendant for some purposes, it necessarily followed that the relationship of partners existed between them. The provisions relied upon are those contained in cl. (iv) of the Indenture of Partnership :

That all the bills for the works already done or that will be done hearafter in connexion with the said contract business will be made in the name of the said Raj Gobind Singh of the first part but the said Sailaja Kanta Mitra of the second part alone is authorized to take payments of all the bills that have already been submitted or that will be submitted hereafter and on receipt of payments therefor, grant receipts in his own name as agent for and on behalf of the said Raj Gobind Singh and such receipts will exonerate the company from all liabilities under the bills for which the receipts will be granted.

Now, the inclusion of that provision in the so-called partnership deed in my judgment is one of the most conclusive arguments against the suggestion here that the partnership existed. The agency of the partners arises not by reason of contract but by reason of the existence of partnership, and the fact that it was necessary to include a provision of this kind rather indicates that the persons were not partners, or, at any rate, whatever they may have called themselves they understood that that relationship did not exist between them. The authority to which I have referred is no authority for the case argued; and the passage in the judgment on which

2. ('72) I A Sup Vol 86=18 W R 384=10 Beng L R 312=9 Moo P C (N S) 214=3 Sar 168 (P C), Mollow, March & Co. v. The Court of Wards.

reliance is placed by the appellants does not support the contention put forward, as that passage is prefaced by the following observation of Sir Montague Smith who delivered the judgment of their Lordships of the Privy Council :

It was strongly insisted for the appellants that if 'a true partnership' had not been created under the agreement, the Watsons were constituted by it the agents of the Raja to carry on the business, and that the debt of the plaintiffs was contracted within the scope of their agency.

It is in relation to that matter that the last two paragraphs of the judgment which are relied upon by the appellants were uttered. In my judgment there was no relationship of partners between these parties by reason of this deed; and, secondly, even if the partnership existed, it had not been acted upon, to use the words of the parties at the time the hypothecation deed was entered into. These observations answer the contention that the suit is not maintainable by reason of this alleged relationship. Now I come to the question of the agreement made by the plaintiff of not pursuing his remedy under O. 21, R. 63, Civil P. C. In the view that I take of the matter, the appellants are on the horns of a dilemma with regard to this matter. The claim under O. 21, R. 58 was heard. The Judge said towards the end of his order dated 11th January 1936 :

Case closed. Arguments of both parties heard. Subsequently claimant files a petition praying for permission to withdraw the claim when the Court is about to rise. Ordered: claim be withdrawn. No costs.

On 13th January 1936, two days after the order which I have just read, there is this order :

Claimant files a petition praying for return of documents exhibited in this case. Opposite party has got no objection to it. Ordered: let the document be returned.

The document referred to is the hatchitha. Karnidan Sarda, who was witness 1 for the defendant, made this statement :

After the arguments I compared such stamps with the 1934 stamp and found it to be different and the type of the stamp affixed to the hatchitha was found on enquiry not to be in vogue at the time or year of its execution. I instructed my pleaders Suresh Babu and Manindra Babu accordingly .... I instructed the pleader to file petition in Court. Thereafter Lalit Babu's son and Profullo Babu, advocate, came to my pleaders. Haridas Babu and Profulla Babu both said they would withdraw the claim. Thereafter the petition withdrawing the claim was filed as the Court was going home after rising. It was on a Saturday. Kamal Babu on behalf of claimant filed petition on next Monday for taking back the documents. Again says the petition was objected to. Thereafter I proposed to the plaintiff that the petition would not be allowed to be filed unless plaintiff gave me undertaking that he would never institute a suit. My petition of objection was not filed because plaintiff gave me an undertaking in writing to the Court that he would not file any suit (I assume it means that, although the words recorded are—'he would not file any institute').

Jatindra Mohan Dutta, one of the pleaders called on behalf of the defendant, made this statement :

I met Haridas Babu, son of Lalit Babu, and requested him to insert such undertaking in order to avoid criminal prosecution of his brother and unpleasantness of this kind. But Haridas Babu did not agree to pay Rs. 10 as fee paid by Karnidan to his pleader Amar Babu. At my request Amar Babu returned his fee which I made over to Karnidan and thus the matter was brought to a close. The petition for a contemplated criminal action was withheld accordingly. The other petition containing such undertaking was filed in Court.

The witness in cross-examination said : "I did not read the petition for contemplated prosecution but I was told by somebody about it." Witness 3 for the defendant, Amrendra Nath Mukharji, states :

I remember that in January 1936, when I was in Subdivisional Magistrate's Court, defendant 2 gave me a petition and vakalatnama to be moved before this Court with a view to have some hatchitha or chithas filed by Sailaja Mitter to be kept in Court's custody for Court's enquiry because it was a suspicious piece of document.

I must say that I find it difficult to ascertain from that evidence, which I read in detail purposely, exactly what the facts were. It seems to me, judging by the statement which I have read, that the agreement to withdraw the application under O. 21, R. 58 was made on 11th January 1936, and if any agreement was arrived at at all with regard to not bringing a suit, it must have been arrived at on 13th January, two days afterwards, when the question arose as to the withdrawal from the Court of this hatchitha which the defendants had suspected. It is difficult to see how any consideration existed at all with regard to this agreement that the plaintiff would not bring a suit. One thing is quite clear that apart from the petition of the plaintiff dated 13th January 1936, there is no agreement in writing by him not to bring a suit. The petition dated 13th January 1936 runs thus :

In the above suit it is submitted on behalf of the claimant that as the claimant has withdrawn his claim and he won't sue against the decree-holders under O. 21, R. 63, Civil P. C., and as it is necessary to take back the exhibits of the said case, it is therefore prayed that all the papers etc. produced by the claimant may be returned.

Apart from that petition there is nothing (as I was saying) in writing to suggest that any such agreement was made. It is quite

clear that even if such an agreement was made, it was made on 13th January, and it was made in consideration of the defendants allowing the plaintiff to withdraw the hatchitha. I cannot myself see how there could be any consideration at all. The plaintiff was absolutely entitled to withdraw the hatchitha; no consent of the defendants was necessary; and if there was any consideration at all it must be deemed to have been an agreement by defendants 2 and 3 not to proceed with their petition which they were about to present to the Court, calling upon the Court to investigate the question of the hatchitha which they contended was a forgery. If we are to take the evidence of the defendants at its face value, it seems to me that the necessary conclusion is that if an enforceable agreement was made — enforceable in the sense that consideration passed—it was an agreement by the defendants not to pursue their case with regard to a criminal prosecution.

It is contended by the respondents that such an agreement is met by S. 23 and S. 28, Contract Act. S. 23 of the Act provides :

> The consideration or object of the agreement is lawful, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The appellants in this connexion rely upon a decision of this Court in 2 Pat L J 630.[3] There the decision was that when an agreement was come to on a mere threat to prosecute or on an apprehension that prosecution would take place, such threat or apprehension would not be sufficient to vitiate the agreement. The learned Judges there (Chapman and Jwala Prasad JJ.) quite clearly laid down that:

> Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not enforcible by law, but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise.

I have come to the conclusion that this agreement, whether there was a mere threat to prosecute or the prosecution had actually started, (if we are to rely upon the defendants' case) was in consideration of the fact that the defendants would not press their petition asking the Court not to enquire into the genuineness of this hatchitha produced by the plaintiff. Now the leading case with regard to this matter is (1892) 1 Ch. 173[4] followed by the Privy Council in 57 I A 117.[5] In the latter case the plaintiff complained against various persons, being some of the principal defendants in the suit, alleging that they had committed certain non-compoundable offences. The Magistrate directed the complainant to prove his case, and then disputes between the parties were referred to arbitration. The Subordinate Judge in trying the suit came to the conclusion that the agreement was not for the purpose of getting a judicial decision but was merely brought into existence to placate one of the parties named Birendra and to induce him to withdraw the criminal proceedings. The High Court, however, came to an opposite conclusion and held that there was no attempt to tamper with the administration of justice. The Judicial Committee, however, came to an opposite conclusion. I might at this stage add that one of the contentions was that there could not be any question that there had been any illegal consideration, because it could not be said to be prosecution unless a summons had been taken out against the parties complained of. Their Lordships of the Privy Council made this observation:

> It may well be said that a prosecution only commences if the summons is issued and that before that stage is reached a complainant cannot be said to have dropped a prosecution.

But their Lordships went on to observe that they did not decide that question. What they were called upon to decide was whether any part of the consideration of the reference or the ekrarnama was unlawful, and not whether any prosecution within the meaning of the Code of Criminal Procedure had been started or not. If it was an implied term of the reference or ekrarnama that the complainant would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or ekrarnama as the case may be was unlawful. And then they proceeded to rely upon the case in (1892) 1 Ch 173.[4] I should have said that in this connexion

3. ('17) 4 A I R 1917 Pat 454=41 I C 812=2 Pat L J 630, Sukhdeo Das v. Mangal Chand.

4. (1892) 1 Ch 173=61 L J Ch 138=65 L T 685=40 W R 273=17 Cox C C 389, Jones v. Merionethshire Permanent Benefit Building Society.

5. ('30) 17 A I R 1930 P C 100=123 I C 187=57 I A 117=57 Cal 1302 (P C), Kamini Kumar v. Birendra Nath.

reference was also made to 38 Cal 880.[6] Later they proceeded to say, though not in express terms, that in consideration of the executants admitting the share of the plaintiffs they would not proceed with the charges laid against the accused. If any authority is needed, this in my judgment is the clearest possible authority on the point contended for by Sir Manmatha Nath Mukherji that (even if we are to hold contrary to his contention on that point as regards the necessity of starting a prosecution) it was not an illegal consideration. In my judgment this agreement, if made by the plaintiff, was an agreement for consideration which was illegal and therefore not binding upon him.

The other contention of the respondents in the circumstances it is unnecessary to determine. That was whether S. 28, Contract Act, was a bar to the enforcement of the agreement. S. 28 provides:

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

A number of cases were relied upon. The first was the Full Bench decision of the Allahabad High Court in 1 All 267.[7] There the agreement was in consideration of the respondents giving the appellant time to satisfy a decree against him. The appellant agreed not to appeal and in breach of this agreement he did appeal. It was held that S. 28 did not apply. Reliance was also placed on 14 M I A 203.[8] In that case a preliminary objection was raised before their Lordships of the Judicial Committee on the footing of a certificate given by the High Court of Fort William in Bengal to the effect that in consideration of the Court deciding the matter on appeal before them on one point only, that is the validity of the Mooktearnamah, the appellant agreed not to appeal. Their Lordships of the Judicial Committee of the Privy Council held :

> But confining it to the decision upon the Mooktearnamah, it was really substituting a nonsuit for an adverse verdict, leaving it open to Baboo Bishchen Singh and the appellant himself, if he can get a new and genuine document in his favour to bring a fresh suit.

Another decision relied upon was 8 Cal 455.[9] There a decree had been obtained, execution had been taken out and the judgment-debtor had been arrested. The debtor filed a petition agreeing not to proceed in appeal, and the decree-holder agreed to have him released. In contravention of this arrangement the judgment-debtor filed an appeal. The learned Judges held that S. 28 had no application to such an undertaking. But incidentally I might observe that they gave no reason for the conclusion that that section did not apply. In 1 All 267[7] to which I first referred, the learned Judges held that that section did not apply and made this observation :

> The provisions (of S. 28) appear to embody a general rule recognized in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the Courts, but notwithstanding this rule it was long since determined that, if a person after mature deliberation enters into an agreement for the purpose of compromising a claim bona fide made to which he believes himself to be liable .... the compromise of such a claim is a sufficient consideration for the agreement, and the agreement is valid.

The next decision relied upon is in 47 All 637[10] where the learned Judges came to the conclusion that the agreement arrived at was substantially a case of O. 23, R. 3. The case was complicated by the other point, namely the criminal prosecution, but the learned Judges came clearly to the decision that the agreement was not invalidated by S. 23 or S. 28, Contract Act. It seems to me however that this matter is concluded, so far as this Court is concerned, by the decision of Fazl Ali and James JJ., in A I R 1934 Pat 644[11] where similar agreement set out in the judgment of my learned brother Fazl Ali was held not to come within the mischief of S. 28, Contract Act. I have referred to these cases somewhat briefly because I have already come to the conclusion that the agreement is invalid by reason of S. 23, Contract Act. Two more questions were raised, one was whether the deed of hypothecation delayed or defeated the creditors under S. 53, T. P. Act. The leading case with regard to that matter is 43 I A 104,[12] the well-known judgment of

6. Golap Jan v. Bholanath, (1911) 38 Cal 880 = 11 I C 311=15 C W N 917.
7. Anant Das v. Ashburner and Co., (1875-77) 1 All 267 (F B).
8. Moonshee Ameer Ali v. Maharanee Inderjeet Singh, (1870-72) 14 M I A 203 = 9 Beng L R 460 = 2 Suther 479 = 2 Sar 731=20 W R 25 (P C).
9. Protap Chunder Das v. Arathoon, (1882) 8 Cal 455 = 10 C L R 443.
10. ('25) 12 A I R 1925 All 503 = 88 I C 768 = 47 All 637=23 A L J 561 (F B), Gajendra Singh v. Durga Kumari.
11. ('34) 21 A I R 1934 Pat 644 = 153 I C 1098, Bhirgunath Prasad v. Mt. Annapurna Dai.
12. ('15) 2 AIR 1915 P C 115=32 I C 343=43 I A 104 = 43 Cal 521 (P C), Musahar Sahu v. Hakim Lal.

Lord Wrenbury, where this observation was made:

> The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor.

Sir Manmatha Nath Mukherji contended in this case that the object of the plaintiff was to delay or defeat the creditor of defendant 1. When met with the decision of their Lordships of the Privy Council in the case to which I have just referred he said that the circumstances had to be taken into consideration, and then drew our attention to a number of decisions. But he contended that when the plaintiff was seen entering into this deed of hypothecation at a time when he knew that defendant 1 was already heavily indebted and involved in litigation, it must be assumed that it was to defeat and delay the creditors, amongst others defendants 2 and 3. With great respect to Sir Manmatha Nath Mukherji, that is an argument which I fail to understand. Either the sums were advanced to defendant 1 or not, and I quite clearly come to the conclusion, as did the learned Judge in the Court below, that they were. What happened in the circumstances was that defendant 1 was preferring the plaintiff (one of his creditors) to the others. That he is entitled to do, as held by their Lordships of the Judicial Committee. A number of authorities were quoted including the case in 23 C W N 817,[13] a decision of the Privy Council. This authority gives no assistance to the appellants. It is a case quite clearly contemplated by the words which I have read of Lord Wrenbury in the leading case. Their Lordships observed there that the entire usufruct was for the benefit of his (debtor's) family and therefore indirectly for himself. That case also involved the question of insolvency as it was found that the debtor had stopped payment: 30 Mad 6[14] was another authority relied upon. The importance of that decision was that S. 53, T. P. Act, did not apply to transfers of moveable property. But as an analogy the learned Judges referred I might add to the statute of 13 Elizabeth, c. 5 and to S. 53, T. P. Act, and made this observation:

> We are equally satisfied that no money was due to Chidambaram. We think that there can be no doubt that the arrangement effected by the assignment, though partly entered into for the purpose of discharging debts really due by Sami Aiyar, was also clearly intended to secure a sum of over Rs. 7000 to the assignor himself or to persons in whom he was interested, but who were not his creditors .... The assignment therefore operated to screen some 50 per cent. of his assets from being taken by his other creditors.

The learned Judges also made this statement:

> As observed by the Judicial Committee of the Privy Council in (1860) 14 Moore P C 121[15] at p. 136) each case must depend upon its own circumstances, and in all the question is one of fact, whether the transaction was bona fide or was a contrivance to defraud creditors.

As I have already said they applied by analogy the provisions of the English statute of 13th Elizabeth c. 5 and S. 53, T. P. Act. But the statute of 13th Elizabeth does not apply to the mofassal and if it is rightly decided that S. 53 does not apply to moveable properties, then the defendant appellants' right at common law under or as the rule of equity, justice and good conscience can certainly be no higher than those which he might have under S. 53, T. P. Act, for at common law a debtor is entitled to dispose of his property how he will and to prefer one creditor to another if he so desires. In my judgment, there is no substance in the contention that this is met by the provisions of S. 53 or the analogous provisions of law. The last point is the question of the rights of the plaintiff under the deed of hypothecation. S. 130, T. P. Act, provides:

> The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not.

The remaining provisions of the section are not relevant for our purpose. S. 134 provides:

> Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor, or recovered by the transferee, is applicable, first in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer, and the residue, if any, belongs to the transferor or other person entitled to receive the same.

It is contended first of all on behalf of the appellants that this was a mere deed of hypothecation; that the plaintiff got no

13. Ghunsham Das v. Umapershad, (1919) 6 A I R P C 6=50 I C 264=15 N L R 68=23 C W N 817 (P C).

14. Chidambaram Chettiar v. Sami Aiyar, (1907) 30 Mad 6=16 M L J 427.

15. Corlett v. Radcliffe, (1860) 14 Moore P C 121=4 L T (N S) 1=134 R R 13.

rights thereunder; that no notice was served on the Railway Company and therefore there was no question of the plaintiff having any priority over the defendant-appellants. A number of English authorities were relied upon. I do not propose to quote them because they are based on the Judicature Act of England which is materially different. I need only say, as has been said so many times, that before the Judicature Act, in the Courts of law as distinguished from the Courts of equity assignments of the choses in action were not recognized; the Court of Chancery did recognize them. The Chancery Court would enforce such rights as between the parties. Then came the Judicature Act which made certain provisions entirely different from the provisions of S. 130. The only resemblance is that they both relate to transfers of actionable claims. S. 25 of the Judicature Act expressly excludes transfers by way of security; S. 130, T. P. Act, expressly recognize them. Under S. 25, Judicature Act, notice is necessary, while under S. 130, T. P. Act, no notice is necessary.

That there is a hypothecation of these actionable claims there is no doubt. But the question which arises is, what has the plaintiff got by that hypothecation? Their Lordships of the Privy Council in 40 I A 24[16] decided that S. 130, T. P. Act, which provided that the transfer of an actionable claim shall be effected only by an instrument in writing, applied not only to absolute assignments but also to assignments by way of charge, and the deposit without writing of a document of title to such a claim does not create any equitable charge. The action there was brought by the respondent against the London and Lancashire Life Assurance Co., with regard to a policy on the life of a person who had died. The plaintiff's claim was based upon a deposit of the policy with him by the assured some time about the end of the year 1904. There was no instrument in writing. The defendant's claim was based upon a deed of assignment of the policy executed in his favour five years later, that is, in 1909, of which notice was given to the company. The trial Judge came to this conclusion :

On the contest between the owner of the legal estate and the prior equitable mortgagee, as nothing has been proved which should have put the owner of the legal estate on inquiry, and as it has not been proved that he had notice actual or constructive of the prior equitable charge, it follows that the owner of the legal estate must succeed.

The High Court, i. e., the Court of appeal, held that the person with whom the policy had been deposited had the prior claim. Their Lordships of the Judicial Committee overruled this decision. During the course of the judgment Lord Moulton first of all referred to the provisions of S. 130 (1) and then proceeds to say :

It is admitted that the right to the moneys becoming due under the policy is an actionable claim. Their Lordships are also of opinion that the Section covers transfers by way of security as well as absolute transfers. If any doubt existed on either of these two points it would be set at rest by the second illustration to the Section which is given in the Act.

The learned Law Lord then proceeded to dispose of the claim made by the respondent in the appeal based upon a deposit and observes :

The Section specifically enacts that such a proceeding shall not have any such effect and a charge can only be created by a written document, and then decided in favour of the person who had the assignment by way of charge. This decision has always been understood to mean that to deal with a chose in action by way of security amounts to an assignment within the meaning of the Section. The decision of the Madras High Court in 33 Mad 123[17] decides :

Where a creditor hypothecates a debt due to him, and authorises the person to whom the debt is hypothecated by power of attorney in writing to recover the debt from the debtor, the debt is absolutely transferred to the transferee under S. 130, T. P. Act.

The learned Judges observed :

That the transfer of the debt by way of security as in this case is good under the Transfer of Property Act, has not been seriously questioned at the bar as it could hardly be in the face of S. 134. Even in the sense of the English law, the assignment under Exs. A and E would be an absolute assignment.

In the decision in 38 Mad 297[18] the learned Judges followed the decision in 40 I A 24[16] to which I have referred. The Chief Justice made this observation :

Under Ex. A the defendants mortgaged to the plaintiffs a house and a promissory note which had been executed to the defendants, by a third party as security for money owing by the defendants to the plaintiffs. The promissory note was not endorsed to the plaintiffs . . . .

and then observed later :

The mortgage thereof was, in my opinion, a transfer of an actionable claim within the meaning

16. Mulraj Khatau v. Vishwanath Prabhuram Vaidya, (1913) 37 Bom 198=17 I C 627 = 40 I A 24=15 Bom L R 9 (P C).

17. Gopalkrishna Iyer v. Gopalkrishna Iyer, (1910) 33 Mad 123=4 I C 420.

18. Muthukrishna Aiyar v. Veeraraghava, Iyer, (1915) 2 A I R Mad 1031=21 I C 316=38 Mad 297=25 M L J 356 (F B).

of S. 130, T. P. Act, which vested in the transferee the rights and remedies of the transferor, subject to the equities which remained in the transferor by reason of the fact that the transfer was by way of security.

This is in accordance with the decision of their Lordships of the Judicial Committee in 40 I A 24.[16] The conclusion therefore at which I arrive is that although the deed was stated to be a deed of hypothecation, in law and in fact it operated as a deed of assignment within the meaning of S. 130, T. P. Act. If that be so, there is no question of priority of title, and the attachment therefore by the defendant-appellants has no meaning whatever. For those reasons, somewhat elaborately expressed, I am of the opinion that the decision of the learned Judge in the Court below is right and the appeal fails and must be dismissed with costs.

Manohar Lall J. — I entirely agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 692

WORT AND DHAVLE JJ.

Kameshwar Singh Bahadur — *Defendant* — Appellant.

v.

Ishwari Prasad Singh and others, *Plaintiffs, and others, Defendants* — Respondents.

Appeal No. 127 of 1937, Decided on 11th April 1940, from original decree of Addl. Sub-Judge, Gaya, D/- 28th April 1937.

(a) Bihar and Orissa Public Demands Recovery Act (4 of 1914), Ss. 8 and 7—Notice under S. 7—Subsequent amendment of certificate proceedings does not affect incidence of charge coming into existence under S. 8.

The incidence of the charge which comes into existence under S. 8 from the date of the service of the notice under S. 7 on the certificate-debtor is not affected by the subsequent amendment of the certificate proceedings as a result of a compromise between the parties: *A I R 1929 P C 171, Ref.; A I R 1914 P C 111, Disting.* [P 693 C 2]

Consequently, a purchase of the tenure after the charge by the landlord at the auction sale in execution of a mortgage decree cannot terminate the relationship of landlord and tenant between the parties; the sale in such case will have the effect of a rent sale subject to the provisions of S. 22, Ben. Ten. Act: *A I R 1930 P C 193, Ref.* [P 695 C 2; P 696 C 1]

(b) Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 26—Principle of representation applies to certificate proceedings.

The principle of representation applies to certificate proceedings. [P 694 C 2]

(c) Hindu Law—Joint family—Karta effectively represents family even though not named as such.

The karta of a Hindu joint family effectively represents the family even though not expressly named as the karta: *A I R 1929 Pat 741, Rel. on.* [P 694 C 1, 2]

Murari Prasad and S. P. Srivastava — *for Appellant.*

Sir M. N. Mukherji, U. N. Banerji, Lal Narain Sinha and R. K. Sinha — *for Respondents.*

Wort J.—This appeal by the defendant arises out of a suit in which the plaintiff-respondents claimed a declaration that certain tenures, more particularly described in the schedule to the plaint, having been purchased by them in execution of a mortgage decree, could not be attached and sold in certificate proceedings, the proceedings in question having the effect of a money decree only. They claimed an injunction restraining the defendants from putting up the properties for sale. The certificate proceedings in question were commenced on 4th September 1934, against one Raghubans Lal, Ramnarain Lal and Jadubans Lal for arrears of mukarrari rent for the years 1338 to 1341 Fasli in respect of villages Neori Silounja, Parwaria, Sadwa, Parsauna and Ankurahwan. These certificate proceedings were started whilst the proceedings in execution of the plaintiffs' mortgage decree were pending, a decree absolute in the mortgage suit having been obtained in the High Court on 15th February 1934; proceedings in the execution proceedings having commenced in the same year. The plaintiffs purchased some of the properties, the subject-matter of the certificate proceedings, on 15th January 1935. As regards the tenures the khewats showed Harbans, Raghubans and Jadubans Lal as tenants. Jadubans had died in the year 1922, Shivnarain was substituted in his place in the proceedings, and Brijkishore Lal was added as a party on 2nd January 1935. Shamnarain and Dipnarain, sons of Raghubans, Alakhnarain, son of Harbans and Bechu, son of Shamnarain, were not made parties. The Judge in the Court below has held that Raghubans and his sons being joint (which is admitted), Raghubans being the karta, the sons were represented in the proceedings. Harbans having died during the proceedings, Raghubans being the karta and manager of the affairs of Harbans, Harbans' sons also were duly represented in the certificate proceedings. In these certificate proceedings Raghubans Lal, Ramnarain Lal, and Brijkishore Lal filed objections, their contention being that as there were two separate tenures in the villages the certi-

ficate proceedings were not maintainable in their present form. This objection was overruled by the certificate officer and the Collector, but before the Divisional Commissioner a compromise was entered into.

It was admitted by the compromise that there were two separate tenures with separate jamas. Certain payments which had been made were credited to the separate tenures: Rs. 984-5-9 was credited to the account of Brijkishore Lal Nandkeolyar with respect to the land in Sch. 1 of the certificate, and Rs. 1250 odd was credited to Raghubans Lal with respect to the tenure in Sch. 2. It was also admitted that the dues as regards the tenure in Sch. 1 had been paid and it was agreed that Brijkishore Lal Nandkeolyar be struck off the list of certificate-debtors and that the properties in Sch. 2 be put up for sale for arrears of Rs. 7699-5-11. The certificate-debtors in this compromise waived all objections regarding the service of notice under S. 7 and R. 25, Public Demands Recovery Act. The parties also waived any objection on the score of the maintainability of the proceedings. The proceedings were continued as regards the 2 annas share of Neori Silounja, 6 annas share of Parsauna and 6 annas share of Ankurahwan.

The learned Judge in the Court below, dealing with the objections to the maintainability of the suit has come to the conclusion that the case came within the exception clause of S. 46, Public Demands Recovery Act, and has held it to be maintainable. He has held that the persons interested in the tenure, although all of them had not been joined as parties, were duly represented; but as the plaintiffs became the purchasers of the properties in suit in execution of their mortgage decree on 15th January 1935, owing to the necessity of the amendments to which reference has been made, and by reason of the order of the certificate officer dated 27th February 1935 by which new sale notifications were ordered to be issued, the certificate proceedings must be deemed to have begun de novo on 22nd November 1935, and the relationship of landlord and tenant no longer existing on that date, the certificate proceedings could not be regarded as proceedings having the effect of a rent decree and the tenures were therefore unaffected thereby.

In appeal the defendant-appellant has contended that the attachment resulting from the issue of the certificate proceedings in September 1934, in spite of the amendments made under the compromise 693 subsisting at the time of the purchase by the respondents; that the certificate proceedings therefore had the effect of a rent decree, and being a first charge on the tenure, the purchase by the plaintiffs in January 1935, was a purchase subject to that charge. It was further contended that all parties necessary to the proceedings in order to give the proceedings the effect of a rent decree had been joined and the others duly represented. The first point to be determined is the validity of the proceedings of 1934, and the question whether the attachment was subsisting in January 1935, the date of the purchase by the plaintiffs. An examination of the Act is necessary for the determination of this question. S. 5, Public Demands Recovery Act (4 of 1914), provides :

> When any public demand payable to any person other than the Collector is due, such person may send to the Certificate Officer a written requisition in the prescribed form.

Section 6 provides that if the Certificate Officer

> is satisfied that the demand is recoverable and that recovery by suit is not barred by law, he may sign a certificate in the prescribed form and shall cause the certificate to be filed in his office.

Section 7 provides for notice on the certificate debtor, and S. 8 provides that from and after the service of any certificate on the certificate-debtor, the certificate-debtor is prohibited from transferring or delivering any of his immovable property; and sub-cl. (b) of the section says :

> The amount due from time to time in respect of the certificate shall be a charge upon such property, to which every other charge created subsequently to the service of the said notice shall be postponed.

It will be seen from the proceedings in the certificate case that notices were served on the certificate-debtors on 27-11-1934, (and it was from that date therefore that the charge provided for by S. 8 of the Act, came into existence) and on the heirs of the deceased Jadubans Lal on 9th January 1935. In my judgment the amendments in no way affected the incidence of the charge. By the order of the Certificate Officer, dated 22nd November 1935, the certificate case was struck out although the certificate holder was requested by the same order to amend the proceedings in conformity with the compromise entered into by the parties before the Commissioner. However, this order seems to have been cancelled as on the next day, having regard to the difficulties pointed out by the certificate-holder,

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s restored and the sale notifica-
the c issued fixing 6th January 1936
tion sale. It is clear therefore that the
fege which took effect on the service of
otice on 9th January 1935 subsisted
throughout from that date: *see* S. 8, Public Demands Recovery Act. In connexion with this matter reference might be made to the case in 57 Cal 205,[1] a decision of their Lordships of the Judicial Committee of the Privy Council. Lord Atkin in expressing the view of their Lordships made this observation:

It seems to their Lordships clear that the provisions of the Act (i. e., the Bengal Tenancy Act) are devised for the purpose of protecting the persons interested in each separate tenure put up for sale. A sub-tenure holder may have to pay the arrears due upon the whole tenure under which he holds, but no more; and it would defeat the objects of the Act, if several tenures could be lumped together in one order for sale, so that a sub-tenure holder, to get protection, would have to pay the arrears not only on the specific tenure under which he held, but on other tenures with which he had no connexion.

Then referring to the decisions in India Lord Atkin proceeds to say as follows:

It appears to have been the view of the High Court, following other decisions in India to the like effect, that such a suit can never result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure.

Then later:

It would be a misfortune to find a system of procedure so rigid as to lead to an illogical and inconvenient result; and their Lordships are not prepared to hold that this defect exists. But obviously if the original suit is brought in respect of separate tenures, the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately, so that each may be redeemed separately by the incumbrancers of such separate part pursuant to S. 170.

The next question is whether all the necessary parties were served with the proceedings. It has been seen that the heirs of Jadubans were served. But it is contended that Shamnarain and Dipnarain, sons of Raghubans, Bachu, Shamnarain's son, and Alakhnarain, son of Harbans Lal, were necessary parties as being interested in the tenure. As the Judge in the Court below points out, Harbans, Raghubans and Jadubans were the recorded tenants; Raghubans and his sons were joint, Raghubans being the karta; also Raghubans was the karta and manager of Harbans' sons after Harbans was dead, and that Raghubans was also the guardian of the son of Jadubans. The karta effectively represented the family even although not expressly named as the karta—*see* 8 Pat 788.[2] In these circumstances, the interests of the parties not actually named in the proceedings were duly represented. It was contended that the principle of representation did not apply to certificate proceedings. There are decisions under the old law to the effect that the doctrine of representation has no place in certificate proceedings. But S. 158-B which is now found at the beginning of Chap. 14, Bihar Tenancy Act, places certificates for arrears of rent, as regards the passing of a tenure or holding on an execution sale, on the same footing as decrees for the same, provided they are signed on the requisition, or in favour, of a sole landlord or the entire body of landlords; and it is settled law that for the execution of a decree for arrears of rent to have the important consequences described in Chap. 14 ordinarily all the tenants are necessary parties but that where one of a number of tenants is put forward by the rest as their representative, he can be regarded as the sole tenant for purposes of Chap. 14. The most important of the consequences in question are found in S. 159 from Chap. 14, and sub-s. (3) of S. 26 of the present Public Demands Recovery Act, attaches the same consequences to certificate sales of tenures and holdings. S. 158-A (7), Bihar Tenancy Act, operates to connect S. 158-B of that Act with S. 26 (3), Public Demands Recovery Act. The question of representation is therefore no longer to be regarded as foreign to certificate proceedings.

The fact of the charge subsisting at the time of the purchase by the plaintiff respondents in execution of their mortgage decree is in my judgment conclusive against the claim they make in their suit. Before dealing with that question in some detail I propose to refer to another matter—the maintainability of the suit. From one point of view, it would have been sufficient for the Judge in the Court below to dismiss this suit in limine. The relief claimed in the plaint as will be seen is for an injunction restraining the defendants from putting these tenures up for sale. That is a claim which cannot succeed. The defendants, even if the plaintiffs are right in their allegations as to the effect of the certificate proceedings, are entitled to put the property up for sale. Whether the

1. ('29) 16 A I R 1929 P C 171=119 I C 618=57 Cal 205=56 I A 238 (P C), Prafulla Nath Tagore v. Satyabhushan Das.

2. ('29) 16 A I R 1929 Pat 741=121 I C 330=8 Pat 788=11 P L T 237, Lalchand Thakur v. Seogobind Thakur.

right, title and interest of the certificate-debtors or something more passes in such sale is another question. However, the first relief claimed may be treated as a claim for a declaration that the certificate sale, if held, would have the effect of a sale in execution of a decree for money in contradistinction to a sale in execution of a decree for rent. Whether the plaintiff is entitled to bring this action as being a representative of the certificate-debtor (if he is, he certainly is not so entitled) will depend upon the view taken of the question of the charge and whether it subsisted at the time of the purchase by the plaintiffs. By S. 46, Public Demands Recovery Act, every question between the certificate-holder and the certificate-debtor or their representatives relating to making execution, discharge or satisfaction of a certificate duly filed under the Act or relating to the confirmation or setting aside by an order under the Act of a sale in execution of such certificate, shall be determined not by suit but by order of the Certificate Officer. Suits on the ground of fraud are expressly saved. Fraud as the ground of this suit has been given up. If therefore the plaintiffs are to be considered representatives of the judgment-debtor the suit would not be maintainable. S. 21 provides for claims to the property attached by persons other than the certificate-debtor or by some person other than one holding property in trust for the judgment-debtor and S. 25 allows of a suit by a person against whom an order is made under the preceding section.

Reverting to the question of the charge and whether it was subsisting at the time of the plaintiffs' purchase, it will be observed that by S. 26, sub-s. 3, there is an exception to the general rule under the Public Demands Recovery Act that only the right, title and interest in the judgment-debtor passes at such sale. The exception is that in areas where Chap. 14, Ben. Ten. Act, applies (and it applies in the area in which the land in dispute is situate) where the land is sold in execution of a decree for rent the tenure or holding subject to the provisions of S. 22, Ben. Ten. Act, passes to the purchaser, subject to protected interests as defined in the Chapter but with power to annul the interests defined in the Chapter as encumbrances. There are other provisions in the section (provisos) with which we are not immediately concerned. The effect therefore is that this sale if it should take place will have the effect of a rent sale so long as the conditions laid down in the Act are complied with. It is to be noticed that the section does not state that Chap. 14, Ben. Ten. Act, applies, but that in areas to which that Chapter applies certain results shall obtain, although S. 22 of the Act expressly applies. With the provisions of that section (S. 22), we have no concern in this appeal.

The matter therefore resolves itself into the simple question, was there a charge upon the tenure at the time of the plaintiffs' purchase. Reliance was placed upon the decision of their Lordships of the Judicial Committee of the Privy Council in 41 I A 91[3] for the contention that no charge came into existence until the decree. Their Lordships were dealing in that case with the construction of S. 65 of the Ben. Ten. Act, but the case is not in point. By S. 8, sub-cl. (b), Public Demands Recovery Act, the charge exists as from the date of the service of notice under the preceding section. In the case before us, notice had been served some time prior to the date on which the plaintiffs purchased in execution of the mortgage decree.

The same considerations apply also to the contention that the proceedings were not maintainable as the relationship of landlord and tenant had ceased to exist before the sale could take place. In 34 C W N 821[4] their Lordships of the Judicial Committee held that by reason of the provisions of the Ben. Ten. Act as regards notification of transfers to the landlord of permanent tenures, such transfers cannot be ignored unless it be proved by the landlord that no such notice was given; and that a landlord cannot obtain a rent decree against a person whom he chooses to record as tenants and that such a decree obtained is not binding on the unimpleaded transferees. The contention here is that so soon as the plaintiffs purchased the tenure the relationship of landlord and tenant ceased to exist between the defendants and the mortgagor, and therefore the certificate proceedings could have the effect only of a money decree. The short answer to these contentions is that the charge came into existence prior to the purchase by the plaintiffs; that this was so as I have already held in spite of the amend.

3. ('14) 1 A I R 1914 P C 111=23 I C 632=41 I A 91 =41 Cal 926 (P C), Forbes v. Bahadur Singh.
4. ('30) 17 A I R 1930 P C 193=126 I C 422=57 I A 214=58 Cal 301=34 C W N 821 (P C), Jiten Nath Ghosh v. Monmohan Ghose.

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ments to the proceedings; and that the charge subsisting as it did the sale if held will have the effect of a rent sale subject to the provisions of S. 22, Ben. Ten. Act. In my judgment, the appeal succeeds. The decision of the Judge in the Court below must be reversed and the suit dismissed with costs throughout.

Dhavle J.—I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. 1940 Patna 696

HARRIES C. J. AND MEREDITH J.

Jograj Mahto and another—Petitioners

v.

Emperor.

Criminal Revn. No. 143 of 1940, Decided on 24th April 1940, from order of Sess. Judge, Darbhanga, D/- 9th January 1940.

(a) Bihar and Orissa Village Administration Act (3 of 1922), S. 27 (1) (ii)—Words 'hue and cry'—Meaning explained.

The words "hue and cry" in S. 27 (1) (ii) must be held to mean something more than a mere direction of the Sub-Inspector of Police to the village chaukidars to look out for certain man and to arrest him. [P 697 C 2]

(b) Criminal P. C. (1898), S. 54 — Village chaukidar is not police-officer within meaning of S. 54.

The village chaukidar has the limited powers of arrest provided under S. 27, of Bihar and Orissa Village Administration Act, and has not the full powers of arrest of a police-officer laid down in S. 54, Criminal P. C. He cannot be regarded as a police-officer within the meaning of S. 54 : *27 Cal 366 ; A I R 1914 Cal 272 ; 3 All 60 and A I R 1929 All 435, Approved.* [P 698 C 1]

(c) Penal Code (1860), S. 99—S. 99 does not apply to cases where act was wholly unjustified.

The word "strictly" has been deliberately inserted by the Legislature to show that S. 99 was not intended to apply to cases where the act was wholly unjustified. It does not extend to cases where there is a complete want of jurisdiction. [P 698 C 2]

(d) Penal Code (1860), Ss. 225 and 323—Accused in dacoity case rescued from custody of village chaukidar—Accused not proclaimed offender nor was there any written order by Sub-Inspector directing chaukidar to arrest accused — Chaukidar attacked with lathis by rescuers and sustaining slight injury—Rescuers held not guilty under S. 225 or S. 323.

Certain persons rescued an accused in a dacoity case from the custody of a village chaukidar and in the course of the rescue they attacked the chaukidar with lathis and the chaukidar received one slight injury. The accused who was rescued was not a proclaimed offender nor was there any written order of Sub-Inspector directing the chaukidar to arrest the accused :

Held that the custody of the chaukidar was illegal and the persons were not therefore guilty under S. 225 in rescuing the accused. [P 698 C 2]

Held further that the persons had right to defend the accused under S. 97, Penal Code and they were not guilty even of an offence under Section 323. [P 669 C 1]

Navadip Chandra Ghosh —

for Petitioners.

Meredith J. — The petitioners Jograj Mahto and his son Rambilas Mahto were convicted by a First Class Magistrate of Samastipur under Ss. 225 and 323, I. P. C. They were sentenced under S. 225 to undergo rigorous imprisonment for one year each and to pay fines of Rs. 20 each in default to undergo a further three months' rigorous imprisonment each. Under S. 323 they were sentenced to undergo rigorous imprisonment for a period of one year each, this sentence to run concurrently with the period of imprisonment under S. 225, I.P.C. An appeal against their conviction and sentence was dismissed by the learned Sessions Judge, Darbhanga. The findings of fact upon which they have been convicted are that on 10th March 1939, they rescued one Faujdar Gope, who was an accused in a dacoity case, from the custody of a chaukidar, and in the course of the rescue they attacked the chaukidar with lathis and the latter received one slight injury. This Faujdar Gope was said to have been absconding in connexion with a dacoity case within the jurisdiction of Mohiuddinnagar police station. The Sub-Inspector of that police station gave instructions to all the village police to look out for this man, and, if they found him, to arrest him. A chaukidar Doman Dusadh, of village Hassanpur learnt that Faujdar Gope was hiding in the house of the petitioner Jograj Mahto. On the day in question he went to Jograj's house and saw Faujdar Gope sitting at the door with the petitioner Rambilas. He went up from behind and caught Faujdar and tied him round the waist with his turban and began to take him towards the thana. When he had proceeded a short distance, Jograj and Rambilas came up with lathis and demanded his release. The chaukidar refused, and then Jograj hit the chaukidar with his lathi, and Rambilas struck him with his fists. The turban was snatched from his hands, and when the chaukidar again tried to seize Faujdar, Faujdar threw him down, and Jograj and Rambilas again assaulted him. Rambilas then untied Faujdar, and all three made off. The chaukidar was not medically examined, but the Sub-Inspector gave evidence that he had noticed a swelling on his arm.

The point taken in revision is that the arrest by the chaukidar was not lawful, and therfore in rescuing Faujdar the petitioners were exercising their legitimate right of private defence as defined in S. 97, I. P. C., and so committed no offence. The chaukidar was not entitled to make the arrest, because a chaukidar though a village policeman, is not a police officer within the meaning of S. 54, Criminal P. C. S. 54 (1) provides inter alia that

> any police officer may, without an order from a Magistrate and without a warrant, arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned.

It is conceded that if the chaukidar was a police officer within the meaning of this section, the arrest was legal. It is clear however that this arrest could not have been lawfully made by the chaukidar as a private person. The powers of arrest of a private person as defined in S. 59, Criminal P. C., are much more limited. A private person may, inter alia, arrest any person who, in his view, commits a non-bailable and cognizable offence, or any proclaimed offender. This was not a case where any offence had been committed in the view of the chaukidar. The case apparently proceeded in the Courts below on the assumption that Faujdar was a proclaimed offender and as such could be arrested even by a private person. It was argued, however, that there was no evidence that Faujdar was a proclaimed offender, and in fact the only material on that point in the evidence was a vague statement of the Sub-Inspector to the effect that "process had issued," whatever that might mean. We have looked into this matter, as it has been contended that no process under S. 87, Criminal P. C., had in fact issued against Faujdar, and we find from the order sheet that this is so. The order sheet shows that processes under Ss. 87 and 88, Criminal P. C., were issued against Faujdar only on 25th March 1939, that is to say fifteen days after the offences for which the petitioners have been convicted, are said to have been committed. Faujdar Gope on 10th March was clearly not a proclaimed offender, and the chaukidar could not have lawfully arrested him as a private person. Nor could the chaukidar have lawfully made the arrest under the special powers of arrest which are conferred on village chaukidars under the Village Administration Act (III of 1922). These powers of arrest are defined in S. 27 of that Act. Though they are somewhat more extensive than the powers of a private person they are considerably more limited than the powers of a police officer. It is provided under S. 27 (1) (ii):

> He shall arrest—(a) all proclaimed offenders; (b) all persons whom he may find in the act of committing any offence specified in Sch. 3; (c) any person against whom a hue and cry has been raised of his being concerned in any offence specified in Sch. 3 whether such offence has been or is being committed within or outside his union; (d) any person in whose possession anything is found which may reasonably be suspected to be stolen property, or who may reasonably be suspected of having committed an offence with reference to such thing; and (e) any person who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

None of these provisions is applicable in the present case. Faujdar was not proclaimed offender. He was not caught by the chaukidar in the act of committing any offence, nor was stolen property seen in his possession, nor had he obstructed the police or escaped from police custody. Nor do I think it can be said that a hue and cry had been raised of his being concerned in any offence. The words "hue and cry" must, I think, be held to mean something more than a mere direction of the Sub-Inspector of Police to the village chaukidars to look out for this man and to arrest him. The special powers of the chaukidar under the Village Administration Act, in my view, would not extend to effecting an arrest in the circumstances of the present case. It cannot be held that this was an arrest that was made under the provisions of S. 56, Criminal P. C. S. 56 provides that

> when any officer in charge of a police station or any police officer making an investigation under Chap. 14 requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made.

Even if it be held that the chaukidar is an officer subordinate to the Sub-Inspector within the meaning of this section, and that is perhaps an arguable point it is not claimed that there was any written order of the Sub-Inspector in this case. S. 56, therefore, has no application. It is clear from the above analysis that this arrest must be held to have been unlawful unless the chaukidar was entitled to arrest as a police officer within the meaning of S. 54, Criminal P. C. It has been held in 19 P L T 268=17 Pat

369,[1] that the chaukidar is a police officer for the purposes of Ss. 25 and 26, Evidence Act. However that may be, with regard to S. 54, Criminal P. C., there are a number of rulings of the Calcutta and Allahabad High Courts which take the view that he cannot be regarded as a police officer within the meaning of this section. Amongst such rulings are 27 Cal 366,[2] 41 Cal 17,[3] 3 All 60[4] and 52 All 203.[5]

In my opinion the view taken in these rulings is correct. In the Police Act 1861, the definition of "police" is as follows: "The word 'police' shall include all persons enrolled under this Act." The chaukidar is not a person enrolled under the Police Act. As I have already said, he is appointed under the Village Administration Act (III of 1922). Apart from that the fact that his powers of arrest are specially defined in a limited sense under S. 27, Village Administration Act, appears to indicate that the Legislature did not contemplate that he should be regarded as a police officer under S. 54, Criminal P. C., who would, as such, have the extended powers of arrest which are provided under that Section. In my view it is clear that the village chaukidar has the limited powers of arrest provided under S. 27, Village Administration Act, and has not the full powers of arrest of a police officer laid down in S. 54, Criminal P. C. The chaukidar then could not have lawfully made this arrest as a police officer, nor, as I have shown, could he have lawfully made it in any other capacity. It is, therefore, clear that the arrest of Faujdar by the chaukidar was not lawful and his custody by the chaukidar was illegal. In this view the conviction under S. 225, Penal Code, cannot be sustained. S. 225 constitutes a special offence, and it is clear from its terms that that offence cannot be committed unless the custody is lawful. It provides that

> whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished, etc., etc.

Whether it is a case of obstructing illegally the lawful apprehension, or rescue from custody, in each case the word "lawful" is expressly used. As the custody in this case was not lawful, there could have been no offence committed under S. 225. It is true that the chaukidar in this case unquestionably acted in good faith. That, however, would not prevent his act from being unlawful, for it is clear from Ss. 339, 340 and 341, Penal Code, that the offences of wrongful restraint and wrongful confinement do not involve bad faith or any particular criminal intent. The question remains whether the convictions under S. 323, Penal Code, can be sustained. Once it is held that the custody of the chaukidar was not lawful, then the petitioners would be entitled to exercise the right of private defence of the person of Faujdar. It is provided in S. 97, Penal Code, that every person has a right, subject to the restrictions contained in S. 99, to defend his own body, and the body of any other person, against any offence affecting the human body. This was a case of an offence affecting the human body if Faujdar was wrongfully confined by the chaukidar. There was, therefore, a right to defend him unless the restrictions contained in S. 99 are applicable. S. 99, Penal Code, provides that

> there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

The chaukidar in the present case was acting in good faith. Indeed he was acting under orders; and he was acting under colour of his office. His act, however, was wholly illegal. It has been held in many cases that S. 99 applies only where there is jurisdiction to do an act but that jurisdiction has been, in some respects, wrongfully exercised; where, for example, the authority, though present, is in some respects defective. It is to be observed that the expression used in the Section is "strictly justifiable by law." I emphasize the word "strictly" which must have been deliberately inserted by the Legislature to show that this Section was not intended to apply to cases where the act was wholly unjustified. It does not extend to cases where there is a complete want of jurisdiction. Such, in my opinion, was the present case. I have shown that the arrest, in any view,

1. ('38) 25 AIR 1938 Pat 308=174 I C 524=39 Cr L J 428=17 Pat 369=19 P L T 268, Emperor v. Mt. Jagia.
2. (1900) 27 Cal 366=4 C W N 252, Kalai v. Kalu Chowkidar.
3. ('14) 1 AIR 1914 Cal 272=20 I C 750=41 Cal 17=14 Cr L J 494=17 C W N 978, Purna Chandra v. Emperor.
4. ('81) 3 All 60, Empress of India v. Kallu.
5. ('29) 16 AIR 1929 All 935=120 I C 205=1930 A L J 242=31 Cr L J 12=52 All 203, Emperor v. Bhagwan Din.

was unlawful, and the chaukidar could, in no circumstances, have had authority to arrest Faujdar Gope. His act, in short, was one which he had no jurisdiction to perform. It was not merely a case of exercising an authority which was there, in a manner which was not wholly legal. This being so, in my opinion, S. 99 is not applicable, and it cannot be said that the petitioners lost their right of private defence by reason of the provisions of S. 99.

They could not, therefore, be convicted even for an offence under S. 323, I. P. C., unless it is held that they exceeded the right of private defence. In my opinion it is impossible to hold on the materials in this case that the right of private defence was exceeded. The chaukidar no doubt would not have released his charge unless force had been used. The force used was slight. The sole injury caused was a swelling on the arm. In my opinion it would be wrong to hold that even if a lathi blow was struck and a slight injury caused in the course of effecting rescue, the right of private defence was thereby exceeded. Once it is held that the petitioners were entitled to effect rescue, the serious character of their actions disappears, and in this view it cannot, in my view, be held that they were guilty even of the offence under S. 323. In my view the conviction of the petitioners cannot be sustained under either of these sections. I would, therefore, make this rule absolute, acquit the petitioners, and direct that they be discharged from their bail. If the fines have been paid, they must be refunded.

Harries C. J.—I agree.

D.S./R.K. *Rule made absolute.*

A. I. R. 1940 Patna 699

HARRIES C. J. AND FAZL ALI J.

Chamru Lal — Appellant.

v.

Shyam Sundar Lal and another— Respondents.

Letters Patent Appeal No. 26 of 1939, Decided on 5th August 1940, from decision of Rowland J., D/- 9th October 1939.

Pre-emption — Cosharer — Partition suit by stranger-purchaser from cosharer—Subsequent pre-emption suit by other cosharer — Preliminary decree in partition suit passed — Before final decree in aforesaid suit pre-emption suit decreed—Cosharer held entitled to pre-empt as right of pre-emption was not lost by preliminary partition decree — On the contrary pre-emption decree held defeated stranger's right to partition.

Where a stranger-purchaser of the interest of a cosharer institutes a suit for partition and subsequently the other cosharer also institutes a suit for pre-emption which is decreed after a preliminary decree in the partition suit is passed the preliminary decree in the partition suit does not defeat the right of the pre-emptor cosharer but on the contrary it is the stranger-purchaser who loses his right to partition as a result of the pre-emption decree. All that the pre-emptor is required to do in such a case is to see that no final decree is passed in the partition suit after he has obtained a decree in his pre-emption suit : *A I R 1932 P C 57 and 21 All 374, Expl. and Disting.* [P 700 C 2]

L. K. Jha and K. P. Upadhya — *for Appellant.*

Janak Kishore — *for Respondents.*

Fazl Ali J. — It appears that the plaintiff and his seven brothers were maliks of Mahal Nayagaon, each of them having a two annas share in the mahal. On 16th October 1936, one of the plaintiff's brothers sold his two annas interest to the appellant. On 18th October 1936, the plaintiff learnt of the sale, and he forthwith made the first demand for pre-emption purchase and on the same day he made the second demand (Talab-i-istishhad) also. On 24th November 1936, the appellant sued for partition, basing his title upon the sale deed of 16th October 1936. On 8th October 1937, the plaintiff instituted the pre-emption suit which has given rise to this appeal, and on 29th March 1937, he filed a written statement in the partition suit in which he pleaded, among other things, that that suit could not proceed. On 26th May 1937, the partition suit was decreed ex parte, and on 25th February 1938, the suit for pre-emption was also decreed. The purchase money, which the plaintiff was directed to deposit under the pre-emption decree, was duly deposited by him soon after the decree. The first point raised on behalf of the appellant in the appeal was that the plaintiff had lost his right of pre-emption by reason of the preliminary decree passed in the partition suit, and in support of his argument reliance was placed by him on an observation made by the Judicial Committee in 54 All 189.[1] The observation is as follows :

So it has been held in several cases that where between the dates of what may be called for convenience the pre-emption sale and the institution of the suit, the pre-emptor has lost his status as a cosharer by the partition of the village, 21 All 374,[2] or the stranger purchaser has resold to

1. ('32) 19 A I R P C 57 = 136 I C 402 = 59 I A 138 = 54 All 189 (P C), Hans Nath v. Ragho Prasad.
2. ('99) 21 All 374=1899 A W N 126, Janki Prasad v. Ishar Das.

another cosharer, 20 All 100,[3] or has become himself a cosharer by an undisputed purchase or by a gift, 26 All 389,[4] the right of pre-emption is lost.

It is contended that this observation supports the view that a pre-emptor loses his right by the partition of the village, and in this particular case the partition was complete as soon as the preliminary decree in the partition suit was passed. As the observation of their Lordships of the Privy Council was based entirely upon the decision of the Allahabad High Court in 21 All 374,[2] it is necessary to refer to the facts of that case which were briefly these. In February 1895 defendants 3 to 5 of the suit which was before their Lordships, had sold a share in an estate known as thoke Ishar Das to the defendant-appellant Janki Prasad, a stranger to the village. The plaintiff-respondent was at that time a cosharer with the vendors in thoke Ishar Das. At the time of the sale, proceedings for perfect partition of the village had been commenced and were still pending. After the sale the partition was completed, and it became operative on 1st July 1895, when the sanction of the Collector was given. By the partition thoke Ishar Das was divided into several separate mahals. The property sold fell within one of the mahals shown as mahal Ganga Prasad. In that mahal neither the plaintiff nor the vendees owned any share, and it was not until 1896 that the suit for pre-emption was brought. In these circumstances, it was held that as the plaintiff had ceased to be a cosharer as a result of the collectorate partition at the date of the suit, that suit could not be maintained by him. The principle underlying this case is quite intelligible. The right of pre-emption arises as between a cosharer and a stranger. If the cosharer ceased to be a cosharer before the suit is decided, he loses the very right upon which a suit for pre-emption can be founded, and he therefore cannot oust the stranger purchaser from the property purchased by him. The same consequences follow, if before the decision of the suit the stranger purchaser becomes a cosharer by reason of an undisputed purchase or gift from another cosharer. In the present case neither of these events has happened. Here the appellant brought the suit for partition on the strength of his having purchased two annas from a brother of the plaintiff, that is to say on the strength of the very transaction which was in question in the pre-emption suit. The pre-emption suit being decided in favour of the plaintiff, the property became his property, and as the appellant ceased to have a share in the estate he was no longer entitled to continue the partition proceedings. I do not see how, in these circumstances, the mere fact that the appellant had a preliminary decree for partition in his favour can help him. The preliminary decree in a partition suit merely amounts to an adjudication that the plaintiff is entitled to a separate share in the property sought to be partitioned. If however before the share is separated the plaintiff ceases to have a right in that property, his suit must automatically fail. In my opinion therefore instead of the decree in the partition defeating the right of the plaintiff, it was the appellant who lost his right to partition as a result of the pre-emption decree.

Another point which was raised by the learned advocate for the appellant was that inasmuch as the plaintiff did not intervene in the partition proceedings as soon as the decree was passed in his favour in the pre-emption suit and object to the continuance of the proceedings, it must be held that he had elected to waive the right acquired by him under that decree. The argument appears to me to be a novel one. The plaintiff had deposited the purchase money in pursuance of the pre-emption decree, and he did appear in the partition suit before the final decree was passed and ask the Court to stay proceedings. The learned advocate for the appellant says that he should have done so much earlier; but he also concedes that in law there was no limitation for his making such an application. He says that the application should have been made within a reasonable time; but he was not able to define what would have been 'reasonable time' in the circumstances of the present case. It is admitted that no final decree has been passed in the partition suit, and in my opinion all that the plaintiff was required to do was to see that no final decree was passed in that suit after he had obtained a decree in his suit for pre-emption. In my opinion there was no waiver in the case and the argument that the waiver should be presumed from the circumstances of the case must be negatived. As no other points were urged, I would dismiss this appeal with costs.

Harries C. J. — I agree.

G.N./R.K. *Appeal dismissed.*

3. ('98) 20 All 100, Seri Mal v. Hukam Singh.
4. ('04) 26 All 389=1 A L J 2029 = 1904 A W N 68, Ram Hit Singh v. Narain Rai.

A. I. R. 1940 Patna 701

MEREDITH J.

Tarachand Sah and others—Petitioners

v.

Emperor.

Criminal Revn. No. 273 of 1940, Decided on 27th May 1940, from order of Magistrate, Chapra, D/- 8th March 1940.

(a) Penal Code (1860), S. 379 — Mortgagee given possession over trees without right to cut or appropriate them, cutting them—He cannot be convicted under S. 379.

Where a mortgagee who is under the mortgage deed given possession over the trees without the right to cut or appropriate them cuts or appropriates them he cannot be convicted under S. 379.

[P 701 C 2]

(b) Criminal Trial—Prosecution must establish its case irrespective of defence taken.

Accused cannot be convicted upon a criminal charge merely on the ground that he did not put forward a defence which was open to him. The prosecution must clearly establish its case irrespective of the defence taken. [P 701 C 2]

Bankey Behari Sahay — *for Petitioners.*

H. P. Sinha — *for the Crown.*

Order.—The petitioner Tara Chand Sah has been convicted under S. 379-114, I.P.C., and sentenced to pay a fine of Rs. 30 in default to suffer rigorous imprisonment for 20 days. The remaining three petitioners have been convicted under S. 379, I. P. C., and have each been sentenced to pay a fine of Rs. 20, in default to undergo rigorous imprisonment for a period of 15 days. An appeal against their conviction has been dismissed. The case against the petitioners was that on 25th October 1939, the other three petitioners under the orders of the petitioner No. 1 cut and removed a sisham tree worth Rs. 25 belonging to the master of the complainant. This tree stood on the gair mazrua land of the malik. The petitioner No. 1, however, was the mortgagee in possession of the village. The point taken in revision is that the petitioner No. 1 was in possession of the tree as mortgagee, and consequently he or his servants could not commit theft of that tree.

In my opinion, this conviction cannot be sustained. Both the Courts below appear to have been under the impression that the trees of the village were excluded from the mortgage. In that, however, they were clearly wrong. On the contrary, it appears from the terms of the mortgage deed (Ex. 1) that the gair mazrua lands and trees were included in the mortgaged property, and it was merely the right to cut down trees that was excluded. It is stated, amongst the recitals in the mortgage bond, that the mortgaged property inter alia includes 16 annas of village Chitauli, tauzi No. 549, according to the boundaries and descriptions detailed below together with ponds and tanks and pucca wells and areas of zirait and bakasht and gair mazrua lands and trees, fruit bearing and non-fruit bearing. Later on in the deed there is a provision that the mortgagee will not have the right to cut and appropriate the trees.

Both the Courts below have interpreted this deed as excluding the trees from the possession of the mortgagee, but manifestly the mortgagee was given possession over the trees, though he was not entitled to cut them down and destroy them. There are other ways in which possession over trees might be exercised, such as utilization of fruits and use of small branches and leaves. The important point is that possession over the trees clearly lay with the mortgagee upon the terms of the deed. This being so, the mortgagee could not commit theft of the tree. It may be that the mortgagee wrongly cut down the tree in question, though his case was that it was not he but some one else who had appropriated this tree. If it was a case of the mortgagee wrongly cutting down the tree, it is one which would be covered by the terms of S. 76, T. P. Act, which provides inter alia, that when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must not commit any act which is destructive or permanently injurious to the property; and if he fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any occasioned by such failure. This section fully protects the rights of the mortgagor in a case of waste of this kind.

It is urged for the opposite party that the case now put forward was not the defence taken at the trial where a bona fide claim of right was, it is alleged, not definitely set up. It may be that the petitioners were not well defended at the trial, and did not put forward a defence which was obviously open to them. They cannot be convicted upon a criminal charge merely on that account, since the prosecution must clearly establish its case irrespective of the defence taken. There is a remark in the judgment of the lower Appellate Court, which would seem to suggest that the petitioners defini-

tely put forward a defence that they were not in possession of the tree, and that defence witness No. 1 stated that not the mortgagee but the mortgagor was in possession. In this respect also, however, the Court below appears to have made a mistake of record. I have looked into the evidence of defence witness No. 1, and I find that he never stated that the malik was in possession. All he did say was that the gair mazrua land and the trees belonged to the malik, which is of course quite correct but is a different matter. All that the defence did say apparently was that it was not the petitioners but some one else who had taken away the tree. The defence was not, therefore, inconsistent with the position now taken that the petitioner No. 1 was in possession of the tree as mortgagee.

The application is allowed, the conviction and sentences passed upon the petitioners are set aside, and they are acquitted. The amount of the fines if paid must be refunded.

D.S./R.K. *Application allowed.*

A. I. R. 1940 Patna 702

MANOHAR LALL J.

Lal Ballabh Nath Sah Deo and others — Appellants.

v.

Maulavi Habibur Rahman and others — Respondents.

Appeal No. 885 of 1938, Decided on 16th October 1939, from appellate decree of Addl. Judicial Commissioner of Chota Nagpur, Ranchi, D/- 4th June 1938.

Landlord and tenant — Rent suit — Revenue officer can pass decree and order sale only when holding is properly represented.

In Chota Nagpur when a rent suit is brought, the Revenue officer's jurisdiction to pass a rent decree and therefore to order a sale of the holding or tenure arises only if the holding or tenure as the case may be is properly represented. Consequently, when the purchasers of interest of some of the tenure-holders or some of the tenure-holders themselves are added as parties after limitation the Revenue Court has no jurisdiction to pass a decree in respect of rent which may have become barred at the time of the addition of aforesaid parties : *A I R 1933 P C 122 and A I R 1939 Pat 225, Rel. on.* [P 702 C 2]

Rai Gurusaran Prasad — *for Appellants.*

Sarju Prasad and Radha Krishna Sahay — *for Respondents.*

Judgment. —This appeal is against a decision of the Additional Judicial Commissioner of Ranchi passed in a rent suit. The suit was instituted before a Rent Suit Deputy Collector on 25th March 1936 for recovery of arrears of rent for the years 1989 to 1992 Sambat from defendants 1, 2 and 3 who were the original tenure-holders of khewat No. 3/1. In accordance with the procedure which apparently prevails in those Courts, the plaint was transferred to be tried by the Subdivisional Officer of Gumla by Letter No. 5254-R, dated 23rd July 1936, which stated that the case was being forwarded for favour of disposal as the villages were within the jurisdiction of the Subdivisional Officer of Gumla. On 27th July 1936 notice was issued to the plaintiffs and summons was issued to the defendants. On 26th August 1936, the tenure-holder of khewat No. 3/2 was added at the request of the plaintiffs (this tenure-holder was defendant 4) and defendant 5, the purchaser of the interest of defendant 2 was added on his own application. It will be noticed therefore that it was when these two persons, namely defendants 4 and 5, were brought on the record that the tenure was represented in its entirety before the Rent Suit Officer. At that time the period of limitation for recovery of arrears of rent for 1989 Sambat had elapsed. Therefore, it was contended in the Courts below, as it was contended before me, by the appellants that a decree for arrears of rent for the year 1989 Sambat ought not to have been passed by the Courts below. The matter was agitated before the learned Deputy Commissioner, but he overruled the contention on the ground that the tenure-holders of khewats 3/1 and 3/2 were jointly liable to pay rent to the plaintiffs and he was also of opinion that the question whether the decree was a rent decree or a money decree should be left to be agitated in the execution department.

I think that after the decision of their Lordships of the Judicial Committee in 12 Pat 626[1] which was followed in 20 P L T 346,[2] it was not open to the learned Additional Judicial Commissioner to adopt the course he did. In Chota Nagpur, when a rent suit is brought, the Revenue Officer's jurisdiction to pass a rent decree and therefore to order a sale of the holding or tenure arises only if the holding or tenure as the case may be is properly represented. For these reasons the decree of the learned Judicial Commissioner is varied by dismis-

1. ('33) 20 A I R 1933 P C 122=142 I C 781=60 I A 176=12 Pat 626 (P C), Jagdishwar Dayal Singh v. Dwarka Singh.
2. ('39) 26 AIR 1939 Pat 225=179 I C 834=20 P L T 346, Manki Kanak Ratan v. Sundar Munda.

ing the suit of the plaintiffs for 1989 Sambat. In other respects there will be a decree in favour of the plaintiffs to be calculated at the rate of rent claimed for the years 1990, 1991 and 1992 Sambat. The appellants are entitled to costs proportionate to the amount for which they have been declared not liable in all the Courts. The plaintiffs are entitled to costs, in proportion to the amount to which they have been ultimately found to be entitled, but only in the Courts below.

G.N./R.K. *Order accordingly.*

A. I. R. 1940 Patna 703

AGARWALA AND ROWLAND JJ.

Shyam Jhulan Prasad Singh and others — *Plaintiffs* — Appellants.

v.

Satruhan Prasad Sahi and others — *Defendants* — Respondents.

Appeal No. 992 of 1938, Decided on 15th April 1940, from appellate decree of Sub-Judge, Muzaffarpur, D/- 27th June 1938.

(a) Bihar Tenancy Act (8 of 1934), S. 155—Heading of notice need not represent it to be from landlords direct.

There is nothing in S. 155 to require that the heading of the notice should represent it to be from the landlords direct and not from the Court at the instance of the landlords. [P 704 C 1, 2]

(b) Bihar Tenancy Act (8 of 1934), S. 155—Notice need not in alternative demand that tenant should vacate holding.

There are no words in S. 155 to require that a notice under this Section should demand of the tenant in the alternative that he vacate the holding: Observation in *A I R 1930 Pat 624, Held obiter.* [P 704 C 2]

(c) Bihar Tenancy Act (8 of 1934), S. 155—Misuse incomplete at time of issue of notice but complete at time of suit—Notice is not defective.

Notice is not defective because at the time it was issued the misuse may have been incomplete whereas at the time of suit it was complete. If there was a misuse before the service of the notice which would entitle the plaintiffs to have compensation and remedy of the misuse, they can hardly lose this right because the misuse is subsequently enlarged. [P 704 C 2]

(d) Bihar Tenancy Act (8 of 1934), Ss. 155 and 188—Notice not containing alternative demand to vacate land—Tenancy cannot be said to have terminated by sixteen annas landlord—Suit for ejectment at instance of some cosharers is not maintainable.

In order to have a cause of action for a suit to eject the defendant as a trespasser, the tenancy must first have been determined and the tenancy must be determined by the sixteen annas landlords. Where in the notice itself there is not contained a demand that the tenant should vacate the land as an alternative to remedying the misuse and paying the compensation demanded, there is not an expression in the notice on behalf of the sixteen annas landlord of an intention to terminate the tenancy. Hence a suit for ejectment at the instance of some of the cosharers is not maintainable. [P 705 C 1]

(e) Bihar Tenancy Act (8 of 1934), S. 155—Duration of tenancy.

The tenancy continues in operation till the failure of the tenant to comply with the decree made under S. 155 within the term prescribed thereby: *A I R 1917 Cal 728, Rel. on.* [P 705 C 1]

(f) Bihar Tenancy Act (8 of 1934), Ss. 25 (a) and 155—Suit for ejectment by some cosharer landlords on ground mentioned in S. 25 (a) found to be incompetent — Decree directing defendant to remedy misuse held should be passed.

A suit for ejectment was brought by some of the cosharer landlords against occupancy tenant on the ground that the tenant had used the land in a manner rendering it unfit for the purposes of tenancy. The suit was held to be incompetent in view of the provisions of S. 155.

Held that though the plaintiffs were not entitled to a decree for ejectment they ought to have a decree requiring the defendant to remedy the misuse: *16 C L J 127, Ref.* [P 705 C 1, 2]

Ganesh Sharma — *for Appellants.*

G. P. Sinha and Lal Narain Sinha — *for Respondents.*

Rowland J. — The plaintiffs-appellants are some of the cosharer landlords of a holding consisting of two plots, Nos. 1120 and 1121, held by the defendants first party as an occupancy raiyati holding. The defendants second party are the other cosharer landlords. The suit was brought to eject the defendants first party from the holding on the ground referred to in S. 25 (a) Bihar Tenancy Act, for having used the land comprised in the holding in a manner rendering it unfit for the purposes of tenancy, that is to say, by constructing three houses, not for agricultural purposes but for subletting, and by digging a ditch. Notice in accordance with S. 155, sub-s. (1) was said to have been served through the Munsif's Court on behalf of the predecessor of the plaintiffs and defendants second party, who was the 16 annas landlord. The compensation demanded was Rs. 50. The Munsif found that three houses had been constructed and a ditch excavated, and that the construction and excavation had been a misuse of the land in a manner rendering it unfit for the purposes of the tenancy. He held that the measure of compensation should be Rs. 20 and he passed a decree for ejectment unless the defendants first party paid compensation and restored the land to its original condition within three months by removing the houses and filling up the excavation.

On appeal the Subordinate Judge held that the construction of two of the houses

had been for legitimate agricultural purposes and had not been a misuse, but the construction of the third house and excavation of the ditch were a misuse. He, however, dismissed the suit on two grounds: first, that the notice served on the defendants first party was not in accordance with law and, therefore, the suit was barred by S. 155 (1). Secondly, he held that S. 188 required such a suit to be brought by all the landlords as plaintiffs, and the present suit, having been brought by some of the cosharer landlords, was not maintainable. The points arising in second appeal are: first, whether under S.155 the suit for ejectment was barred, on the ground of failure of the notice, to conform to the requirements of that Section; secondly, whether the suit for ejectment, at the instance of some cosharers, is not maintainable in face of S.188; and thirdly, if the plaintiffs are disentitled to the remedy of ejectment, whether the whole suit including the claim for compensation can be dismissed.

The notice is required to be served in accordance with R. 3 of the Government rules under the Act, which can be found at p. 700 of Mr. B. K. Sen's edition of the Bihar Tenancy Act. No defect is shown in the manner of service; but it is said that the notice is invalid, (a) because it is expressed to be a notice from the Court and not from the landlord, (b) because in specifying the particular misuse and demanding compensation, it did not demand, in the alternative, that the defendants should vacate the holding, and (c) because in the notice it is said that the defendants were beginning to build the houses and dig the ditch; but in the suit these misuses are said to be complete. The notice which had been served on the tenants had been issued on behalf of the sixteen annas proprietor Babu Jagat Nandan Prasad Singh, predecessor of the plaintiffs and pro forma defendants. It was issued through the Court and served in accordance with R. 3 of the Government Rules under the Bihar Tenancy Act in the manner prescribed for the service of the summons on a defendant under the Code of Civil Procedure. The Subordinate Judge thought it was defective because the notice actually served is headed as being a notice from the Court and not from the landlord; the landlord's name however appears on the heading as the applicant at whose instance the notice is issued. There is nothing in S. 155 to require that the heading of the notice should represent it to be from the landlords direct and not from the Court at the instance of the landlords and this supposed defect seems to me to be imaginary. It is not necessary to read into the Section words that are not there. There are no words in S. 155 to require that a notice under this Section should demand of the tenant in the alternative that he vacate the holding; but in A I R 1930 Pat 624[1] there is an observation to this effect:

> The law requires that the notice must set out the misuse complained of and must ask the defendant to remedy the misuse within a specified time and to pay a reasonable compensation; in default to quit the land.

The last words of this observation seem to be obiter as the appeal failed on the ground that the Subordinate Judge had found as a fact that service of the notice had not been established. I do not think that the statute requires that the notice should contain an express demand to quit the land in order to comply with the requirements of S. 155 (1). I shall however have to return later to the effect of a notice in which this demand is absent. I do not think that the notice was defective because at the time it was issued the misuse may have been incomplete whereas at the time of suit it was complete. If there was a misuse before the service of the notice which would entitle the plaintiffs to have compensation and remedy of the misuse, they can hardly lose this right because the misuse is subsequently enlarged. If the plaintiff is entitled to a decree to remedy the partial injury, it will obviously be impossible for the defendant to comply with that decree unless he remedies the whole of the enlarged misuse which has taken place up to the time of the suit. I am therefore of opinion that the grounds on which the Subordinate Judge has held the notice to be defective and unfit to form a foundation for a suit under S. 155 are erroneous.

The next question is whether the suit for ejectment at the instance of some cosharers is not maintainable in face of S. 188, Bihar Tenancy Act. It is settled law that a suit to eject a trespasser is not anything that is required by the Act to be done by the landlord and can be maintained by a cosharer in respect of his own share; but in order to have a cause of action for a suit to eject the defendant as a trespasser, the tenancy must first have been determined and the tenancy

1. Muhammad Yunus v. Kamla Singh, (1930) 17 A I R Pat 624=128 I C 790 = 11 P L T 668.

must be determined by the sixteen annas landlords. It has been held in 13 P L T 432[2] that when the sixteen annas landlords being raiyats had given their under-raiyat a notice to quit that fact terminated the tenancy and a suit in ejectment could be maintained by some cosharers only. But here we have to see whether the notice which was served had terminated the tenancy before the institution of the suit and there are two difficulties in the way of holding that it could so terminate the tenancy. The first is that in the notice itself there is not contained a demand that the tenant should vacate the land as an alternative to remedying the misuse and paying the compensation demanded; that is to say, there was not an expression in the notice on behalf of the sixteen annas landlord of an intention to terminate the tenancy.

It has been held in 31 Cal 786[3] following an earlier decision in 7 Cal 414[4] that a tenancy must be determined by all the cosharers before one of them can sue for khas possession in respect of his share. Secondly, the service of a notice under S. 155 has not the same effect as for instance the service of a notice under S. 49. As has been held in 44 Cal 954[5] the tenancy continues in operation till the failure of the tenant to comply with the decree made under S. 155 within the term prescribed thereby. The contention of the appellants before us that the tenancy came to an end on the expiry of the time given by the earlier notice under S. 155 cannot be accepted. That being so, the plaintiffs are not entitled to maintain a suit for ejectment in face of the provisions of S. 155, Bihar Tenancy Act. The question remains whether the suit ought to be entirely dismissed or whether the plaintiffs should get some relief by way of damages. We may get some assistance from the decision in 16 C L J 127.[6] This was a suit brought by a cosharer landlord against a raiyat in which there was no prayer for ejectment; but the relief sought was to compel the defendant to fill up a tank which he had dug in the mal lands of the holding and in the alternative for damages. A suit of this nature, it was held, was not one which the whole body of landlords was required or authorized to bring under the Bengal Tenancy Act and it was held that S. 188 was no bar to the maintainability of the suit for the above reliefs.

We have then to consider the form of decree that should be passed. S. 155 (2) requires the decree in every suit under the section to declare whether the misuse or breach is, in the opinion of the Court, capable of remedy. As may be seen from the decisions in 29 C L J 40[7] and 16 P L T 830[8] the measure of compensation may be affected by the finding; the judgments of both the Courts below are defective in that there is no specific finding on this point; but it seems to have been assumed that the misuse is capable of remedy and we proceed on that footing, the assumption not having been challenged before us. It would seem then that the plaintiffs ought to have a decree requiring the defendant to remedy the misuse to the extent that misuse has been found by the lower Appellate Court; that is to say by filling up the ditch and removing the third of the three houses which have been erected. The decree must also provide a measure of damages and here the Subordinate Judge has not given us the necessary finding. The Munsif had assessed the damage consisting of erection of three huts and digging of a ditch at Rs. 20, but the Subordinate Judge has not found how much of this damage is referable to the one hut and the ditch. To avoid the inconvenience of a remand the parties have left this matter to the Court and we assess the damage at Rs. 15 of which the plaintiffs as eight annas cosharers are entitled to recover one-half. The time allowed for the defendant for complying with the Court's order and bringing the compensation money into Court will be three months from this day. In default the plaintiffs will be entitled to have the misuse remedied by the Court at the cost of the defendants and to execute the decree for the amount of damages. The plaintiffs will get half their costs of the first Court and the defendants will get half their costs in the lower Appellate Court. Parties will bear their own costs of the second appeal.

Agarwala J.—I agree.

D.S./R.K. *Order accordingly.*

2. ('32) 19 A I R Pat 259=140 I C 14=13 P L T 432, Lachmi Lal v. Ganesh Chamar.
3. ('04) 31 Cal 786 = 8 C W N 325, Gholam Mohiuddin Hossein v. Khairan.
4. ('81) 7 Cal 414 = 9 C L R 76, Radha Prasad v. Esuf.
5. ('17) 4 A I R 1917 Cal 728 = 38 I C 493 = 44 Cal 954 = 24 C L J 523 = 21 C W N 776, Shyam Mandal v. Satinath Banerjee.
6. ('12) 16 C L J 127=17 I C 115, Gobind Chandra v. Kamijuddi Soyal.
7. ('19) 6 A I R Cal 722=34 I C 497=29 C L J 40, Afiladdi v. Satis Chandra.
8. ('35) 22 A I R Pat 422=16 P L T 830=14 Pat 279, Mt. Sadia Bibi v. Dukhi Gope.

A. I. R. 1940 Patna 706

HARRIES C. J. AND FAZL ALI J.

Cuttack Municipality — Appellant.

v.

Surendra Nath Sahu — Respondent.

Letters Patent Appeal No. 27 of 1939, Decided on 5th August 1940, from decision of Mohamad Noor J., D/- 9th August 1939.

Bihar and Orissa Municipal Act (7 of 1922), Ss. 282 (1) and 291 (j) — S. 282 (1) does not contemplate annual license — License fee fixed in lump sum paid by druggist — He cannot, by subsequent amendment of bye-law, be made to pay it annually.

Once a druggist's shop is registered the Commissioner must grant a license. The license is not an annual one but is a license which permits the occupier of the premises to sell certain drugs for an indefinite period. Hence once the druggist has paid the license fee fixed in lump sum he cannot, by subsequent amendment of bye-laws, be made to pay it annually. [P 707 C 1]

G. P. Das — *for Appellant.*

S. M. Gupta — *for Respondent.*

Harries C. J.—This is a Letters Patent appeal from a decision of Mohamad Noor J., upholding concurrent decrees of the Courts below passed in favour of the plaintiff-respondent. The plaintiff-respondent brought a suit against the Cuttack Municipality claiming a declaration that the Municipality were not entitled to charge an annual license fee in respect of druggists' shops registered in the Municipality. The learned Munsif who heard the case came to the conclusion that the by-law upon which the Municipality relied was ultra vires the Bihar and Orissa Municipal Act, 1922, and he decreed the plaintiff's claim for the declaration. On appeal the lower Appellate Court upheld this decision which was again affirmed in second appeal by Mohamad Noor J. The facts of the case can very shortly be stated as follows : The respondent is a medical practitioner who occupied certain premises which have been used as a druggist's shop for over twenty years. Some time after the Bihar and Orissa Municipal Act, 1922, came into force the Municipality, acting under the provisions of S. 291 (j) of the Act, fixed a fee for the granting of a license to holders of druggist shops. Such a license is made necessary by reason of the provisions of S. 282 of that Act. The fee fixed for the license appears to have been Rs. 20 and the by-law of the Municipality was confirmed by the Local Government as required by S. 354 of the Act on 1st June 1929. The Gazette of that date has this item :

> By-law framed by the Commissioners of the Cuttack Municipality under S. 291 (f) and (j) Bihar and Orissa Municipal Act. The fees for the grant of a license under S. 282 of the Bihar and Orissa Municipal Act shall be Rs. 20.

There can be no question, and indeed it is not denied, that the respondent paid Rs. 20 after this by-law came into force. The Municipality, however, claimed a right to demand Rs. 20 per annum, and this they did until the year 1931. In that year the Municipality amended this by-law and substituted "Rs. 10" for "Rs. 20," and this amendment was confirmed by the Local Government on 7th September 1931, and notification of the amendment and confirmation appeared in the Gazette of that date. After this date the license fee was Rs. 10 and not Rs. 20, and though it was not stated that the fee was an annual one the Municipality claimed from the druggists in the town this sum of Rs. 10 annually. The respondent, among others, paid this sum for some years under protest. The Municipality, realizing the difficulties that they were in, again amended their by-laws, and this amendment was confirmed by the Local Government and published in the Gazette of 9th April 1934. By that amendment the fee for a druggist's license was stated to be not Rs. 10 but Rs. 10 a year. This is the first mention in the official notifications of an annual fee being chargeable. The section requiring premises kept for the retail sale of drugs to be licensed is S. 282 (1), Bihar and Orissa Municipal Act. That section is in these terms :

> No shop or place shall be kept for the retail sale of drugs recognized by the British Pharmacopoeia, not being also articles of ordinary domestic consumption, unless the same has been registered in the office of the Commissioners. The Commissioner shall upon registration, grant the keeper of such shop or place a license which he shall be bound to display in some conspicuous part of his premises...

Once a druggist's shop is registered, it would appear that the Commissioner must grant a license, and the license is not an annual one but is a license which permits the occupier of those premises to sell certain drugs for an indefinite period. The section permitting the Municipality to levy a fee for such license is S. 291 (j) of the Act, and that is in these terms :

> The Commissioners at a meeting may make by-laws consistent with this Act-fixing the fees for the grant of any license under this chapter.

There can be no doubt that the Municipality had a right to fix a fee for the license granted to the respondent to sell drugs on these premises. The fee fixed was not an annual one but a lump sum one of Rs. 20.

The respondent paid that fee, and I cannot see how he can be compelled to pay any further sum. He paid the fee fixed for his license, and he obtained the license, which entitles him to carry on the sale of drugs on these premises. Had the license been an annual one, different considerations would have arisen; but the section does not contemplate an annual license, and no one suggests that the license granted to the respondent was an annual one. His premises were registered, and the Commissioner, as he was bound to do, granted a license permitting the sale of drugs on these premises. Having paid all that the law required him to pay for the license, he could not, in my view, be made to pay more by an amendment of these by-laws to make the fee payable an annual one. It may be argued hereafter that this amendment making the fee an annual one is ultra vires the statute; but it is unnecessary for me to express any opinion on that question in this particular case, though the lower Courts and Mohamad Noor J. have expressed their views on the subject. For the decision of this case it is sufficient to say that the respondent, having paid the prescribed fee, cannot by a subsequent amendment be compelled to pay more. The fee, which was fixed and which he paid, was a lump sum fee for all time, and that being so, he could not be made to pay any further sum. As I have said, I prefer in this case to express no opinion as to the rights of parties when a new license is granted under this section. That matter can be considered when the facts give rise to the question. In the present case however there is no possible ground upon which the Municipality can demand further payment when it is abundantly clear that the respondent paid what was by law fixed in 1929 as a lump sum fee for this license. Having paid that, his liability was at an end. In the result therefore I hold that the plaintiff-respondent was entitled to a declaration that he personally was not liable to pay any further amount in respect of the license granted to him under S. 282, Bihar and Orissa Municipal Act. For these reasons this appeal must fail and I would dismiss it with costs.

Fazl Ali J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1940 Patna 707

HARRIES C. J. AND MANOHAR LALL J.

Suraj Narain Chaudhary —
Defendant — Appellant.

v.

Maharajadhiraja Kumar Bisheshwar Singh, Plaintiff and others,
Defendants — Respondents.

Appeal No. 116 of 1936, Decided on 8th March 1940, from original decree of Sub-Judge, Darbhanga, D/- 7th August 1935.

(a) Civil P. C. (1908), O. 21, R. 66 — Valuation — Determination.

The valuation is to be determined on the materials such as they are on the record : *A I R 1925 Pat 500, Ref.* [P 711 C 1]

(b) Privy Council — Privy Council decisions — Duty of Indian Courts.

It is not open to the Indian Courts to attempt to draw fine distinctions in the pronouncements of their Lordships of the Judicial Committee. [P 712 C 1, 2]

(c) Mortgage — Mortgagee purchasing for small value equity of redemption in estate with notification and subject to his own debt — Mortgage debt is satisfied if valuation to him exceeds amount due on mortgage.

The mortgage debt of a mortgagee who purchases for a small value the equity of redemption in an estate with a notification and subject to his own debt is satisfied by the purchase of the village and the value of that village if the valuation to him exceeds the amount due on this mortgage : *7 Cal 648 (P C), Rel. on; Case law discussed.* [P 712 C 2]

P. R. Das, L. K. Jha and S. K. Mitra — *for Appellant.*

Sir Sultan Ahmad, Murari Prasad, S. P. Srivastava and Prem Lall — *for Respondents.*

Manohar Lall J. — This is an appeal by defendant 1 against a decision of the learned Additional Subordinate Judge of Darbhanga dated 7th August 1935 by which he decreed the suit of the plaintiff, respondent 1, which was instituted for enforcing four mortgage bonds executed by the appellant on various dates in favour of respondent 2, the assignor of the plaintiff. The principal question for determination is the extent to which the first mortgage bond dated 14th August 1925 can be enforced. The facts necessary for determination of the controversy between the parties may be stated as follows.

On 14th August 1925 the appellant executed a mortgage bond (Ex. 5) for Rupees 30,000 in favour of Apurba Babu, defendant 2 in the action, stipulating to pay interest at 12 per cent. per annum, the due date of payment was 14th August 1926. The properties mortgaged in this bond consisted among other properties of village

Kasraur, tauzi No. 16. On 7th February 1927 the appellant executed another mortgage bond to secure a sum of Rs. 12,000 in favour of the same mortgagee by giving in hypothecation the same properties as were covered by the bond of 1925. On 25th August 1929 the appellant executed a third mortgage bond in favour of the same mortgagee to secure a sum of Rs. 10,000 and lastly on 15th September 1929, the appellant executed a fourth mortgage bond in favour of defendant 2 to secure an advance of Rs. 15,000 the properties mortgaged being the same in all these four bonds in suits the rate of interest being also the same. In the year 1930 Mt. Sarosati Bahuria, defendant 3, was executing her money decree against the mortgagor; she assigned four annas in this decree to the plaintiff on 4th August 1930. On 12th September of the same year the plaintiff applied to be added as a co-decree-holder in the execution proceedings. In his petition, Ex. 3 (E) at p. 111, he stated that he was the purchaser of the four annas share of the decree passed in favour of Mt. Sarosati Bahuria against Suraj Narain Choudhuri, judgment-debtor, under the deed of assignment executed by Mt. Sarosati Bahuria on 4th August 1930, that the said decree was under execution in case No. 160 of 1930 and prayed that he should be brought on the record as one of the decree-holders.

The order sheet Ex. M at p. 99 shows that the Court after hearing the objection of the parties ordered on 12th January 1931, that the plaintiff should be added as a decree-holder in the execution proceedings. It should be stated, however, that before this when Sarosati Bahuria was the sole decree-holder she had applied to realise her decree by asking the Court to attach and sell village Kasraur tauzi No. 16, one of the mortgaged properties. On 18th July 1930, she had put in a petition that the property sought to be sold had an encumbrance of Rs. 45,000 upon which the Court ordered that a note to that effect should be made in the sale proclamation: *see* Ex. M at p. 99. The petition of the lady is at p. 109 in which reference is made to the encumbrance of Rs. 45,000 under a mortgage bond. It is common ground, and indeed it is established on the evidence, that the mortgage bond referred to is first mortgage bond in suit, namely, of 14th August 1925. On 16th January 1931 the plaintiff and his co-decree-holder both informed the Court by means of a petition that in order to show the encumbrance on the judgment-debtor's properties noted in the inventory of the properties sought to be sold a copy of the mortgage bond dated 14th August 1925, executed by Suraj Narain Chaudhuri (the appellant) in favour of Apurba Babu is being obtained today in the registration department which will be supplied within two days (Ex. F (3) at p. 113). On the next day the two decree-holders filed another petition Ex. H (1) (at p. 114) in which they stated that the entire debt due on this mortgage was Rs. 56,038, that is Rs. 30,000 principal and Rs. 26,038 as interest, and they also filed a copy of the bond executed by the appellant in favour of Apurba Babu. The proceedings show that the Court had ordered the issue of sale proclamation fixing 2nd March 1931, for sale at 12 noon and the value of the property sought to be sold was fixed by the Court at Rs. 4,00,000: *see* Order No. 36 Ex. M at p. 100.

On 19th January 1931, the Court by Order No. 42 after hearing the parties directed that the sale of the property should take place first of four annas share and if the price fetched did not cover the decretal amount which was about Rs. 15,000 then another four annas share was to be sold and finally the remaining eight annas would also be sold if the first two sales did not fetch the full decretal amount and directed that the sale proclamation was to make a mention of these specific directions. The sale proclamation which was actually issued is Ex. L at p. 116. It mentions that in the property which was sought to be sold, namely, village Kasraur, the share of the judgment-debtor was 15 annas and odd bearing tauzi No. 16, and also gave particulars as to the area and the sadar-jama payable. It also mentions the encumbrance as Rs. 56,038 under mortgage bond dated 14th August 1925, executed by Babu Suraj Narain Chaudhuri in favour of Apurba Babu and then notes the directions which the Court had given as to the order in which shares in this property would be put for sale. On 2nd March 1931 the two decree-holders applied for permission to offer bids in the auction sale to the extent of their decretal amount. The Court apparently allowed the prayer. The sale was actually held on 7th March 1931—four annas share in village Kasraur, tauzi No. 16, was first sold to the decree-holders for Rs. 3800 and then another four annas share was sold for

Rs. 3800 and lastly the remaining eight annas share was sold for Rs. 7600 with the result that the entire share of the judgment-debtor in village Kasraur was knocked down to the decree-holders for a sum of Rs. 15,200.

The judgment-debtor put in the usual application under O. 21, R. 90, Civil P. C., asking for the setting aside of the sale on the ground of alleged irregularities in publishing and conducting the sale leading to the sale in favour of the decree-holders for a grossly inadequate price. The decree-holders auction-purchasers in their objections to this application of the judgment-debtor asserted amongst other things that the allegation of the petitioners that the properties sold by auction are valued at Rs. 4,00,000 is wrong and false. The properties sold by auction have been sold, subject to the encumbrance, for proper price.

See para. 5 Ex. J (1), p. 125 and para. 5, Ex. J at p. 126—the first is the refutation petition by Mt. Sarosati Bahuria dated 2nd May 1931, and the second is the refutation petition by the plaintiff dated 5th June 1931.

The Court by its order dated 16th January 1932, (see Order No. 65 at p. 104), refused to set aside the sale holding that the processes of execution were duly served and that there was no irregularity. The only irregularity which was alleged for the first time in argument before him was that the sale which was originally fixed for 2nd March had been adjourned to 7th March without fixing the hour of sale. But the Court held that even if this may be assumed to be an irregularity there was nothing in the evidence from which it could be directly or indirectly inferred that the inadequacy of the price fetched — which could not be gainsaid—at the sale was due to this irregularity. Against this decision there was an appeal to this Court (Miscellaneous Appeal No. 23 of 1932) but the judgment-debtor could not obtain any real relief. On 22nd January 1932 the Court issued a sale certificate in favour of Mt. Sarosati Kuer and the plaintiff certifying that these decree-holders have been declared purchasers for a consideration of Rs. 15,200 at a sale held by public auction on 7th March 1931, of 15 annas and odd share of village Kasraur, tauzi No. 16,. having an area of 750.42 acres with a jama of Rs. 902-3-0 together with all zamindary rights appertaining to this tauzi. It also mentions that the plaintiff was substituted as a decree-holder on 12th January 1931. It appears that about this time a receiver was appointed and had taken possession of this village Kasraur, tauzi No. 16. On 6th July 1932, defendant 2 assigned his rights in all the mortgage bonds in suit to the plaintiff for a sum of Rs. 90,000.

The plaintiff instituted the present suit on 9th August 1932, and stated in para. 12 of the plaint that before getting the assignment under the sale deed dated 6th July 1932 from the mortgagee, the plaintiff along with Mt. Sarosati Bahuria purchased a portion of the mortgaged property, namely, village Kasraur, tauzi No. 16, given in sch. 3 of the plaint, at an auction sale held on 7th March 1931, for Rs. 15,200 in which the plaintiff's share was four annas (being the same share which he had purchased in the decree) and in which the Musammat has a share of 12 annas. He also stated in this paragraph that the plaintiff and Mt. Sarosati Bahuria, defendant 3, entered into possession by obtaining a formal delivery of possession in November 1933, after the appeal of the judgment-debtor had been dismissed by the High Court against the order refusing to set aside the sale and that the plaintiff is in possession of only four annas, the share which he purchased. The plaintiff gave a deduction of Rs. 3040 from the amount due on the mortgage bond by spreading the proportionate amount of the dues on the four mortgages in suit on his four annas of village Kasraur. He prayed for the usual mortgage decree for Rupees 1,20,356-12-0 together with interest pendente lite till realization.

The defendant in his written statement put forward a number of defences, but the principal objection which was relied upon before us was that by reason of the purchase by the plaintiff of tauzi No. 16 for a very small consideration the entire debt due under the first mortgage bond had been wiped off. This written statement was filed on 9th January 1933, and on 1st May 1935 an additional written statement was filed in which it was alleged then for the first time (see para. 1) that the plaintiff is the purchaser of the entire share of the mortgaged property, namely village Kasraur, tauzi No. 16, that Mt. Sarosati Bahuria is only his benamidar and that the plaintiff is in possession of the entire mortgaged property. But the issues had already been struck on 16th March 1933 and after the filing of the additional written statement on 1st May 1935 the appellant did not ask the Court to frame an additional issue as to whether the plaintiff was the purchaser of

the entire 16 annas of village Kasraur with the result that it must be assumed, as has been assumed in the Court below, that the two decree-holders were purchasers of their respective shares in village Kasraur. The learned Subordinate Judge found that the plaintiff purchased 4 annas share in touzi No. 16, village Kasraur.

Mr. Das at one stage of the argument suggested that upon a true construction of the sale certificate, it must be held that the plaintiff and defendant 3 are only joint purchasers of village Kasraur without any specification of shares but later on contended that even if it be established that as between the co-purchasers the plaintiff has purchased only 4 annas share in village Kasraur his argument as to the effect of the sale remains unaffected (this contention will be considered later on). It must be assumed, therefore, as it was assumed before the learned Subordinate Judge, that the plaintiff is the purchaser of 4 annas of village Kasraur only. If it was necessary to decide this point on the evidence I would have come to the same conclusion. The appellant also questioned the deed of assignment in favour of the plaintiff and protested at the high rate of interest included in the bond. But these two questions have been decided adversely to the appellant and have not been raised before us in appeal. The learned Subordinate Judge fixed the value of village Kasraur, tauzi No. 16, at Rupees 72,000, of tauzi No. 17 at Rs. 63,000 and of the remaining properties under the mortgage at Rs. 54,000. He came to the conclusion that the properties mortgaged must contribute towards the amount due under the bonds in suit as follows:

Plaintiff's 4 annas share in touzi No. 16	2/21
Mt. Bahuria's 12 annas share in touzi No. 16	6/21
Touzi No. 17	7/21
And the remaining properties ...	6/21

with the result that he decreed the suit for 19/21 of the amount claimed; that 2/7th of the claim would be payable by defendant 3 out of her 12 annas share in touzi No. 16 and the remaining, that is 13/21 of the amount claimed, by defendant 1 out of the properties in mortgage except village Kasraur, touzi No. 16. He further ordered that in case of non-payment the mortgaged properties except the four annas share of the plaintiff in village Kasraur, touzi No. 16 will be sold. In the appeal before us the principal question and indeed the sole question argued was that the amount due to the plaintiff should be reduced by wiping off the whole of the dues under the first mortgage bond of 1925 and that in any event under the provisions of the Bihar Money-Lenders Act 1939, if the plaintiff was entitled to claim the whole of the dues under the first mortgage bond he could not recover interest thereon more than the principal. The application of the Bihar Money-Lenders Act to this case has not been challenged by the respondent. The provisions are clear and if the plaintiff is entitled to claim any sum under the first mortgage bond the amount will be limited to Rs. 60,000. In order to determine the important question seriously agitated before us, it is plain that the most important question of fact to be determined in the first instance is what is the value of the village Kasraur, tauzi No. 16, at the date of the auction sale. The learned counsel for the appellant seriously contested the finding of the learned Subordinate Judge by which he had fixed the valuation at Rs. 72,000. (After examining certain evidence his Lordship concluded.) For these reasons I am unable to say that the learned Subordinate Judge was wrong when he fixed the valuation of village Kasraur at Rs. 72,000. The estimate is rather excessive but is in favour of the appellant. The other oral evidence in the case is unreliable and consists in the main of the evidence of the appellant himself. It may be observed that he had produced no village papers to show what the income from the zerait and bakast lands and other zemindary income of this village was. He admitted he had no papers to show the income from pokhars. He sought to justify the non-production of the papers by asserting that all the *jama kharch* books were destroyed by the earthquake. It is difficult to accept the explanation. The witness sought to make out that his family purchased these mortgaged properties for Rs. 4,00,000. At p. 54 he says:

> I had to spend four lacs including the value of 46 bighas and 22 bighas. I had to spend the money in cash. We paid one lac five thousand by borrowing and the rest was with my father. My father had about three lacs of rupees. I have no documentary evidence to show that we spent four lacs. The income of my father was Rs. 1500 to Rs. 2000 besides 500 to 600 bighas of land of khas cultivation ..... We paid Rs. 1,63,000 or Rs. 1,65,000 to Mr. Crowdy brother of Mr. Crowdy —the value of that land was settled at Rs. 87,000. Mr. Crowdy did not take any price for this. I have no papers to show that we paid Rs. 1,63,000 or so to the brother of Mr. Crowdy.

It seems to me that a mere perusal of the cross-examination of the appellant shows that he could not be relied upon. The state-

ment which he has made as to the amount paid to the vendor is belied by the documentary evidence consisting of the sale deed from Mr. Crowdy. But it was argued that the respondent is bound by the valuation fixed in the sale proclamation which was inserted at the instance of defendant 3 at a time when she was the sole decree-holder and that the plaintiff when he became a co-decree-holder and joined in the execution proceedings not having taken any steps to challenge the valuation was bound by the same. The valuation in the sale proclamation as already stated was given at Rs. 4,00,000, but the record shows that the valuation was fixed on an admission made by the advocate of the decree-holder who was not allowed to challenge the same at a late hour of the same day. Order No. 22 dated 23rd August 1930 shows that Babu Gangadhar Missir objected to a petition for time being granted to the judgment-debtor to adduce evidence of valuation because he was willing to accept the valuation as given by him. The Court observes:

> The matter ended then. In the last hour another pleader appeared for the decree-holder to say that the question of valuation be decided by the Court on evidence. The parties cannot be allowed to play fast and loose in Court. I accept the valuation as given by the judgment-debtor. This value is to be entered in the sale proclamation.

It is clear therefore that the Court did not decide the question of valuation on any evidence but fixed it in these circumstances. It may be that the pleader for the decree-holder whose decree amounted to only Rs. 15,000 was not concerned with the valuation because the property admittedly is worth more than Rs. 15,000. Be that as it may, no estoppel of any kind can arise against the plaintiff on account of the mode in which the pleader of his vendor's decree-holder agreed to have the valuation fixed for the purpose of this execution at the stage of R. 66, Civil P. C. The parties have adduced evidence in the case and the valuation is to be determined on the materials such as they are on the record: *see* in this connexion, 4 Pat 731.[1] Having given the matter my most anxious consideration I am unable to hold that the decision of the learned Subordinate Judge that the value of village Kasraur cannot be taken at any figure higher than Rs. 72,000 is at all erroneous, and I agree with him that for the purposes of the present suit the valuation of village Kasraur should be taken at Rs. 72,000.

I have already held that the plaintiff has purchased 4 annas share of tauzi No. 16 which must now be taken to be of the value of Rs. 18,000. What then is the effect of the assignment in favour of the plaintiff of the rights of the mortgagee in the mortgage bond dated 14th August 1925? Mr. Das for the appellant contends relying in the main on the decision of the Privy Council in 8 I A 93[2] that the effect of the purchase was to wipe off the entire encumbrance of 14th August 1925. He also argued relying upon the decision in 36 I A 203[3] that the plaintiff was bound to indemnify defendant 1 to this extent by reason of his having purchased 4 annas share of village Kasraur, tauzi No. 16, in execution of a money decree in a sale held with a notification of this prior encumbrance. Sir Sultan Ahmad on the other hand, appearing for the respondents, contends that notwithstanding the purchase by the plaintiff his rights to contribution under S. 82, T. P. Act, are not abrogated and that all that the appellant can claim is to have a distribution of the mortgage debt due under the first bond on all the properties including the 4 annas of village Kasraur in the appropriate proportion as has been done by the learned Subordinate Judge; he also contended that the principle laid down by the Judicial Committee in 8 I A 93[2] was confined to the peculiar facts of that case and has never been followed in the Indian decisions by which similar questions were decided.

In my opinion it is not possible for this Court to refuse to apply the principle laid down in 8 I A 92[2] and 36 I A 203[3] to the facts of this case but this will help the appellant only to the extent that the mortgage bond of 14th August 1925 will be considered to have been satisfied to the extent of the value of 4 annas of village Kasraur, viz., Rs. 18,000 less the price paid by the respondent for it. In 8 I A 93[2] the facts shortly stated were that the mortgagor who was the owner of several villages and amongst others of two villages called Korina and Nandan had first mortgaged Korina in 1865 to the Bank and later on had mortgaged Korina and Nandan to Dooli Chand to secure Rs. 38,000. The mortgagor there-

1. ('25) 12 A I R 1925 Pat 500 = 88 I C 332 = 4 Pat 731 = 6 P L T 843 (S B), Mohit Narain Jha v. Thekan Jha.

2. ('81) 7 Cal 648=8 I A 93=4 Sar 245=3 Suther 734 (P C), Dooli Chand v. Ram Kishen Singh.

3. ('09) 31 All 583 = 3 I C 793 = 36 I A 203 = 6 A L J 817 (P C), Mt. Izzatunnissa Begam v. Kunwar Pertab Singh.

after mortgaged Nandan to the respondent for Rs. 5500. The Bank then instituted a suit on their mortgage of 1865 and obtained a decree for the sale of Korina. But Korina had been attached in execution by Chuttun Singh another decree-holder of the mortgagor and purchased by the respondent subject to the mortgage of the Bank. Shortly after this sale, the respondent paid into Court the entire amount to satisfy the mortgage amount of the bank and got possession of village Korina. In the meantime the respondents had instituted a suit to enforce their mortgage and having obtained a decree they were proceeding in execution to sell Nandan when the appellant Doolichand intervened, gave notice of his mortgage of January 1870 and requested that it should be notified at the time of the sale and it was so notified. It was found as a fact that the sale was made subject to that notification, and of course subject to the mortgage to the appellant, upon which he at that time claimed that a sum of Rupees 1,51,239 was due. Sir Montague E. Smith in delivering the judgment of the Board observed :

> It is plain what the effect of such a notification upon the sale must have been, and the biddings were only for the equity of redemption, which was of small value. The sale took place in August 1872, and the purchaser was one Dindyal, the appellant's brother, the price being Rs. 11,710. A certificate of sale and possession were obtained on 11th September 1873. It has been found by both Courts that Dindyal purchased benami for the appellant. The appellant, therefore, having given notice of his mortgage, purchased the equity of redemption subject to his own debt, and thus became both owner of the equity of redemption and mortgagee. In that state of things it became material to inquire what was the value of Nandan. It has been found by the Courts that its value, beyond the purchase money, exceeded the amount due upon the appellant's mortgage, and was sufficient to recover not only that amount but Rs. 18,800 . . . . . Under these circumstances, it must be taken that the mortgage debt was satisfied by the purchase of Nandan and the value of that estate. The appellant, having thus obtained the full amount of his debt, could no longer avail himself of any other part of his security. The mortgage was only a security for the debt, and when it was satisfied there was an end of any right to resort to the further securities he held.

This case was sought to be distinguished by the learned Judges of the Madras High Court in the Full Bench case in A I R 1920 Mad 375 = 43 Mad 372[4] but with great respect I am unable to agree with the observations made by the learned Judges. It is not open to the Indian Courts to attempt to draw fine distinctions in the pronouncements of their Lordships of the Judicial Committee. The observations of Sir Montague Smith which I have just quoted appear to me to be very clear and establish that the mortgage debt of a mortgagee who purchases for a small value the equity of redemption in an estate with a notification and subject to his own debt is satisfied by the purchase of the village and the value of that village if the valuation to him exceeds the amount due on this mortgage. If I apply this observation to the facts of the present case, it helps the appellant only to this extent that the mortgage debt will be taken to be satisfied to the extent of the value of the village purchased by the respondents less the price paid by him for it. The respondent purchased only 4 annas of the village which has been found by me to be of the value of Rs. 18,000 but on paying Rs. 3800 for it. It follows that the mortgage of the respondent was satisfied but to the extent of Rs. 14,200 only thus leaving him the right to enforce the unsatisfied portion of the mortgage debt against other parts of his security under this mortgage bond of August 1925 namely against the remaining 12 annas of village Kasraur, tauzi No. 16, and other properties. The case reported in 24 W R 83[5] points to the same direction. In that case the mortgagor had mortgaged three villages to the plaintiff who had become the purchaser at a sale in execution of another decree of the rights of the mortgagor in one of the villages at a price wholly inadequate of its proper value and the Court found that at the sale in question the bids were made on the understanding that the property was burdened with the plaintiff's bond-debt. In these circumstances it was held that

> the plaintiff has, by his own act, supplemented by the fact that he has in reality got back all money, precluded himself from following other portion of the property pledged to him,

per Glover, J. at p. 85. Mitter J. agreeing observed :

> The effect of this purchase by the plaintiff was therefore that through this execution sale in which he himself became the purchaser, he got himself repaid of the whole amount due to him then under the bond which is the foundation of the present action. It has been pressed upon us that, as the plaintiff only purchased one out of three properties hypothecated in the bond, the whole charge should, according to the ordinary rule of equity, be distributed over them all. We think that the plaintiff by his own conduct has precluded the Court in applying this ordinary rule, and under the peculiar

4. ('20) 7 A I R 1920 Mad 375=55 I C 666 = 38 M L J 239 = 43 Mad 372 (FB), Ponnambala Pillai v. Annamalai Chettiar.

5. ('75) 24 W R 83, Byjonath Sahoy v. Doolhun Biswanath.

circumstances of this case it would be inequitable to adopt it.

In the present case plain equity requires that the plaintiff when he has obtained the satisfaction of his mortgage debt to the extent of the value to him of the village which he purchased he should not be allowed to enforce the mortgage bond to that extent. The plaintiff purchased the village on paying one-fourth of Rs. 15,200 that is to say Rs. 3800 and obtained in lieu thereof a property of the value of Rs. 18,000. The result is that this mortgage bond is satisfied to the extent of Rs. 14,200 as stated already. Nor can Mr. Das derive any greater advantage than this from the case in 36 I A 203.[3] In that case the mortgagor whose property had been sold at an auction sale subject to certain encumbrances which later on turned out to be invalid sued the purchaser for recovery of the amount due under the invalid mortgages but the suit was dismissed on the ground that the purchaser was entitled to the benefit accruing to the property from its having been exonerated from mortgage liability and was not liable to account to the vendor for the amount thereof as unpaid purchase money or by reason of his being estopped from denying the validity of the mortgages. Lord Macnaughten in delivering the judgment of the Board observed:

> On the sale of property subject to incumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed existence, of incumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the incumbrances are satisfied or disposed of, is without foundation. After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase.

Relying upon these weighty observations Mr. Das argued that when the plaintiff purchased four annas share of village Kasraur he gave an indemnity to the appellant that he would be relieved from the entire burden of the mortgage debt due on the bond of August 1925. Similarly he argued that when defendant 3 purchased the twelve annas share in village Kasraur by the same sale she also gave an implied indemnity that she would relieve the mortgagor, whose property she had purchased, from the entire encumbrance of the bond of August 1925. He also referred to the case in 57 Mad 218[6] and to certain passages in the well-known book of Leek on Contract at page 50, etc., to show that the indemnity of co-sureties extends to the whole of the amount indemnified.

In my opinion this argument is of no assistance to the appellant. There is admittedly no express indemnity in the present case. But there is an implied indemnity and that implied indemnity, by the application of the principle laid down in 8 I A 93,[2] can only extend to the actual value to him of the property which has been purchased by the auction-purchaser. I cannot construe the auction sale in the present case as imposing an implied liability upon the plaintiff-respondent to pay off the prior encumbrances of an amount in excess of the value to him of the share which was purchased. It should be noticed that in the present case the auction-purchaser was not the mortgagee at the date of the purchase in 1931. He became the assignee of the mortgagee at a later date. The question of the extent to which the mortgagor can call upon defendant 3 to indemnify him can only be decided in appropriate proceedings hereafter if the mortgagor is so advised and we have not been asked to decide that question in the present action. But the plaintiff having become the assignee of the mortgagee after his auction-purchase cannot be allowed in this action to enforce his newly acquired rights without indemnifying the mortgagor to the extent already indicated. It is right that I should deal with some cases that were relied on by Sir Sultan Ahmad in support of his argument that the principle in 8 I A 93[2] should not be applied to this case. The first case relied upon was the Full Bench case in 22 All 284[7] where it was held that:

> When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the

6. ('34) 21 A I R 1934 Mad 1 = 149 I C 379 = 57 Mad 218 = 66 M L J 4, Rama Rayanimgar v. Raja of Kalahasti.
7. (1900) 22 All 284 = 1900 A W N 69 (FB), Bisheshur Dial v. Ram Sarup.

property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage.

The judgment of the Full Bench which was delivered by Banerji J., shows that the learned Judge relied entirely upon the provisions of S. 82, T. P. Act. He points out that there can be no doubt that if persons other than the mortgagee purchase different parcels of the mortgaged property, their liability, inter se, is proportionate to the relative value of the property purchased by each of them, and it is immaterial what price was paid for it and that

if any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property, and this right subsists even if the price of the parcel purchased by him was grossly inadequate, and the difference between that price and the actual market value of the property was in excess, not only of the amount of the proportionate liability of the property, but also of the whole amount of the mortgage debt.

The learned Judge then at p. 290 puts this question :

Does the case become different if the purchaser of a part of the mortgaged property be the mortgagee himself ?

and gave this answer :

There appears to be no difference in this respect between the case of a purchase by a stranger and that of a purchase by the mortgagee. When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, all that the mortgagor or other person interested in the remainder of the mortgaged property can claim, is that he should not be placed in a worse position than that in which he would have been had the purchase been made by an outsider; that is to say that the property in his hands should not be rendered liable for a larger amount than the sum with which it would have been chargeable in the case of a purchase by a stranger. In the latter case, if the mortgagor or other owner were compelled to discharge the whole of the debt he would be entitled to contribution from the purchaser rateably to the value of the property purchased by him. In the case of a purchase by the mortgagee there appears to be no reason why the mortgagor or his representative should be allowed anything beyond a right to have his liability reduced to the same extent as in the case of a purchase by an outsider, and this seems to be the only equity to which he is entitled.

The conclusion at which the Full Bench arrived as given by the learned Judge at p. 293 is:

As the mortgagee in this case purchased a moiety of the mortgaged property, the mortgage debt became extinct to the extent of a moiety only, and the plaintiffs were entitled to recover the other moiety by the sale of the remainder of the mortgaged property.

Although the facts of the case show that at the time of the auction sale an application had been made to notify the amount of the mortgage debt, this fact has not been noticed in the judgment of Banerji J. nor, it is to be observed, was the case in 8 I A 93[2] brought to the notice of the learned Judges. Although this case is directly in favour of the contention of Sir Sultan Ahmad, I am unable to treat this as a decision binding upon this Court in the face of a contrary decision of the Privy Council. It may also be observed that the learned Judge relied upon two decisions of the Privy Council, namely, 16 Cal 682[8] and 13 M I A 404,[9] but these decisions do not appear to be relevant. In the former case all that was held was that the mortgagee who buys the mortgaged property at auction with the leave of the Court is not a trustee for the mortgagor, and is in the same position as any independent purchaser. The facts of the case show that the mortgagees had put up to sale the mortgaged property in execution of a decree obtained by them and themselves purchased the property after obtaining leave to bid. In the second case it was admitted before their Lordships that the plaintiffs as purchasers of the equity of redemption in a portion of the mortgaged properties are entitled to redeem that portion on payment of some proportion of the mortgage debt and the only objections to the decrees made were (so far as relevant to the present controversy) as to the mode in which the rateable share of the debt payable in respect of Hosseinpore had been calculated, and secondly, as to the mode in which the gross amount of the mortgage debt to be apportioned had been ascertained : *see* the observations of Sir James Colvile, who delivered the judgment of the Board, at p. 408. It may be observed that in that case the mortgagee is not stated to have purchased the property as the result of a notification such as exists in the present case.

The next case relied upon was the case in 22 Bom 304.[10] In that case three properties were mortgaged to the plaintiff for Rs. 90. In execution of a simple decree for money the equity of redemption in one of those properties, namely, a house, was sold by auction and purchased by the plaintiff-mortgagee for a very small sum of Rs. 2-2-0. The mortgagee auction-purchaser sold this

8. ('89) 16 Cal 682=16 I A 107=5 Sar 345 (P C), Mahabir Pershad Singh v. Macnaghten.
9. ('70) 13 M I A 404=14 W R 17 (P C), Nawab Azmat Ali Khan v. Jawahir Singh.
10. ('98) 22 Bom 304 (F B), Lakhmidas Ramdas v. Jamnddas Shankar Lal.

to one Francis for Rs. 100 and subsequently brought his suit to recover Rs. 90, the whole of the mortgage amount by sale of the two remaining properties. Farran C. J. in reversing the decision of the trial Court, who had dismissed the suit on the ground that the plaintiff had realised Rs. 100 by the sale of the property purchased by him and, therefore, nothing was due, held that:

> The plaintiff, when he purchased the equity of redemption in the house, purchased it subject to its due proportion of the mortgage debt. That portion of the mortgage debt thus ceased to exist, and the plaintiff's right as mortgagee to recover the money secured by his mortgage was reduced to that extent. What proportion of the mortgage debt was thus wiped out depends upon the proportion of the value of the house to the value of the rest of the mortgaged properties.

It will be observed again that in this case which was relied upon by the learned Judges in 22 All 284[7] the mortgagee did not purchase the property after the mortgage encumbrances had been notified. The next case to which our attention was drawn was the case in 6 I C 842=11 C L J 639.[11] It is pointed out at p. 844 that

> the Courts, if called upon to scrutinise the transaction, will look upon it with jealousy, and will set aside a purchase made by the mortgagee when, by the influence of his position or by constructive fraud, he has gained an unconscionable advantage and has purchased the property for such a low price as may be taken to be fairly indicative of fraud or undue influence. But, in the absence of fraud or undue influence or fiduciary relation, the mortgagee may purchase the equity of redemption of the mortgagor upon the same footing as any other person;

and a few lines later:

> What then is the result of such purchase on the position of the mortgagee? It has been argued on behalf of the mortgagee that, if he takes a conveyance of a part of the mortgaged premises from the mortgagor, his position is not affected at all and he is entitled to proceed against the property still left in the hands of the mortgagor for the realisation of the balance of his debt. It has been strenuously argued, on the other hand, on behalf of the mortgagor, that the effect of a purchase by the mortgagee of a part of the mortgaged premises, is always to extinguish the mortgage pro tanto. In our opinion, both the contentions are too broadly expressed, and neither of them can be accepted as strictly correct and well-founded on principle. The true principle is that the effect of the transaction must be judged by its nature. If the sale was intended to be one of the equity of redemption merely, the mortgagee acquired the property subject to his mortgage, and in such a contingency, it would be right to hold, that, while there is no extinguishment of his right to enforce the mortgage against the remainder, the mortgage is extinguished to the extent of the amount fairly chargeable upon the property purchased by him. If, on the other hand, the sale was of the property freed of the mortgage, and the intention of the parties was that the mortgagee should hold the portion transferred to him freed from the mortgage debt, and the purchase money should be applied in reduction of his dues, it would obviously be erroneous to maintain that the mortgagee was still bound to apportion the debt. In this latter contingency, unless the purchase might be successfully impeached on the ground of fraud or undue influence, it would manifestly be equally erroneous to ask the mortgagee to allow credit for a larger sum than what was deliberately settled as the price of the portion purchased by him. If this distinction is borne in mind, the judicial decisions, to which reference has been made by the parties in support of their respective cases, may be easily reconciled.

The learned Judges then proceeded to consider a number of cases including the Allahabad Full Bench case and the Bombay case referred to by me already. In my opinion the observations in 6 I C 842[11] do not help the respondent and do not appear to lay down any rule of law contrary to what has been authoritatively laid down by their Lordships of the Judicial Committee in 8 I A 93.[2] I next consider the case in A I R 1933 All 929[12] which was relied upon by both sides. The facts of the case though somewhat complicated have been succinctly stated at page 930 of the report, and may be briefly reproduced here. In November 1910 the mortgagor executed a mortgage for village Lalpur and Kuramai in favour of two persons Mauji Ram and Sita Ram. On 17th March 1911 he entered into an agreement for granting village Kuramai in zarpeshgi to Mt. Aziz Fatima, who obtained a decree for specific performance of this agreement in January 1912 with a declaration that the zarpeshgi was to take effect from 17th March 1911. On 22nd March 1911 the mortgagor executed two simple mortgages in favour of Gulzari Lal regarding village Kuramai and one house. We notice therefore that the mortgage in favour of Gulzari Lal was the third mortgage regarding village Kuramai and the first mortgage regarding the house. On 19th August 1919 the mortgagor executed a usufructuary mortgage in favour of defendants 2 and 3 regarding village Lalpur only which, it may be noticed, was subject to the only mortgage of November 1910. Gulzari Lal instituted a suit on the foot of his simple mortgages and obtained a preliminary and final decree in the presence of all the necessary parties, in execution whereof he purchased village Kuramai for a sum of Rs. 5000.

11. ('11) 11 C L J 639=6 I C 842, Mir Eusuff Ali Haji v. Panchanan Chatterjee.

12. ('33) 20 A I R 1933 All 929=147 I C 521=1933 A L J 1639, Gulzari Lal v. Ali Ahsan.

After he became the purchaser he paid off the sums due to the zarpeshgidar of 17th March 1911 and also paid off the two earlier mortgages of November 1910. In September 1928, Gulzari Lal instituted a suit for contribution against defendants 2 and 3 as usufructuary mortgagees of August 1919 regarding village Lalpur, the prior encumbrance whereof had been paid off by Gulzari Lal. The defence to the action was that when Gulzari Lal purchased Kuramai he purchased it subject to the entire incumbrance of the bond of November 1910 with the result that Lalpur became free from incumbrance altogether. The learned Subordinate Judge found that the value of Kuramai, which was purchased by Gulzari Lal in execution of his decree, was over Rs. 17,000 and as the plaintiff has purchased it for only Rs. 5000 he was not entitled to contribution. In the appeal before the High Court of Allahabad, two questions arose for consideration. The first was whether the plaintiff's purchase of village Kuramai was subject to the entire charge created by the deed of November 1910, which has been subsequently paid off by him, and secondly, whether assuming the plaintiff purchased Kuramai subject to the entire charge, he is or is not entitled to contribution from those interested in village Lalpur. In proceeding to consider the question of fact which would decide this question the learned Judges observed that sale proclamation was not produced in the case but considering the entire evidence in the case they had no doubt that the plaintiff purchased village Kuramai far below its market value and observed that :

> This circumstance by itself may have no effect on the right of the plaintiff to obtain contribution, but it has evidential value in considering the question whether he purchased the village subject to the entire incumbrance or only to a proportionate charge.

They further observed :

> We think the circumstances of this case indicate that the arrangement contemplated was that the entire charge be laid on this village which was of much greater value than the decretal amount for which it was to be sold. The fact however remains, as appears from the documents to which reference has been made, that the village Kuramai was sold to the plaintiff-appellant on the distinct understanding that the whole of the mortgage money payable under the deed of 18th November 1910 would be paid by him. In arriving at this finding we have been greatly influenced by the proceeding recorded on the date of sale and the terms in which the auctioned property is described in the sale certificate.

The learned Judges further pointed out that there was no doubt that if a sale deed executed by the mortgagor couched in the terms employed in drawing up the sale certificate had been executed, the plaintiff could not have successfully contended that he did not assume the liability to pay the entire incumbrance created by the mortgage of 18th November 1910 and that the position could not be materially different where the sale certificate contained the same terms and where it was clear that the bids had been invited on those terms. The sale certificate, it may be stated, in the case before the learned Judges gave the description of the property sold as village Kuramai subject to the entire prior encumbrance. For these reasons the learned Judges held that the plaintiff purchased the village Kuramai subject to the entire incumbrance in favour of the earlier mortgagees, Mauji Ram and Sita Ram, with the result that village Lalpur became free from incumbrance as between the auction-purchaser and the judgment-debtor.

Sir Sultan Ahmad relied strongly upon this case in support of his contention that it is the sale certificate which should decide what the executing Court had sold and argued that as the sale certificate in the present case did not make any mention that the sale of village Kuramai, tauzi No. 16, was subject to the entire incumbrance, it should be held that the plaintiff in the present case purchased the village subject to the so-called incidence which attaches to a sale of property which is subject to a mortgage so that the rights of the plaintiff to contribution under S. 82 cannot be defeated. Mr. P. R. Das on the other hand argued that a sale certificate which is directed to be issued by the Courts under O. 21, R. 94, Civil P. C., is nothing more than a ministerial act and that the proceedings which lead up to the sale, and in particular the sale proclamation, must always be looked at to determine what the Court did actually put up for sale and what was purchased. In my opinion the true view is that the fact whether the purchase by the plaintiff is subject to the entire charge is a question of fact in each case as was truly observed at p. 930 of the case just dealt with. If the question of fact is decided in favour of the plaintiff that neither the Court intended to sell nor the auction-purchaser intended to purchase village Kasraur subject to the entire encumbrance of the earlier mortgage, the plaintiff is entitled to the benefit of the provisions of S. 82, T. P. Act. It seems to

me therefore that this case is of no assistance to either side.

The result then of the examination of the cases relied upon by Sir Sultan Ahmad is that I am confirmed in the view which I have already expressed that this case is expressly governed by the rule laid down by their Lordships of the Judicial Committee in 8 I A 93.[2] The account of the amounts due from defendants 1 and 3 on the first mortgage bond dated 14th August 1925, will have to be re-cast in the light of my decision in this way that the first mortgage bond will be treated to have been satisfied to the extent of Rs. 14,200 on 9th August 1932 and with the further condition that the amount due on this bond on account of principal and interest shall not exceed Rs. 45,800. The figures as worked out in the decree at pp. 82 and 83 as to the amount due from defendant 1 on account of the second, third and fourth mortgage bonds are admittedly correct. Similarly the account of the first mortgage bond due from defendant 3, Mt. Sarosati Baburia, will have to be re-cast on the same lines, but the amount due from her on account of the second, third and the fourth mortgage bonds as worked out at pp. 85 and 86 of the decree will not be interfered with. The office will draw up a mortgage decree to carry out these directions. The result is that the appeal is allowed in part ; the appellant is entitled to costs in proportion to his success in this appeal. He will pay to the plaintiff-respondent costs in proportion to the extent to which the appeal has failed.

Harries C. J.—I agree.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1940 Patna 717

DHAVLE J.

Kewal Saran Singh — Petitioner.

v.

Kamla Pati Lal and others —

Opposite Party.

Criminal Ref. No. 35 of 1940, Decided on 12th August 1940, by Addl. Dist. and Sessions Judge, Patna, D/- 22nd June 1940.

Criminal P. C. (1898), S. 139—One of jurors submitting his report before completion of appointment of jury — Report of majority of jury itself becomes illegal and cannot be acted upon—Fresh jury can be appointed.

Where before the completion of the appointment of the jury one of the jurors had already submitted his report, he is not a fit person to be on the jury and the constitution of the jury as completed is essentially defective. In these circumstances the report of the majority of the jury itself becomes illegal and one that cannot be acted upon. In such case the Court can appoint a fresh jury and allow the proceedings to go on with a fresh jury : *A I R 1920 Cal 161, Rel. on.* [P 717 C 2 ; P 718 C 1]

Raj Kishore — *for Reference.*

D. P. Sinha — *against Reference.*

Order. — This is a reference made by the Additional Sessions Judge of Patna recommending that an order of the Sub-Divisional Magistrate of Dinapore, dropping under S. 139 (2) certain proceedings under Chap. 10, Criminal P. C., be set aside, and that the Magistrate be directed to appoint a fresh jury and dispose of the case according to law. It appears that the constitution of the jury gave a certain amount of trouble in the case. The gentlemen nominated at first to act as jurors declined, some of them, to act in that capacity. The appointment of the jury only became complete on 16th January 1940 ; but more than six weeks before this Babu Deonandan Sahay one of the jurors had already submitted his report on 28th November 1939. The jurors in a body inspected the locality on 30th January 1940 when four of the jurors submitted a concurrent report and Babu Deonandan Sahay repeated his report of 28th November 1939. It is clear that having expressed his opinion before 16th January Babu Deonandan Sahay was not a fit person to be on the jury and the constitution of the jury as completed on 16th January 1940 was essentially defective. In these circumstance the report of the majority of the jury itse t becomes illegal and one that cannot be acted upon. Mr. Raj Kishore has in this connexion drawn attention to 24 C W N 928[1] where the constitution of the jury was found defective and it was held that the Magistrate should not have acted on the repo of the jury and should have appointed a fresh jury and allowed the proceedings to go on with a fresh jury.

The learned advocate for the opposite party before me has contended that S. 139, Criminal P. C., does not give the Court any power to appoint a fresh jury and that the analogy of Sec. 282 cannot be properly invoked in connexion with a jury under Chap. 10. I am unable to accept this contention. It is obvious that S. 139 contemplates a legal verdict by a duly constituted jury and the case in 24 C W N 928[1] is not the only decision in which it was held

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1. ('20) 7 A I R 1920 Cal 161 = 56 I C 240 = 21 Cr L J 448 = 24 C W N 928 = 31 C L J 371, Dasya v. Nibaran Chandra.

that it is open to the Court in its inherent jurisdiction to deal with a defect of the kind that we find in the present case. As a matter of fact it was not in respect of the impropriety of having Babu Deonandan Sahay on the jury at all that the Magistrate came to the conclusion that the verdict of the majority of the jurors was illegal. As pointed out by the learned Additional Sessions Judge he seems to have overlooked Babu Deonandan Sahay's report of 28th November probably because he had failed to note it in the order sheet; but even apart from this there were two matters in which the jury had exceeded their functions, because the Magistrate had not clearly drawn the attention of the jurors to what they were supposed to enquire into. These two matters are, the question of public right which under S. 139-A (3) the jury were not competent to look into in the circumstances of the present case and the rule which had already been made absolute against certain parties that had not appeared and shown cause or applied for the appointment of a jury. Even these illegalities would clearly affect the position. The learned advocate for the opposite party has cited 4 P L T 15[2] which followed 13 C W N 367[3] and contended that this party should now be at liberty, instead of having to face a fresh jury, to adopt the other alternative mentioned in S. 135-B; but the cases referred to are cases under S. 141 of the Code and have nothing to do with a defectively constituted jury or with a jury that exceeded its functions in material respects. S. 141 has no application to the facts of the case at all. The result is that the recommendation of the learned Additional Sessions Judge must be accepted, the order of the Sub-Divisional Magistrate set aside and the direction made that the Magistrate do appoint a fresh jury and dispose of the case according to law.

D.S./R.K. *Reference accepted.*

2. ('23) 10 A I R 1923 Pat 229=72 I C 956 = 24 Cr L J 492 = 4 P L T 15, Jiblal Teli v. Gena Sahu.
3. ('09) 13 C W N 367=4 I C 72=10 Cr L J 494, Kishori Lal v. Emperor.

A. I. R. 1940 Patna 718

FAZL ALI AND MEREDITH JJ.

Mt. Lal Pari — Applicant — Appellant.

v.

Janki Rai and others, Decree-holders and others, Defendants—Respondents.

Appeal No. 251 of 1939, Decided on 23rd August 1940.

Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), Ss. 11 and 13—Purchaser of equity of redemption impleaded in mortgage suit and decree passed against him — He is judgment-debtor and is as such entitled to benefit of Ss. 11 and 13.

Section 11 was enacted for the benefit of all judgment-debtors and the benefit conferred by this section cannot be confined only to a mortgagor and denied to a purchaser of the equity of redemption. If the purchaser of the equity of redemption was impleaded in a mortgage suit and a decree was passed against him, he is a judgment-debtor and is as such entitled to the protection afforded by this section. Under S. 13 he is entitled to ask the Court to estimate the value of the property after hearing him as well as the decree-holder. [P 719 C 1, 2]

Mrs. Dharmasila Lall — *for Appellant.*

Bankim Chandra Mitra, M. K. Mukherjee and S. Mustafi — *for Respondents.*

Fazl Ali J.—This is an appeal from an order passed by the Subordinate Judge of Monghyr in an execution proceeding. The decree sought to be executed is a mortgage decree which was obtained by the respondent decree-holders against a number of persons including the appellant who is the purchaser of one out of four properties which are the subject-matter of the decree. The property in which the appellant is interested is the second property in a schedule which forms part of the decree and the decree provides that this property shall be sold last of all. The objection which was preferred by the appellant to the decree-holders' application for execution was firstly that her property should not be sold along with other mortgaged properties, secondly, that no sale should be held unless all the properties were properly valued and thirdly, that she should be allowed to pay by instalments such part of the decree as remains unsatisfied after the sale of the other three properties. The learned Subordinate Judge in disposing of her objection has expressed the view that the Money-lenders Act has no application to the present case. The learned Judge has stated that the Money-lenders Act has been passed to give relief to the debtors and not to persons who with their eyes open purchase the property subject to a mortgage charge. In other words, the learned Judge was of the view that the Money-lenders Act had no application to the case merely because the appellant was a person other than the mortgagor and because she had purchased the property after the mortgage with notice thereof.

In my opinion this view is erroneous. The Money-lenders Act 7 of 1939 describes it as an Act "to provide for the

regulation of money-lending transactions in the province of Bihar." This Act repeals the greater part of the Money-lenders Act of 1938 (Bihar Act 3 of 1938). The Preamble of that Act stated that the Act was passed, because it was expedient to regulate money-lending transactions and to grant relief to debtors in the province of Bihar. Neither of these Acts defines a debtor but in S. 2 of the present Act it is stated that the judgment-debtor includes a certificate debtor under the Bihar and Orissa Public Demands Recovery Act of 1914. This shows that the expression "debtor" has been used in a wide sense so as to include a judgment-debtor. The real question which we have to consider in this case is whether Ss. 11, 13 and 14 of the Money-lenders Act, which the learned Subordinate Judge was asked to apply to the present case, have any application or not. S. 11 empowers the Court to direct payment of the amount due in respect of a loan or a mortgage by instalment. S. 13 enjoins the executing Court to estimate the value of the judgment-debtor's property after hearing the parties and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree. S. 14 provides among other things that the sale proclamation shall include only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree.

On a reference to S. 11 it will appear that the person who is to apply to the Court for fixing instalment is "the judgment-debtor" and on his application the Court may after notice to the decree-holder direct that the amount of the decree shall be paid in such number of instalments and subject to such conditions and on such date as it considers fit. On a plain reading of the section it would appear that this section was enacted for the benefit of all judgment-debtors and in my opinion the benefit conferred by this section cannot be confined only to a mortgagor and denied to a purchaser of the equity of redemption. If one purchaser of the equity of redemption was impleaded in a mortgage suit and a decree was passed against him, he is a judgment-debtor and is as such entitled to the protection afforded by this section. It is also to be noticed that this section provides that the Court may fix instalment for the payment of the decree notwithstanding any contract between the "money-lender and the person to whom the loan was advanced." It seems to me that if the benefit of the section was intended to be confined only to the mortgagor, the expression "the person to whom the loan was advanced" or some such similar expression, must have been used in the latter part of the section also. But as I have already stated the section clearly states that an order of instalment may be passed on the application of the judgment-debtor and not merely of the person to whom the loan was advanced. S. 13, Money-lenders Act, runs thus:

> When an application is made before or after the commencement of this Act for the execution of decree passed in respect of a loan or interest on a loan by the sale of the judgment-debtor's property, the Court executing the decree shall, notwithstanding anything to the contrary contained in any other law or in anything having the force of law, hear the parties to the decree and estimate the value of such property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree.

This section clearly provides that before selling the judgment-debtor's property, the Court shall hear the parties to the decree and estimate its value. In the present case one of the properties which the executing Court was called upon the sell was the appellant's property. As the appellant was one of the judgment-debtors it is manifest that under S. 13 he was entitled to ask the Court to estimate the value of the property after hearing him as well as the decree-holder. S. 14 of the Act is entirely dependent on S. 13 and need not be discussed. The learned Subordinate Judge has discussed the evidence offered on behalf of the appellant in order to show that the value of the mortgaged property stated by the decree-holder is not unreasonable, but as he has proceeded to deal with the question on the footing that the Money-lenders Act has no application, it is clear that he has approached the case from a wrong point of view. Under S. 13, Money-lenders Act, it is the duty of the Court to hear the parties and estimate the value of the properties to be sold under the decree. As however the learned Subordinate Judge was dealing with the case apart from the Money-lenders Act, there was no obligation upon him to fix the value of the properties. Under O. 21, R. 66, Civil P. C., as it stands now, the Court has only to insert the valuation given by the decree-holder and the judgment-debtor respectively in the sale proclamation and it has to state that it does not vouch for the accuracy of either. From the judgment of the learned Subordinate Judge it will appear that he was of the view that the present case was

governed by O. 21, R. 66 and not by the Money-Lenders Act. The learned Subordinate Judge therefore could not be expected to deal with the question of value with the same care as he would have done, if he had realized that the case was governed by the Money-Lenders Act. The findings of the learned Subordinate Judge have therefore, in my opinion, to be scrutinized with particular care.

In the present case the property in which the appellant is interested was purchased by her for a sum of Rs. 2950 in June 1930. The property in question is a house in Begusarai. The decree-holders valued it at Rs. 1000 only and the learned Subordinate Judge has expressed the view that this valuation is quite fair. The learned Subordinate Judge supports the valuation of the decree-holders by pointing out that "the tiled chhapar from the second storey has now been taken down." It appears to me, however, that the mere fact that the tiled chhapar has been taken down cannot affect the value of the house to a very large extent. Again items 3 and 4 of the mortgaged properties consist of 2½ bighas of land which are situated by the side of a Local Board road. These lands have been valued by the decree-holders at Rs. 600 only. The appellant examined several witnesses before the learned Subordinate Judge to show that the lands being situated by the side of a road in the town of Begusarai was regarded as valuable and that the price of these lands according to the witnesses examined by the appellant was Rs. 200 a cattah. The witnesses stated that a number of persons are building their houses near about the place where these lands are situated and several kebalas were tendered in evidence to support the statement made on behalf of the appellant as to the value of these lands. On the other hand one of the decree-holders examined himself in the case and stated that the total value of these lands was Rs. 600 only.

The learned Subordinate Judge has explained away the kebalas on the ground that they relate to lands which had been purchased for residential purposes, whereas one portion of the land which was mortgaged is used for growing maize and another portion is an orchard. He has also stated that the lands purchased under the kebala are at sufficiently long distance from the lands which are the subject of the mortgage. Here again, the learned Subordinate Judge seems to have been at pains to demonstrate that the value given by the decree-holder was not unreasonable. In doing so he overlooked the fact that even though a portion of the mortgaged lands may be used for growing maize and another portion is an orchard at present, it can also be used as a building site and therefore its potential value could not be ignored. The learned Subordinate Judge is [illegible] quite correct in saying that the lands which are the subject-matter of the kebalas are situated at a long distance from the mortgaged lands. One of these lands, according to the evidence offered on behalf of the appellants, is at a distance of one bigha and another plot of land is contiguous south of the mortgaged lands.

In my opinion the conclusion arrived at by the learned Judge cannot be accepted because it has been greatly influenced by the wrong assumption that he had made in deciding this case, namely, that it was governed by O. 21, R. 66 and not by the Money-lenders Act. I think therefore that the order of the learned Subordinate Judge should be vacated and he should be asked to estimate the value of the properties in question under Ss. 13 and 14, Money-lenders Act. I would therefore allow this appeal, set aside the order of the learned Subordinate Judge and remand the case to him for disposal according to law. The learned Subordinate Judge should proceed strictly in accordance with S. 13, Money-lenders Act, and after hearing the parties and such further evidence as they may adduce estimate the value of each property and also decide whether only some or all the properties should be sold. As provided in the decree, the property No. 2 in which the appellant is interested should be sold last of all and before that property is sold the Court should consider whether under S. 11, Money-lenders Act, such portion of the decretal amount as remains unsatisfied after the sale of the properties other than the property No. 2 shall be made payable by instalment. Costs will abide the result.

Meredith J.—I agree.

D.S./R.K. *Appeal allowed.*

END

Acc. No 177235
Dated 20.4.50